



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF MSI-, INC.

DATE: FEB. 8, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a distributor and importer of natural stone, seeks to temporarily employ the Beneficiary as a “business analyst” under the H-1B nonimmigrant classification. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The Director, California Service Center, denied the petition. The matter is now before us on appeal. Upon *de novo* review, we will dismiss the appeal.

I. ISSUE

The issue before us is whether the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

II. SPECIALTY OCCUPATION

A. Legal Framework

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term “specialty occupation” as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

*Specialty occupation* means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the

attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Fed. Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified

individuals who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the individual, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

#### B. Proffered Position

In the labor condition application (LCA) submitted to support the visa petition, the Petitioner indicated that the proffered position corresponds to the occupational category "Management Analysts" with SOC (ONET/OES) code 13-1111, at a Level I (entry level) wage.

In a support letter dated April 1, 2015, the Petitioner stated that the Beneficiary will work as a business analyst, performing the following duties:

- Analyze product sales by geographical territories;
- Develop and present data to management and team leaders[;]
- Identify and implement process improvement initiatives;
- Analyzing sales trends and creating reports;
- Data analysis and manipulation through the use of various software programs;
- Analyze and improvise upon present Company projects;
- Review national and international market trends and economic conditions and recommend growth strategies for the Company;
- Analyze, develop and implement strategies to maximize revenue through supply chain commitments, [and] channel inventory management, pricing strategies and marketing program support;
- Basic system administration of MAS500 and other sales and marketing technologies;
- Assist the Sales Operations Manager with the selection and implementation of other sales and marketing initiatives;

- Devise and modify procedures to improve efficiency and solve operational problems including computer equipment capacity and limitations, operating time, and form of desired results;
- Work within business area and project teams and manage projects within a process area beginning from project design through post implementation;
- Process and configure application systems in order to support existing business requirements;
- Analysis of business and user needs, documentation of requirements, and translation into proper system requirement specifications;
- Perform cost analysis and cost control, import and logistics; inventory management and control and monitor supply chain; and;
- Prepare reports and develop presentations that summarize analysis and recommendations which facilitate decision-making for senior management.

The Petitioner further stated that the minimum educational requirement for the position is a Bachelor's degree in Business Administration.

In response to the RFE, the Petitioner stated in a letter dated June 9, 2015, that the Beneficiary would:

- Collect and analyze data & recommend sites for new national and international distribution centers for the company; (15%)
- Collect and analyze data and recommend new sites to import stone, including collection & analysis of data related to various operational costs like warehousing etc. & devising techniques for smoother & economical operations, analysis of various aspects of a job or work & devise more efficient techniques to improve performance & thereby reduce costs, and devise & implement various cost control techniques; (15%)
- Analyze and improvise upon present Company projects while devising the recruitment strategy for long term manpower requirement in light of the core corporate growth plan, recommend improvements in organizational structure, recommendation of manpower planning tools & various models of executive compensation, , [sic] analysis of existing employee training techniques & suggesting new or improvements in existing methods, productivity analysis & setting benchmarks for productivity, and recommendation of alternate methods of compensation to improve employee motivation; (10%)
- Review national and international market trends and economic conditions and recommend growth strategies for the Company as well as understand the market trend by researching the repeated reviews of market trends & growth of various markets & accordingly recommending growth strategies to management, pricing analysis by collection and analysis of price movements in the various markets and recommendation of a suitable aggressive pricing policy, and promotion mix by

- analysis of various methods of sales promotion & devising the correct promotion mix strategy; (10%)
- Analyze, develop and implement strategies to maximize revenue through supply chain commitments, channel inventory management, pricing strategies and marketing program support by collection of data regarding the working standards & strengths of various suppliers & using their strengths for the competitive advantage of the company, analysis of the performance of the members of the supply chain & using that to track down preferred suppliers, purchase pricing negotiations and new materials selection, material inspection at the suppliers; (10%)
  - Devise and modify procedures to improve efficiency and solve operational problems including computer equipment capacity and limitations, operating time, and form of desired results; (10%)
  - Analysis of business and user needs, documentation of requirements, and translation into proper system requirement specifications; (10%)
  - Perform cost analysis and cost control, import and logistics; inventory management and control and monitor supply chain; and; (10%)
  - Prepare reports and develop presentations that summarize analysis and recommendations which facilitate decision-making for senior management such as recommendation & implementation of corporate growth strategy by use of various forecasting tools to help management in planning core corporate strategy, collection & analysis of data on the various upcoming markets & recommendation of sites for future new distribution centers & offices for the company, assist management in deciding lease vs. buying of major capital assets, overseeing the maintenance of [the Petitioner] & providing informative reports to the management for Corporate Decision making, and analysis of present projects & suggesting new or improved process to improve efficiency. (10%)

In this same letter, the Petitioner also changed its originally stated requirement of a bachelor's degree in business administration to that of the credential held by the Beneficiary, namely, a Master's degree in Business Administration (MBA).<sup>1</sup>

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<sup>1</sup> The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to an RFE, the Petitioner cannot offer a new position to the Beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, its associated job responsibilities, or the requirements of the position. The Petitioner must establish that the position offered to the Beneficiary when the petition was filed merits classification for the benefit sought. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). If significant changes are made to the initial request for approval, the Petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. We find that the Petitioner's attempt to upgrade the position's minimum entry requirement from a bachelor's degree to a master's degree was a material change to that requirement, rather than simply a clarification or provision of additional information, and we therefore will not discuss or otherwise consider it.

C. Analysis

As a preliminary matter, we find that the Petitioner's original claim, that a bachelor's degree in business administration is a sufficient minimum requirement for entry into the proffered position, is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 (Comm'r 1988).

To prove that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.<sup>2</sup>

As stated above, the Petitioner changed its minimum educational requirements from when it initially filed the petition to when it submitted a response to the RFE. In response to the RFE, the Petitioner stated the proffered position requires at least an MBA degree. Additionally, the Petitioner submitted copies of advertisements it placed for other business analyst positions with varying requirements that include: 1) a bachelor's degree in business plus two years of experience; 2) a bachelor's degree in business, management, or the equivalent plus one year of experience; and 3) a bachelor's degree with no further specialization. The Petitioner does not provide any explanation for these inconsistencies in its degree requirements. "[I]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence." *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner

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<sup>2</sup> Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

The courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. *See, e.g., Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; *cf. Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: otherwise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

Id.

submits competent objective evidence pointing to where the truth lies. *Id.* at 591-92. However, we note that the existence of a number of varying degrees and experience for what the Petitioner claims are the same or similar positions within its company as the one proffered here is further evidence that the Petitioner does not require at least a bachelor's degree in a *specific specialty*. To the contrary, it appears as though the Petitioner accepts a wide variety of degrees and experience for its business analyst positions.

Again, the Petitioner in this matter has claimed that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree, i.e., a bachelor's degree in business administration. Without more, this assertion alone indicates that the proffered position is not in fact a specialty occupation.<sup>3</sup> The Director's decision must therefore be affirmed and the appeal dismissed on this basis alone.

Moreover, it also cannot be found that the proffered position is a specialty occupation because the Petitioner has not satisfied any of the supplemental, additional criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). To reach this conclusion, we first turn to the proffered position in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

*A baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position*

USCIS recognizes the U.S. Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>4</sup> We note that according to the Occupational Information Network (O\*NET) summary report for management analysts, a business analyst position is one of the

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<sup>3</sup> A general degree requirement does not necessarily preclude a proffered position from qualifying as a specialty occupation. For example, an entry requirement of a bachelor's or higher degree in business administration with a concentration in a specific field, or a bachelor's or higher degree in business administration combined with relevant education, training, and/or experience may, in certain instances, qualify the proffered position as a specialty occupation. In either case, it must be demonstrated that the entry requirement is equivalent to a bachelor's or higher degree in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.

It is also important to note that a position may not qualify as a specialty occupation based solely on either a preference for certain qualifications for the position or the claimed requirements of a petitioner. *See Defensor v. Meissner*, 201 F.3d at 387. Instead, the record must establish that the performance of the duties of the proffered position requires both the theoretical and practical application of a body of highly specialized knowledge and the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as the minimum for entry into the occupation. *See* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

<sup>4</sup> All references are to the 2016-2017 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/ooh/>. The excerpts of the *Handbook* regarding the duties and requirements of the referenced occupational category are hereby incorporated into the record of proceeding.

reported job titles under that job classification.<sup>5</sup> Further, the Petitioner classified the proffered position as a management analyst on the Labor Condition Application. We therefore reviewed the section of the *Handbook* entitled “How to Become a Management Analyst,” which states the following with regard to how to become one:

Most management analysts have at least a bachelor’s degree. The Certified Management Consultant (CMC) designation may improve job prospects.

### **Education**

A bachelor’s degree is the typical entry-level requirement for management analysts. However, some employers prefer to hire candidates who have a master’s degree in business administration (MBA).

Few colleges and universities offer formal programs in management consulting. However, many fields of study provide a suitable education because of the range of areas that management analysts address. Common fields of study include business, management, economics, political science and government, accounting, finance, marketing, psychology, computer and information science, and English.

Analysts also routinely attend conferences to stay up to date on current developments in their field.

### **Licenses, Certifications, and Registrations**

The Institute of Management Consultants USA (IMC USA) offers the Certified Management Consultant (CMC) designation to those who meet minimum levels of education and experience, submit client reviews, and pass an interview and exam covering the IMC USA’s Code of Ethics. Management consultants with a CMC designation must be recertified every 3 years. Management analysts are not required to get certification, but it may give jobseekers a competitive advantage.

*Handbook*, 2016-17 ed., Management Analysts, available on the Internet at <http://www.bls.gov/ooh/business-and-financial/management-analysts.htm#tab-4> (last viewed Feb. 4, 2016).

The *Handbook* reports that certification may be advantageous for some management analyst positions within this occupational category. However, we note that there is no indication that the Petitioner requires the Beneficiary to have obtained the CMC designation or any other professional designation to serve in the proffered position.

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<sup>5</sup> See <http://www.onetonline.org/link/summary/13-1111.00>.

The *Handbook* does not indicate that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into this occupation. Although the *Handbook* does report a bachelor's degree as a typical entry-level requirement, it does not indicate that it must be from a specific specialty. Rather, the *Handbook* reports that the occupation accommodates other paths for entry, including a bachelor's degree in a wide variety of distinct fields, including business, management, economics, political science and government, accounting, finance, marketing, psychology, computer and information science, and English. Thus, the *Handbook* does not support the claim that the occupational category of management analysts - the one selected by the Petitioner on the LCA - is one for which normally the minimum requirement for entry is a baccalaureate degree (or higher) in a specific specialty, or its equivalent. Even if it did (which it does not), the record lacks sufficient evidence to support a finding that the particular position proffered here (an entry-level position relative to others within the occupation - as indicated on the LCA), would normally have such a minimum, specialty degree requirement, or its equivalent.

The *Handbook's* recognition that some employers prefer candidates with a master's degree in business administration is acknowledged. However, given the *Handbook's* above-mentioned statements regarding entry-level positions, and the Petitioner's wage level designation on the LCA, this does not appear to be one of those positions.

We further note that on appeal, the Petitioner cites to *Unico American Corp. v Watson*, 1991 WL 11002594 (C.D. Cal. Mar. 19, 1991) (*Unico*), an unpublished federal district court decision, for the proposition that we should give deference to the employer's view and not simply rely on the *Handbook*.<sup>6</sup> However, we note that the Petitioner's reliance on *Unico* is misplaced because the facts in that case are not analogous to those here, and because *Unico* was adjudicated under regulations that predate the adoption of the specialty occupation standard into the H-1B program.

The fact that a person may be employed in a position designated by a petitioner as that of a management analyst and may apply some analytical principles in the course of his or her job is not in itself sufficient to establish the position as one that qualifies as a specialty occupation. In this case, the Petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the Petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

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<sup>6</sup> In contrast to the broad precedential authority of the case law of a United States circuit court, we are not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715, 719-20 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before us; however, the analysis does not have to be followed as a matter of law. *Id.* In addition, as the published decisions of the district courts are not binding on us outside of that particular proceeding, the unpublished decision of a district court has even less persuasive value.

*The requirement of a baccalaureate or higher degree in a specific specialty,  
or its equivalent, is common to the industry in parallel  
positions among similar organizations*

Next, we will review the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common for positions that are identifiable as being (1) in the Petitioner's industry, (2) parallel to the proffered position, and also (3) located in organizations that are similar to the Petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As previously discussed, the Petitioner has not established that its proffered position is one for which the *Handbook* (or other independent, authoritative source) reports a standard industry-wide requirement for at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter.

There are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement and no submission of letters or affidavits from firms or individuals that attest that such firms routinely employ only individuals with a degree in a specific specialty.

In support of the assertion that the degree requirement is common to the Petitioner's industry in parallel positions among similar organizations, the Petitioner submitted copies of job advertisements placed by other companies. However, upon review of the documents, we find that the Petitioner's reliance on the job announcements is misplaced.

The Petitioner stated that it is a distributor and importer of natural stone with 600 employees and gross annual revenue of more than \$559 million. The Petitioner designated its business operations under the North American Industry Classification System (NAICS) code 423320.<sup>7</sup> This NAICS code is designated for "Brick, Stone, and Related Construction Material Merchant Wholesalers." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following: "This industry comprises establishments primarily engaged in the merchant wholesale

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<sup>7</sup> According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity and each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last visited Feb. 4, 2016).

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distribution of stone, cement, lime, construction sand, and gravel; brick; asphalt and concrete mixtures; and/or concrete, stone, and structural clay products.”<sup>8</sup>

For the Petitioner to establish that an organization is similar, it must demonstrate that it shares the same general characteristics. Without such evidence, documentation submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the Petitioner. When determining whether the Petitioner and the organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). Notably, it is not sufficient for the Petitioner to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

Upon review of the documentation, we find that the Petitioner did not establish that a requirement of a bachelor’s or higher degree in a specific specialty, or its equivalent, is common for positions that are identifiable as being (1) in the Petitioner’s industry, (2) parallel to the proffered position, and also (3) located in organizations that are similar to the Petitioner.

For instance, the advertisements include a position with [REDACTED] (a global paper manufacturer), [REDACTED] (a home and garden décor company), [REDACTED] (a membership retailer), [REDACTED] (a tire company), [REDACTED] (an air-operated double diaphragm pumps company), [REDACTED] (an international transportation company), and [REDACTED] (a global multi-asset brokerage). Without further information, these advertisements appear to involve organizations that are not similar to the Petitioner, and the Petitioner has not provided additional evidence to suggest otherwise. Furthermore, the Petitioner submitted some confidentially-placed advertisements for several companies for which little or no information regarding the employers is provided. Consequently, the record is devoid of sufficient information regarding the employers to conduct a legitimate comparison of the organizations to the Petitioner. The Petitioner did not supplement the record of proceeding to establish that the employers are similar to it.

Moreover, some of the advertisements do not appear to involve parallel positions. For example, several advertisements required more than two years of experience in addition to a bachelor’s degree, or even a Master’s degree. As previously discussed, the Petitioner designated the proffered position as an entry-level position on the LCA. Thus, a number of the advertised positions appear to involve more senior positions than the proffered position. Moreover, the Petitioner has not sufficiently established which primary duties of the advertised positions are parallel to the duties of the proffered position.

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<sup>8</sup> U.S. Dep’t. of Commerce, U.S. Census Bureau, 2012 NAICS Definition, 423320 - Brick, Stone, and Related Construction Material Merchant Wholesalers, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited Feb. 4, 2016).

Further, contrary to the purpose for which the advertisements were submitted, the postings do not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the positions. For example, some employers require a bachelor's degree in business and/or business administration. As discussed, a general-purpose degree such as a degree in business administration, may be a legitimate prerequisite for a particular position; however, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.

As the documentation does not establish that the Petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed. The evidence does not establish that similar organizations in the same industry routinely require at least a bachelor's degree in a specific specialty or its equivalent for parallel positions.<sup>9</sup>

Therefore, the Petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the Petitioner's industry in positions that are (1) in the Petitioner's industry, (2) parallel to the proffered position, and also (3) located in organizations that are similar to the Petitioner. For the reasons discussed above, the Petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

*The particular position is so complex or unique that it can be performed only by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent*

We will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the Petitioner shows that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

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<sup>9</sup> Although the size of the relevant study population is unknown, the Petitioner does not demonstrate what statistically valid inferences, if any, can be drawn from these advertisements with regard to determining the common educational requirements for entry into parallel positions in similar companies. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (7th ed. 1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-96 (explaining that “[r]andom selection is the key to [the] process [of probability sampling]” and that “random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error”).

As such, even if the job announcements supported the finding that the position required a bachelor's or higher degree in a specific specialty, or its equivalent (for organizations in the same industry that are similar to the petitioner), it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not normally require at least a baccalaureate degree in a specific specialty, or its equivalent, for entry into the occupation in the United States.

We reviewed the record in its entirety and find that the Petitioner has not explained how the documentation submitted establishes that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent.<sup>10</sup>

Upon review, we find that the Petitioner has not sufficiently developed relative complexity or uniqueness as an aspect of the proffered position. For instance, the Petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it may believe are so complex and unique. While a few related courses may be beneficial, or even required, in performing certain duties of the position, the Petitioner has not demonstrated how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position. The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. Additionally, as discussed in greater detail in the next section, the Petitioner's own advertisements for purportedly similar business analyst positions to the one proffered here indicate that the Petitioner will accept general bachelor's degrees as well as general business degrees. The Petitioner did not explain the discrepancies in its requirements. As, the record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent, the Petitioner has therefore not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

*The employer normally requires a baccalaureate or higher degree in a specific specialty, or its equivalent, for the position*

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. To this end, we review the Petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position, and any other documentation submitted by a petitioner in support of this criterion of the regulations.

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<sup>10</sup> The Petitioner's designation of this position as a Level I, entry-level position undermines its claim that the position is particularly complex, specialized, or unique compared to other positions *within the same occupation*. Nevertheless, a Level I wage-designation does not preclude a proffered position from classification as a specialty occupation, just as a Level IV wage-designation does not definitively establish such a classification. In certain occupations (e.g., doctors or lawyers), a Level I, entry-level position would still require a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor's degree in a specific specialty, or its equivalent. That is, a position's wage level designation may be a relevant factor but is not itself conclusive evidence that a proffered position meets the requirements of section 214(i)(1) of the Act.

To merit approval of the petition under this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. While a petitioner may assert that a proffered position requires a specific degree, that statement alone without corroborating evidence cannot establish the position as a specialty occupation. Were we limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the Petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty, or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent, to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d at 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act.

The Petitioner stated that it has routinely hired business analysts and submitted copies of advertisements it placed for these other business analyst positions. We note that one of the advertisements required a minimum of a bachelor's degree in business plus two years of experience while another advertisement just required a bachelor's degree generally without specifying that the degree must be in a specific specialty. Still other advertisements placed by the Petitioner for other business analyst positions required a minimum of a bachelor's degree or its equivalent in business or management. As the duties listed in those advertisements are briefly stated, it is not clear whether those positions are equivalent to the one proffered here, an entry-level position. However, even assuming that they are, we incorporate our earlier discussion that there must be a close correlation between the required specialized studies and the position, and that the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Assocs.*, 19 I&N Dec. at 560. Additionally, the inconsistencies within the Petitioner's advertisements for other business analyst positions, which show that the Petitioner would accept a variety of general degrees and experience, indicates that the Petitioner does not actually require at least a bachelor's degree in a *specific*

*specialty* for the proffered position. Therefore, the Petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

*The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent*

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

Upon review of the record of proceeding, we note that the Petitioner has not provided sufficient evidence to satisfy this criterion of the regulations. In the instant case, relative specialization and complexity have not been credibly developed by the Petitioner as an aspect of the proffered position. Although the Petitioner provided additional details regarding the proffered duties in response to the RFE, the Petitioner's own stated minimum requirements for the position varied widely between its advertisements for other business analysts and even within the present petition, as described previously. These varied requirements for the same or similar positions within the Petitioner's company, which included an unspecified bachelor's degree, a bachelor's degree in business administration, a bachelor's degree in business administration or management plus experience, and an MBA, demonstrate that the duties to be performed for the proffered position are no more specialized and complex than those of positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent.

We further reiterate our earlier discussion regarding the Petitioner's designation of the proffered position in the LCA as a Level I position (the lowest of four assignable wage-levels) relative to others within the occupational category. Without more, the position is one not likely distinguishable by relatively specialized and complex duties. That is, without further evidence, the Petitioner has not demonstrated that its proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a substantially higher prevailing wage.<sup>11</sup>

Although the Petitioner asserts that the nature of the specific duties is specialized and complex, the record lacks sufficient evidence to support this claim. Thus, the Petitioner has not satisfied the criterion of the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the Petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation.

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<sup>11</sup> For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems" and requires a significantly higher wage.

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### III. CONCLUSION

In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

Cite as *Matter of MSI, Inc.*, ID# 15624 (AAO Feb. 8, 2016)