U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: APR 0 7 2014 OFFICE: CALIFORNIA SERVICE CENTER

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director initially denied the nonimmigrant visa petition. Upon further review, the director subsequently reopened the matter on Service motion in order to afford the petitioner an additional opportunity to establish its eligibility for the benefit sought. In the reopened proceeding the director once again concluded that the petition should be denied, and she certified her decision to the Administrative Appeals Office (AAO) for review. The director's decision recommending denial of the petition will be affirmed. The petition will be denied.

I. PROCEDURAL HISTORY

The petitioner describes itself as a 40-employee information technology solutions provider established in 2002.[1] It seeks approval of this Petition for a Nonimmigrant Worker (Form I-129) so that it may employ the beneficiary as an H-1B temporary worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b), and the related regulations at 8 C.F.R. § 214.2(h).

The petitioner identifies the proffered position by the job title "Project Compliance Analyst" and, as reflected in the petition's Labor Condition Application (LCA), it presents the position as belonging to the "Management Analysts" occupational category.

The director denied the petition on August 27, 2013, for failure to establish the proffered position as a specialty occupation. After reopening the matter on Service motion, the director again determined that the evidence of record does not establish the proffered position as a specialty occupation. The director certified that decision to the AAO for review.

The AAO received counsel's brief and additional evidence submitted in response to the director's Notice of Certification on December 23, 2013. On certification, counsel submits his brief and a legal memorandum issued by the American Immigration Lawyers' Association (AILA) on April 4, 2012 (the AILA memo).

The record of proceeding before the AAO thus contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's initial decision denying the petition; (5) the director's service motion combined with the Form I-290C, Notice of Certification; and (6) counsel's brief and supporting materials submitted in response to the Notice of Certification.

As will be discussed below, the AAO finds that the evidence of record fails to overcome the director's ground for denying this petition. Consequently, the director's decision recommending denial of the petition will be affirmed, and the petition will be denied.

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[1] The petitioner provided a North American Industry Classification System (NAICS) Code of 541511, "Custom Computer Programming Services," U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "541511 Custom Computer Programming Services," http://www.census.gov/cgi-bin/sssd/naics/naicsrch (last visited Apr. 2, 2014).

Further, as will later be discussed, the AAO finds, beyond the decision of the director, an additional ground which, although not addressed in the director's decision, nevertheless precludes approval of the petition. Specifically, the AAO finds that the evidence of record does not establish that the beneficiary is qualified to perform the duties of the proffered position.[2] For this additional reason, the petition must also be denied.

II. STANDARD OF REVIEW

As a preliminary matter, unless the law specifically provides that a different standard applies, the AAO follows the preponderance of the evidence standard as specified in the controlling precedent decision *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). In pertinent part, that decision states the following:

> Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.
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> * * *
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> The "preponderance of the evidence" of "truth" is made based on the factual circumstances of each individual case.
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> * * *
>
> Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.
>
> Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Id.

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[2] The AAO conducts review of service center decisions on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and it was in the course of this review that the AAO identified this additional ground for denial.

Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, the AAO finds that the director's determination that the evidence of record does not establish the proffered position as a specialty occupation was correct. Upon its review of the entire record of proceeding, the AAO finds that the evidence of record does not establish that the proffer of a specialty occupation position is "more likely than not" or "probably" true. In other words, as the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads the AAO to believe that the petitioner's claim that the proffered position qualifies as a specialty occupation is "more likely than not" or "probably" true.

III. STATUTORY AND REGULATORY FRAMEWORK

To meet the petitioner's burden of proof with regard to the proffered position's classification as an H-1B specialty occupation, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

> An occupation which requires [(1)] 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 requires [(2)] 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, the position must also 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;
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> *(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. Federal 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 aliens 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.

Thus, to determine whether a particular job qualifies as a specialty occupation, USCIS does not rely simply upon a proffered position's title. The specific duties of the 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 beneficiary and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d at 384. The critical element is not the title of the position nor 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.

IV. OVERVIEW OF THE PETITIONER AND THE PROFFERED POSITION

A. The Petitioner

As noted above, the petitioner stated on the Form I-129 that it has been doing business as an information technology solutions provider since 2002, that it currently employs 40 individuals, that it has a gross annual income of $8,500,000, and that it has a net annual income of $943,763.

In its March 20, 2013 letter of support, which was signed by the petitioner's vice president, the petitioner described itself as follows:

> [The petitioner] is a premier Information Technology solution provider. We are dedicated to be the long-term strategic partner to our clients in the fields of Insurance and Healthcare. We combine our thorough understanding of business processes, industry best practices and strategic vendor partnerships to conceive innovative solutions for our clients and execute them. We consistently exceed expectations and allow our clients to enjoy a measureable return on their IT investment and realize significant business benefits. [The petitioner] is headquartered in USA with offices in [the] United Kingdom and India and has the ability to service clients globally.
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> [The petitioner] offer[s] a wide range of services to our clients in the Property & Casualty Insurance sector. We partner with leading software vendors in each area to provide end-to-end execution on complete solutions or expert guidance to solve key challenges. We also reduce business risks and meet critical IT challenges by providing independent Quality Assurance and Testing services for the entire program involving one or more vendors. In addition, our insurance industry[-]specific best-of-breed integration solution called allows our clients to maximize their current technology investment while connecting different internal or external applications on disparate platforms.

In its July 1, 2013 letter submitted in response to the director's RFE, the petitioner further described itself as follows:

> [The petitioner] develops customized software applications for our clients using a proprietary methodology that we have internally developed. Our clients are large insurance companies and we develop customized software for them based on the line of insurance and the needs of the company like secure policy rating, automated underwriting, [and] data transmission/storage/recall. . . .
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> While each client's needs are unique, most of our projects for them occur in 3 locations. Initial architecture and design of the application software will be done at our office in

Arizona. We have an off-shore development office in India where the code development occurs. From there, the project will be transferred to the US for further development and testing at our office in Arizona. Once the project is ready for implementation, we will send a small team to the client's offices to implement the software into the client's existing system which requires implementing, testing[,] and modifying the software as well as training the client's staff on how to use the software. At any time, we have 15 projects for various clients occurring at the same time. As you can see, there is a lot of coordination between our various offices as well as our team members.

For each project and client, we create an action plan which provides timelines, summary of the client's needs, the scope of the work to be done, any ramp-ups and ramp-down phases, team structure, costs, and terms of the engagement. Each action plan contains milestones that must be met as well as other criteria/standards that must be met. Our PMO (Project Management Office) Director, [,] is responsible for ensuring that each action plan meets the standards and deadlines stated in the action plan.

Further, in order to provide quality products, we are required to follow a process defined by for every project. is a method of improving business processes that some organizations use to improve the efficiency of their operations. As much as a model can guide the construction of a building, can guide the construction of a business process. is not an out-of-the-box set of processes, but rather, a method to help businesses make their own unique processes more effective. It was developed at , with funding from the Department of Defense (DOD). DOD initially funded the creation of a software development model known as the which was later expanded to apply to general business processes. Unlike with most business improvement models, an organization can never be certified in takes appraisals of a business process at a point in time.

B. The Proffered Position

As noted earlier, the petitioner seeks to employ the beneficiary in a position to which it assigned the job title "Project Compliance Analyst" at a wage-rate of $45,000 per year. As also noted above, the petitioner submitted an LCA that had been certified for a job offer falling within the "Management Analysts" occupational category, at a Level I (entry-level) prevailing wage rate. In addition, the record reflects that this is the first time the petitioner is seeking to employ someone in this position.

Both the petitioner's March 20, 2013 letter of support and its July 1, 2013 letter responding to the RFE indicate that the beneficiary would serve as an assistant to the PMO Director. This is reflected in the RFE-reply letter's statement of the rationale for this new position:

> Our current PMO Director has been overwhelmed by the amount of work that is required to manage all of our projects and because of this, we have decided to hire a Project Compliance Analyst to assist him as it is critical that we meet deadlines and quality standards for our clients. Further, this position would constantly conduct organizational studies with the goal of identifying areas where we can be more efficient which is something that our PMO Director does not have time to do.

This explanation accords with the following statements about the proffered position in the petitioner's March 20, 2013 letter of support:

> The Project Compliance analyst assists the PMO director in defining and maintaining the project management standards. She will support the successful delivery of the programs undertaken by the organization through effective facilitation, tracking, and reporting. She will assist the management of key initiatives and programs supporting the strategic objectives of the organization. This position is a subset of the larger classification of Management Analysts[.]

In a statement attached to the aforementioned July 1, 2013 RFE-reply letter, the petitioner stated that the beneficiary would spend the following percentages of time performing the following duties:

- Supporting the PMO director in the preparation and execution of independent assessments of all major projects/programs and their performance against plan (15%);
- Reviewing plans from all major projects/programs on a weekly basis to ensure they are updated regularly and are of an appropriate quality (10%);
- Possibly working with architects to identify business process improvements in support of the business and IT strategy (5%);
- Maintaining processes to ensure that project management documentation, reports, and plans are relevant, accurate, and complete (10%);
- Coordinating events, activities, and facilities meetings to gather and document products/services or generic process changes according to the needs of the PMO director and programmatic requirements (10%);
- Assisting in the facilitation of meetings to PMO Document Control, specifically document versioning and library maintenance (5%);
- Continuing to update and improve project methodologies (5%);
- Maintaining existing departmental and Project Office policies and procedures (5%);

- Supporting the PMO Director, Project Manager[,] and teams in the development of materials for presentations to various stake holder groups including the Steering Committee, and the taking of minutes for management meetings (5%);

- Serving as a business process subject matter expert to business development teams (10%);

- Working with diverse groups within the organization and assisting in the development and implementation of compliance policies and procedures (10%); and

- Conducting readiness reviews and creating tools and processes for the renewal of certification of the organization (10%).

In that RFE letter the petitioner added some expectations that the beneficiary would expected to fulfill, stating that the beneficiary:

- [I]s expected to interface with senior managers and users within the company as well as client/partners peers and third party audit personnel

- [Must maintain a] [g]ood understanding of IT project management [in order] to review project management plans and monitor schedules of various projects

- [I]s expected to have [a] good understanding of [the] to conduct review and internal audits

- [I]s expected to analyze various project related metrics to measure quality, profitability[,] etc., and generate management reports and present to project stakeholders

- And most importantly, assist management in ensuring a smooth, efficient process that meets deadline and quality standards that are set forth by our company and agreed upon by our clients.

In the statement attached to its July 1, 2013 letter, the petitioner described the minimum qualifications for this position as: (1) a bachelor's degree in business administration or a related field; and (2) two years of project management or management consulting experience.

V. PRELIMINARY FINDINGS

We will first render specific findings on evidentiary aspects of the record that will be relevant to our evaluation of the merits of the petitioner's claim that the proffered position qualifies as a specialty occupation.

We shall also note our finding, beyond the decision of the director, that if the evidence of record had established the proffered position as a specialty occupation – which is not the case – the petition

still could not be approved, because the evidence of record does not establish that the beneficiary had attained the amount of full-time work experience that the petitioner asserted as necessary for the performance of the proffered position.

A. Evidence Regarding the Proffered Position and Its Duties

As evident in the preceding excerpts from the record, the petitioner describes the proffered position and its constituent duties exclusively as generalized functions that are stated in relatively abstract terms and not explained in sufficient detail to establish a necessary correlation between them and a requirement for at least a bachelor's degree in a specific specialty, or the equivalent in education, training, and/or experience.

Though those functions are numerous, they are so generally stated that they fail to convey what their performance would involve, not only in terms of actual work but also in terms of the theoretical and practical application of highly specialized knowledge in a specific specialty, which is an element required to establish that a particular position meets the definition of an H-1B specialty occupation at section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4).

With regard to "Supporting the PMO director in the preparation and execution of independent assessments of all major projects/programs and their performance against plan," we note that the record does not establish the substantive nature of the support that the proffered position would provide or the methodologies and particular types and levels of knowledge that would be required to perform this duty.

Likewise, the evidence of record does not identify the substantive knowledge that the position's incumbent would have to apply in "[r]eviewing plans from all major projects/programs on a weekly basis to ensure they are updated regularly and are of an appropriate quality."

"Possibly working with architects to identify business process improvements in support of the business and IT strategy" not only fails to identify any of the processes or knowledge applications that would be involved if and when, if ever, this function would be performed, but it also merits little to no weight because of its speculative character.

While the petitioner identifies as another duty "Maintaining processes to ensure that project management documentation, reports, and plans are relevant, accurate, and complete," the record contains no substantive information with regard to the nature and educational and/or education-equivalent level of any particular body of knowledge that would be required to perform this function.

Likewise, the record of proceeding does not identify what applications of highly specialized knowledge in any specialty would be required to "[c]oordinat[e] events, activities, and facilities meetings" as described by the petitioner.

Nor does any portion of the record of proceeding establish any particular work and associated levels of education and/or educational-equivalency that would be required to perform the position's functions

that are stated as "Assisting in the facilitation of meetings" related to document control; "Coordinating events, activities, and facilities meetings to gather and document products/services or generic process changes."

The petitioner provides no substantive details about whatever work and associated applications of knowledge would be involved in either "Maintaining existing departmental and Project Office policies and procedures," "Maintaining existing departmental and Project Office policies and procedures," or "Supporting the PMO Director, Project Manager[,] and teams in the development of materials for presentations to various stake holder groups including the Steering Committee, and the taking of minutes for management meetings."

The AAO accords no probative weight to the petitioner's assertion that the incumbent's functions would include "[s]erving as a business process subject matter expert to business development teams." The petitioner does not define either (1) what it means by a "business project subject matter expert," (2) what substantive requirements, if any, it sets for designating a person as such, or (3) what "serving" in that capacity "to business development teams" would involve in terms of substantive work and applications of substantive knowledge in any specific specialty.

Next we note that while the petitioner states that the proffered position's duties would also include "assisting in the development and implementation of compliance policies and procedures," the record of proceeding fails to establish both the substantive nature of that assistance and also whatever educational level of specialized knowledge in any particular field would have to be applied to provide this assistance.

As so stated, the additional function of "Conducting readiness reviews and creating tools and processes for the renewal of certification of the organization" is not indicative of any particular level of knowledge beyond what the petitioner itself could impart to the position-holder by on-the-job training as a Level 3 institution.

Thus, we find that while the petitioner itemizes a number of functions that it ascribes to the proffered position, it does not provide sufficient, substantial details about any of them. Consequently, the record of proceeding fails to establish not just the substantive nature of whatever work the proffered position would actually involve but also whatever education or equivalent knowledge would be required to perform those tasks.

Additionally, the record's descriptions of the proffered position and its constituent duties do not develop relative complexity, specialization, and/or uniqueness as aspects of the proffered position or its duties. In this regard and for the reasons discussed below, by submitting an LCA certified for a Level I wage-rate, the petitioner in effect attested that the proffered position and its duties should not be regarded as among the more specialized, complex, and/or unique among the pertinent occupational category.

B. Implications of the LCA Submitted by the Petitioner in Support of this Petition

The first subparagraphs at 8 C.F.R. § 214.2(h)(4)(iii)(B) (*General requirements for petitions involving a specialty occupation*) states:

> Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

Likewise the first two subparagraphs of 8 C.F.R. § 214.2(h)(4)(iii)(B) (*Petitioner requirements*) state that "the petitioner will submit the following with an H-1B petition involving a specialty occupation:

> (*1*) A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,
>
> (*2*) A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay . . . .

Here, the petitioner submitted an LCA that had been certified for a job prospect for which assignment of a Level I wage-level would be appropriate for determining the prevailing-wage for the job within the occupational group and geographical location where it would be performed.[3]

According to the guidelines of the U.S. Department of Labor's Employment and Training Administration, which manages the LCA process, the prevailing-wage should be determined only after selecting the most relevant O*NET code classification. A prevailing wage determination is then made by selecting one of four wage levels for an occupation based upon a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.[4]

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[3] Section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A), requires an employer to pay an H-1B worker the higher of either the prevailing wage for the occupational classification in the "area of employment" or the actual wage paid by the employer to other employees with similar experience and qualifications who are performing the same services. *See* 20 C.F.R. § 655.731(a). The prevailing wage may be determined based on the arithmetic mean of the wages of workers similarly employed in the area of intended employment. 20 C.F.R. § 655.731(a)(2)(ii).

[4] For additional information on wage levels see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf (last visited Apr. 2, 2014).

Prevailing wage determinations start at Level I (entry) and progress to a wage that is commensurate with that of Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.[5] The U.S. Department of Labor (DOL) emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received as indicated by the job description.

It is also clear that in submitting an LCA in support of an H-1B petition, the petitioner (not DOL) is responsible to ensure that the wage-level designation matches the experience, responsibility, judgment, and occupational knowledge aspects of the proffered position.[6] Here the petitioner submitted an LCA that had been certified for the lowest of the four wage-levels assignable to a position.

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[5] A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and Specific Vocational Preparation (SVP) range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1"or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

[6] DOL has stated clearly that its LCA certification process is cursory, that it does not involve substantive review, and that it makes the petitioner responsible for the accuracy of the information entered in the LCA. With regard to LCA certification, the regulation at 20 C.F.R. § 655.715 states the following:

> *Certification* means the determination by a certifying officer that a labor condition application is not incomplete and does not contain obvious inaccuracies.

Likewise, the regulation at 20 C.F.R. § 655.735(b) states, in pertinent part, that "[i]t is the employer's responsibility to ensure that ETA [(the DOL's Employment and Training Administration)] receives a complete and accurate LCA."

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(*2*) specifies that certification of an LCA does not constitute a determination that an occupation is a specialty occupation:

> Certification by [DOL] of a labor condition application in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. The director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. The director shall also determine whether the particular alien for whom H-1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.

The aforementioned *Prevailing Wage Determination Policy Guidance* issued by DOL states the following with regard to Level I wage rates:

> **Level I** (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf (last visited Apr. 2, 2014).

Thus, by attesting on the LCA that the proffered position is a Level I, entry-level position, the petitioner indicates that the job may only require "a basic understanding of the occupation" expected of a "worker in training" or an individual performing an "internship." As such, absent evidence to the contrary, this LCA is countervailing evidence against any claim by the petitioner that the proffered position or its duties are relatively complex and/or specialized as compared to others within the same occupation. In accordance with the relevant DOL explanatory information on wage levels, the selected wage rate indicates that the holder of the position would only be required to have a basic understanding of the occupation; would be expected to perform routine tasks that require limited, if any, exercise of judgment; would be closely supervised and have his or her work closely monitored and reviewed for accuracy; and would receive specific instructions on required tasks and expected results.

As noted above, under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. *See* section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A); 20 C.F.R. § 655.731(a); *Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 422 & n.3 (4th Cir. 2005); *Patel v. Boghra*, 369 Fed.Appx. 722, 723 (7th Cir. 2010); *Michal Vojtisek-Lom & Adm'r Wage & Hour Div. v. Clean Air Tech. Int'l, Inc.*, No. 07-97, 2009 WL 2371236, at *8 (Dep't of Labor Admin. Rev. Bd. July 30, 2009). The LCA serves as the critical mechanism for enforcing section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). *See* 65 Fed. Reg. 80110, 80110-80111 (indicating that the wage protections in the Act seek "to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers" and that this "process of protecting U.S. workers begins with [the filing of an LCA] with [DOL]").

It is noted that the petitioner would have been required to offer a significantly higher wage to the beneficiary in order to employ her at a Level II (qualified), a Level III (experienced), or a Level IV (fully competent) level. The petitioner has offered the beneficiary a wage of $45,000 per year, which satisfied the Level I (entry level) prevailing wage of $38,813 per year for a management analyst in the Phoenix-Mesa-Scottsdale, Arizona Metropolitan Statistical Area at the time the LCA was certified. U.S. Dep't of Labor, Foreign Labor Certification Data Center, Online Wage Library, FLC Quick Search, "Management Analysts," http://www. flcdatacenter.com/OesQuickResults. aspx?code=13-1111&area=38060&year=13&source=1 (last visited Apr. 2, 2014). However, in order to offer employment to the beneficiary at a Level II (qualified) wage-level, which would involve only "moderately complex tasks that require limited judgment," the petitioner would have been required to raise her salary to at least $54,870 per year. The Level III (experienced) prevailing wage was $70,949 per year, and the Level IV (fully competent) prevailing wage was $87,006 per year. *Id.*

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct wage level in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to submit an LCA for a different wage level at a lower prevailing wage than the one that it claims the beneficiary would perform in the proffered position.

This aspect of the LCA undermines the credibility of any assertions that the proffered position would require the application of a relatively high level of occupational knowledge, responsibility, and judgment. To the extent that the petitioner would ascribe such dimensions to the proffered position, it would be contesting the accuracy of the LCA that it provided in support of the petition. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile a conflicting account will not suffice unless the petitioner submits competent objective evidence that resolves the inconsistency. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Further, if the petitioner were to assert that the proffered position actually merits a higher wage-level than assigned in the certified LCA that it submitted, the petition would have to be denied for failure to provide an LCA that corresponds to the petition.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

> For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion

> model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, if the proffered position in fact merits a higher-wage level commensurate with a higher-level and more complex position than reflected in the LCA's Level I wage-rate, the petitioner would have failed to submit an LCA that corresponds to the claimed duties and requirements of the proffered position. That is, the LCA submitted in support of the petition would then fail to correspond to the level of work, responsibilities and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work, responsibilities, and requirements in accordance with section 212(n)(1)(A) of the Act and the pertinent LCA regulations.

In such a case, the LCA's Level I wage-rate would not only conflict with the petition and require dismissal of the petition on that basis, but such conflict would also undermine the overall credibility of the petition.

C. Membership Requirements of the

Here the AAO will focus on the evidentiary significance of documentation that the petitioner submitted into the record with regard to membership in the That evidence consists of two printouts of a copy of an Internet printout regarding the five classes of membership and their requirements for entry.

According to the related documentary evidence submitted by the petitioner, is an organization devoted to the promotion of proficiency and ethical standards among management consultants or management analysts, that it offers Certified Management Consultant certification to management analysts who have achieved prescribed levels of competency, and understanding in management analysis. Accordingly, the documentation - specifically, the document addressing the membership categories - is relevant to the issues before us.

We shall focus on three of the five classes of membership addressed in the document, namely, Professional, Student, and Certified.

1. Requirements for Professional Membership in

Referring to under the heading "Industry-Related Association," counsel's July 15, 2013 letter replying to the RFE mistakenly asserts that one cannot become a professional member of without holding a master's degree in business or a related field. There counsel states:

> Per website, in order to become a professional member, one must have a Master's degree in business or a related field.

Likewise, counsel's brief on appeal (at page 7) asserts that the petitioner's response to the RFE included "[e]vidence that the leading association for management analysts requires an MBA for membership."

The record reflects that in both instances, counsel referred to the June 6, 2013 copy of the printout of the Membership Categories section of Internet site, submitted into the record as part of the RFE-reply's USA Printout" documents. However, contrary to counsel's assertion, the content of the document does not specify any educational credential as a requirement for Professional Membership. We quote directly from the document:

> A Professional Member is a practicing management consultant or a potential management consultant, who agrees to subscribe to the Code of Ethics and who may choose to work towards the Institute's professional qualification of The applicant must possess evidence of AT LEAST ONE of the criteria listed below:
>
> - Minimum of one year's experience as a management consultant.
> - At least five-years experience in management
> - At least five-years experience in a technical or professional specialty.
> - Master's Degree in Business or related field (e.g., MBA).
> - Currently working as a consultant with an Accredited Practice.
>
> Professional members are voting members and receive the full benefits of the Institute. Professional Member annual dues are $325 (can be prorated) plus a $50 application fee.

Thus, we accord no weight to counsel's claim that one must hold a master's degree in order to become a Professional Member of and we discount the petitioner's reliance on that claim as misplaced and unsupported by the record of proceeding as currently constituted.

2. Requirements for Student Membership in

We observe that the aforementioned document indicates that Student Membership is not restricted to any major or academic concentration; it is open to all.

3. Designation as a

First, as can be gleaned from the document itself and as noted in the *Handbook's* comment upon it, designation is not required for entry into the Management Analysts occupational category but may improve a management analysts job prospects.

Second, review of the qualification criterion provides additional evidence that a person may work as a management analyst without having attained a bachelor's degree at all, let alone one in a specific specialty. In pertinent part, the record's "Membership Categories" itemizes the following as the qualifying criteria (emphasis added):

- Document *3 years experience in the full[-]time practice of management consulting*, with major responsibility for client engagements during at least one of those years.
- Possess a *bachelor's degree* from an Accredited College or University.
- Provide multiple references, most of them from officers or executives of clients served.
- Provide written summaries of client engagements.
- Pass a qualifying interview by other
- Professional Member in good standing for at least one year preceding application for designation.

Experience as a management consultant is a separate criterion from the bachelor's degree requirement, with no indication that the degree must be earned prior to the gaining of this experience. This suggests that recognizes that a person may indeed be employed as a management analyst without first having attained a bachelor's degree, let alone one in a specific specialty closely related to the person's particular position.

D. Lack of Evidence Establishing that the Job Requirements Asserted by the Petitioner Constitute a Bona Fide Need for at Least a Bachelor's Degree in a Specific Specialty or Its Equivalent

In this regard, we note that, as will be reflected in discussions later in this decision, the petitioner presents no supporting documentary evidence that its claimed requirement of at least a bachelor's degree in business and two years management or management consulting experience is equivalent to a requirement for at least a bachelor's degree in a specific specialty. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

E. The Beneficiary's Qualifications

Next, assuming the proffered position requires two years of project management or management consulting experience as stated in the document attached to its July 1, 2013 letter, the AAO also finds, beyond the decision of the director, that the evidence of record does not establish that the beneficiary is qualified to perform the duties of the position proffered by the petitioner. The evidence of record does not establish that the beneficiary possesses such experience. While the beneficiary's resume is acknowledged, the record contains no documentary evidence to support the claims made in the resume. The evidentiary weight of this resume is insignificant. It represents claims made by the beneficiary rather than evidence to support those claims. Here, the record of proceeding lacks documentary evidence to establish or corroborate the claims regarding the

beneficiary's professional experience made on her resume. Again, without documentary evidence to support the claims made, a petitioner will not satisfy its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

However, even if the AAO were to accept the uncorroborated assertions made by the beneficiary on her resume, those assertions would still not establish that she meets the petitioner's claimed work experience requirements. Specifically, the beneficiary's resume describes three periods of employment. First, the beneficiary claims that she worked for the from April 2009 until June 2009, a period of two to three months. Next, the beneficiary claims that she worked for from March 2010 until August 2010, a period of five to six months. Finally, the beneficiary claims that she worked for from December 2010 until April 2011, a period of four to five months. The beneficiary's resume indicates at most fourteen months of employment and, therefore, does not indicate that she possesses at least two years of relevant work experience.

Moreover, even if the beneficiary's resume did indicate two years of work experience, it would still not establish that it was relevant to the type of experience allegedly required by the petitioner. Again, the petitioner attested that it requires two years of project management or management consulting experience. As the beneficiary's resume indicates that all of her work experience was gained while being simultaneously engaged in either undergraduate or graduate coursework, it is not clear that her work experience was both (1) full-time and (2) relevant.

Accordingly, the evidence of record does not establish that the beneficiary is qualified to perform the duties of the proffered position according to the standards claimed by the petitioner. Thus, even if it were determined that the petitioner had overcome the director's ground for denying this petition (which it has not), the petition could still not be approved.

VI. THE SPECIALTY OCCUPATION ISSUE

The AAO will now address the director's determination that the proffered position is not a specialty occupation. Based upon a complete review of the record of proceeding, the AAO agrees with the director that the evidence fails to establish that the position as described constitutes a specialty occupation.

A. The Requirement for a Bachelor's Degree in a Specific Specialty or Its Equivalent

Counsel's primary argument on certification is that the director erred in interpreting the statutory and regulatory framework cited above as requiring not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Counsel submits the aforementioned AILA memo and his own brief in support of this argument. Upon review, the AAO affirms the director's interpretation of the relevant statutory and regulatory framework.

The AAO will first address the AILA memo. As indicated above, this memo was issued by AILA on April 4, 2012 and addressed to the USCIS director. In this memo, AILA urged USCIS to reconsider its

interpretation of the term "degree." As noted above, USCIS has consistently interpreted this term to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

This interpretation is based on the fact that section 214(i)(1) of the Act defines the term "specialty occupation" as one requiring both the theoretical and practical application of a body of *highly specialized knowledge* and attainment of a bachelor's or higher degree *in the specific specialty*, or the equivalent, as a minimum for entry into the occupation in the United States, and that 8 C.F.R. § 214.2(h)(4)(ii) further defines the term "specialty occupation" as an occupation requiring the same, i.e., both the theoretical and practical application of a body of *highly specialized knowledge* and 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. AILA asserted nonetheless that a bachelor's degree in a specific specialty, or the equivalent, is not required in order to demonstrate that a proffered position qualifies as a specialty occupation. AILA contended that so long as a petitioner satisfies one of the four alternative criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(*1*)-(*4*), an H-1B petition should be approved.

In other words, AILA appears to suggest that 8 C.F.R. § 214.2(h)(4)(iii)(A) must be read in a vacuum and that the statutory and regulatory definition of the term "specialty occupation" need not be considered when reading this supplemental regulatory provision. As indicated above, however, such a reading of the law could result in a position meeting one of the conditions under 8 C.F.R. § 214.2(h)(4)(iii)(A), but not satisfying the statutory or regulatory definition of a "specialty occupation." *See Defensor v. Meissner*, 201 F.3d at 387. Again, 8 C.F.R. § 214.2(h)(4)(iii)(A) must be read and construed in harmony with the statute and any related regulatory provisions. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. at 291.

In promulgating the H-1B regulations, the former Immigration and Naturalization Service (INS) stated the following:

> Thirty-one commenters suggested that the definition of specialty occupation was too severe and would exclude certain occupations from classification as specialty occupations. Most of these commenters suggested that the definition should be expanded to include those occupations which did not require a bachelor's degree in the specific specialty. The definition of specialty occupation contained in the statute contains this requirement. Accordingly, the requirement may not be amended in the final rule.

56 Fed. Reg. 61111, 61112 (Dec. 2, 1991). As such, given that the plain language of the Act contains this "degree in the specific specialty" requirement, USCIS may not conclude that a position qualifies as a specialty occupation if it does not satisfy this requirement. *See* section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Therefore, we do not find the AILA memo persuasive on this point.

In his brief, counsel states the following:

> [T]he Director's position is that it is not possible to show eligibility for inclusion in a "specialty occupation" unless that occupation requires a *single* field of study [and that] [i]f one may qualify to work in the occupation on the basis of having graduated in one of several qualifying fields, then the position is not a "specialty occupation."

Counsel appears to have misinterpreted the director's position. In any event, the AAO does not subscribe to or apply the analytical view that counsel imputes to the director's decision.

In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. *See* section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing, again, the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

Counsel also claims that the AAO approved H-1B petitions "in numerous pre-2009 decisions" without requiring the petitioner to demonstrate that the positions involved in those petitions required the attainment of a bachelor's or higher degree in a specific specialty, or the equivalent, as a minimum for entry into the occupation, as required by section 214(i)(1)(B) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). Although counsel cited several unpublished AAO decisions, he did not provide copies of those decisions.

When any person makes an application for a "visa or any other document required for entry, or makes an application for admission [. . .] the burden of proof shall be upon such person to establish that he is eligible" for such relief. Section 291 of the Act, 8 U.S.C. § 1361; *see also Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Furthermore, any suggestion that USCIS must review unpublished decisions and possibly request and review each case file relevant to those decisions, while being impractical and inefficient, would also be tantamount to a shift in the evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act. Accordingly, neither the director nor the AAO was required to request and/or obtain copies of the unpublished decisions cited by counsel.

In any event, it must be emphasized that each petition filing is a separate proceeding with a separate record. *See Hakimuddin v. Dep't of Homeland Sec.*, No. 4:08-cv-1261, 2009 WL 497141, at 6 (S.D. Tex. Feb. 26, 2009); *see also Larita-Martinez v. INS* 220 F.3d 1092, 1096 (9th Cir. 2000) (stating that the "record of proceeding" in an immigration appeal includes all documents submitted in support of the appeal). In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). The records of proceeding and the evidence therein relevant to the nonprecedent decisions cited by counsel have not been submitted into this record and, as such, we shall not speculate as to their content or to whether or not they in fact supported the AAO decisions cited by counsel.

Also if a petitioner wishes to have unpublished decisions considered by USCIS in its adjudication of a petition, the petitioner is permitted to submit copies of such evidence that it either obtained itself through its own legal research and/or received in response to a Freedom of Information Act request filed in accordance with 6 C.F.R. Part 5. Otherwise, "[t]he non-existence or other unavailability of required evidence creates a presumption of ineligibility." 8 C.F.R. § 103.2(b)(2)(i). In the instant case, the petitioner failed to submit copies of the unpublished decisions. As the record of proceeding does not contain any evidence of the unpublished decisions, there were no underlying facts to be analyzed and, therefore, no prior, substantive determinations could have been made to determine what facts, if any, were analogous to those in this proceeding.

Nevertheless, even if this evidence had been submitted and even if it had been determined that the facts in those cases were analogous to those in this proceeding, those decisions are not binding on USCIS. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Moreover, if the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approvals would constitute material and gross error. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

The AAO turns next to counsel's citation of *Tapis Int'l v. INS*, 94 F. Supp. 2d 172 (D. Mass. 2000). In that case, the U.S. district court found that while the former INS was reasonable in requiring a bachelor's degree in a specific field, it abused its discretion by ignoring the portion of the regulations that allows for the equivalent of a specialized baccalaureate degree. According to the U.S. district court, INS's interpretation was not reasonable because then H-1B visas would only be available in fields where a specific degree was offered, ignoring the statutory definition allowing for "various combinations of academic and experience based training." *Tapis Int'l v. INS*, 94 F. Supp. 2d at 176. The court elaborated that "[i]n fields where no specifically tailored baccalaureate program exists, the only possible way to achieve something equivalent is by studying a related field (or fields) and then obtaining specialized experience." *Id.* at 177.

The AAO agrees with the district court judge in *Tapis Int'l v. INS*, that in satisfying the specialty occupation requirements, both the Act and the regulations require a bachelor's degree in a specific

specialty or its equivalent, and that this language indicates that the degree does not have to be a degree in a single specific specialty. Again, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) (emphasis added).

Moreover, the AAO also agrees that, if the requirements to perform the duties and job responsibilities of a proffered position are a combination of a general bachelor's degree and experience such that the standards at both section 214(i)(1)(A) and (B) of the Act have been satisfied, then the proffered position may qualify as a specialty occupation. The AAO does not find, however, that the U.S. district court is stating that any position can qualify as a specialty occupation based solely on the claimed requirements of a petitioner.

Instead, 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 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 a specific specialty as the minimum for entry into the occupation as required by the Act.

In addition, the district court judge does not state in *Tapis Int'l v. INS* that, simply because there is no specialty degree requirement for entry into a particular position in a given occupational category, USCIS must recognize such a position as a specialty occupation if the beneficiary has the equivalent of a bachelor's degree in that field. In other words, the AAO does not find that *Tapis Int'l v. INS* stands for either (1) that a specialty occupation is determined by the qualifications of the beneficiary being petitioned to perform it; or (2) that a position may qualify as a specialty occupation even when there is no specialty degree requirement, or its equivalent, for entry into a particular position in a given occupational category.

First, USCIS cannot determine if a particular job is a specialty occupation based on the qualifications of the beneficiary. A beneficiary's credentials to perform a particular job are relevant only when the job is first found to qualify as a specialty occupation. USCIS is required instead to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether an alien beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is

found that the position in which the petitioner intends to employ him falls within [a specialty occupation].").

Second and as discussed *supra*, in promulgating the H-1B regulations, the former INS made clear that the definition of the term "specialty occupation" could not be expanded "to include those occupations which did not require a bachelor's degree in the specific specialty." 56 Fed. Reg. at 61112. More specifically, in responding to comments that "the definition of specialty occupation was too severe and would exclude certain occupations from classification as specialty occupations," the former INS stated that "[t]he definition of specialty occupation contained in the statute contains this requirement [for a bachelor's degree in the specific specialty or its equivalent]" and, therefore, "may not be amended in the final rule." *Id.*

In any event, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Tapis Int'l v. INS*. The AAO also notes that, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising even within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Nor is the AAO persuaded by counsel's citation to *Unical Aviation, Inc. v. INS*, 248 F. Supp. 2d 931 (D.C. Cal 2002). The material facts of the present proceeding are distinguishable from those in *Unical*. Specifically, *Unical* involved: (1) a position for which there was a companion position held by a person with a Master's degree; (2) a record of proceeding that included an organizational chart showing that all of its employees in the marketing department held bachelor's degrees; and, in the court's words, (3) "sufficient evidence to demonstrate that there is a requirement of specialized study for [the beneficiary's] position." Also, the proffered position and related duties in the present proceeding are different from those in *Unical Aviation, Inc.*, where the beneficiary was to liaise with airline and Maintenance Repair Organization ("MRO") customers in China for supply of parts and services; analyze and forecast airline and MRO demands to generate plans to capture business; provide after-sales services to customers in China; and develop new products and services for the China market. Moreover, there is no indication in the record of proceeding that the petitioner is in the same industry or is in any way similar in size or type of business as *Unical Aviation, Inc.*

Further, in *Unical Aviation* the Court partly relied upon *Augut, Inc. v. Tabor*, 719 F. Supp. 1158 (D. Mass. 1989), for the proposition that the former INS had not used an absolute degree requirement in applying the "profession" standard at 8 U.S.C. § 1101(a)(32) for determining the merits of an 8 U.S.C. § 1153(a)(3) third-preference visa petition. That proposition is not relevant here, because the H-1B specialty occupation statutes and regulations, not in existence when INS denied the *Augut, Inc.* third-preference petition, mandate not just a baccalaureate or higher degree, or its equivalent, but a degree "in the specific specialty." Section 214(i)(1) of the Act; *see also* 8 C.F.R. § 214.2(h)(4)(ii). The AAO also notes again, that, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising even within the same district. *See Matter of K-S-*, 20 I&N Dec. at 715. Although the reasoning underlying a district judge's decision will be given due

consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Finally, the AAO notes that counsel cites to *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985 (S.D. Ohio 2012), for the proposition that "'[t]he knowledge and not the title of the degree is what is important. Diplomas rarely come bearing occupation-specific majors. What is required is an occupation that requires highly specialized knowledge and a prospective employee who has attained the credentialing indicating possession of that knowledge.'"

The AAO agrees with the aforementioned proposition that "[t]he knowledge and not the title of the degree is what is important." Once again, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. For the aforementioned reasons, however, the petitioner has failed to meet its burden and establish that the particular position offered in this matter requires a bachelor's or higher degree in a specific specialty or its equivalent directly related to its duties in order to perform those duties. *See also Health Carousel, LLC v. U.S. Citizenship & Immigration Services*, No. 1:13-cv-23 (S.D. Ohio Jan. 3, 2014) (agreeing with AAO's analysis of *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*).

As with *Tapis Int'l v. INS*, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*.[7] As explained above, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising even within the same district. *See Matter of K-S-*, 20 I&N Dec. at 715. Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

For all of these reasons, the AAO reiterates its earlier statements 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); that this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole; and that, 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, as to otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result

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[7] It is noted that the district judge's decision in that case appears to have been based largely on the many factual errors made by the service center in its decision denying the petition. The AAO further notes that the service center director's decision was not appealed to the AAO. Based on the district court's findings and description of the record, if that matter had first been appealed through the available administrative process, the AAO may very well have remanded the matter to the service center for a new decision for many of the same reasons articulated by the district court if these errors could not have been remedied by the AAO in its *de novo* review of the matter.

in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. 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. Accordingly and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), 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.

B. Review of the Director's Recommended Decision

The AAO will now discuss the application of each supplemental, alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

The AAO will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), which is satisfied by establishing that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position that is the subject of the petition.

The AAO recognizes DOL's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.[8]

The petitioner asserts that the proffered position and its duties fall within the "Management Analysts" occupational category and should be analyzed as such. The director agreed, and followed suit. Both the petitioner and the director cite the related chapter of the *Handbook,* although in support of opposite conclusions. The AAO will likewise analyze the proffered position as falling within the Management Analysts occupational classification.

In relevant part, the *Handbook* summarizes the duties typically performed by management analysts as follows:

> Management analysts, often called management consultants, propose ways to improve an organization's efficiency. They advise managers on how to make organizations more profitable through reduced costs and increased revenues
>
> **Duties**
>
> Management analysts typically do the following:
>
> - Gather and organize information about the problem to be solved or the procedure to be improved

[8] The *Handbook*, which is available in printed form, may also be accessed online at http://www.stats.bls.gov/oco/. The AAO's references to the *Handbook* are from the 2014-15 edition available online.

- Interview personnel and conduct on-site observations to determine the methods, equipment, and personnel that will be needed
- Analyze financial and other data, including revenue, expenditure, and employment reports
- Develop solutions or alternative practices
- Recommend new systems, procedures, or organizational changes
- Make recommendations to management through presentations or written reports
- Confer with managers to ensure that the changes are working

Although some management analysts work for the organization that they are analyzing, most work as consultants on a contractual basis.

Whether they are self-employed or part of a large consulting company, the work of a management analyst may vary from project to project. Some projects require a team of consultants, each specializing in one area. In other projects, consultants work independently with the client organization's managers.

Management analysts often specialize in certain areas, such as inventory management or reorganizing corporate structures to eliminate duplicate and nonessential jobs. Some consultants specialize in a specific industry, such as healthcare or telecommunications. In government, management analysts usually specialize by type of agency.

Organizations hire consultants to develop strategies for entering and remaining competitive in the electronic marketplace.

Management analysts who work on contract may write proposals and bid for jobs. Typically, an organization that needs the help of a management analyst solicits proposals from a number of consultants and consulting companies that specialize in the needed work. Those who want the work must then submit a proposal by the deadline that explains how they will do the work, who will do the work, why they are the best consultants to do the work, what the schedule will be, and how much it will cost. The organization that needs the consultants then selects the proposal that best meets its needs and budget.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Management Analysts," http://www.bls.gov/ooh/Business-and-Financial/Management-analysts.htm#tab-2 (last visited Apr. 2, 2014).

The *Handbook* states the following with regard to the educational requirements necessary for entrance into this field:

> 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 Registration**
>
> The 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 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.

Id. at http://www.bls.gov/ooh/Business-and-Financial/Management-analysts.htm#tab-4 (last visited Apr. 2, 2014).

The statements made by DOL in the *Handbook* do not support a finding that at least a bachelor's degree in a specific specialty or its equivalent is normally required for entry into the Management Analysts occupational category, let alone into the particular management-analyst position that is the subject of this petition.

First, we find that consolidated and read together the *Handbook*'s major education-level statements do not support the proposition that a position's inclusion within the Management Analysts occupational group is sufficient in itself to establish, in the words of this criterion, that this "particular position" is one for which "a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry." That segment of the *Handbook* reads:

> 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).

The statements that "most management analysts have at least a bachelor's degree" and that a "bachelor's degree is the typical entry requirement for management analysts" do not equate to a declaration that absence of a bachelor's degree would preclude a person from being hired into the Management Analyst occupational group. Nor can we reasonably deduce from those statements that, merely by a position's inclusion within that occupational group, one can deduce a minimum educational level of highly specialized knowledge that would be required to perform that particular position. Further, we do not read the qualifying language about some employers preferring a Master's Degree as indicating either a Master's Degree or a bachelor's degree as the minimum educational requirements for entry into the Management Analysts occupational category. Such a conclusion would ignore the opening statement that most management analysts have at least a bachelor's degree and that statement's clear implication that if "most" management analysts hold a bachelor's degree, others do not.

More importantly, while the *Handbook* indicates that a master's degree in business administration may be preferred for some positions, it also indicates no limit to the range of bachelor degrees that a management analyst might hold.[9] In this regard, we note that the *Handbook* reports the widely divergent fields of business, management, economics, political science and government, accounting, finance, marketing, psychology, computer and information science, and English as "common" – and not even exclusive – "fields of study" in which management analysts have engaged. Such a wide range of acceptable majors or academic concentrations is not indicative of an occupational classification composed of positions requiring the theoretical and practical application of a body of highly specialized knowledge and a bachelor's or higher degree in a specific specialty, or its equivalent, as required by section 214(i)(1) of the Act and its implementing regulation at 8 C.F.R. § 214.2(h).

Also, the fact that the *Handbook*'s information indicates that a degree in business, without any further specification, could provide adequate preparation, constitutes additional evidence that a particular position's inclusion in this occupational group is not in itself sufficient to establish that position as one for which the normal entry requirement is at least a bachelor's degree in a specific specialty, or the equivalent. 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

[9] It is further noted that a demonstrated preference for a degree is not sufficient to establish that such a degree is required.

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 Associates*, 19 I&N Dec. 558.

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. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.[10]

Accordingly, the *Handbook* does not support this petition's "particular position" as one for which, in the language of the criterion, "a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry."

Where, as here, the *Handbook* does not support the proposition that the proffered position satisfies this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise satisfies this criterion by a preponderance of the evidence standard, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's burden to provide probative evidence (e.g., documentation from other authoritative sources) that supports a favorable finding with regard to this criterion.

The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. In this case, the *Handbook* does not support the proposition that the proffered position satisfies 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), and the record of proceeding does not contain any persuasive documentary

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[10] Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

> [t]he 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: elsewise, 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.

evidence from any other relevant authoritative source establishing that the proffered position's inclusion in this occupational category would be sufficient in and of itself to establish that a bachelor's or higher degree in a specific specialty or its equivalent "is normally the minimum requirement for entry into [this] particular position."

In addition to the fact that the record contains no information from an authoritative source establishing that performance of the duties of the proffered position requires at least a bachelor's degree in a specific specialty, or the equivalent, the petitioner's own statements establish further that such is not the case. In its July 1, 2013 letter, the petitioner stated the following:

> [T]here was no doubt that we would require a bachelor's degree in business as a very minimum[.]

As indicated above, the statement that a general-purpose bachelor's degree – i.e., a bachelor's degree in business – would adequately prepare an individual to perform the duties of this particular position is tantamount to an admission that the proffered position is not in fact a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.

Finally, the AAO notes again that the petitioner submitted an LCA certified for a job prospect with a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation, and which signifies that the beneficiary is only expected to possess a basic understanding of the occupation. We also here incorporate into this analysis this decision's earlier comments and findings with regard to the membership categories and their implications, which also do not support the proffered position as one normally requiring at least a bachelor's degree in a specific specialty, or the equivalent.

In conclusion, as the evidence in the record of proceeding does not establish that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position that is the subject of this petition, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

Next, the AAO finds that the petitioner has not satisfied 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 (1) common to the petitioner's industry in (2) positions that are both: (a) parallel to the proffered position; and (b) 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 already discussed, the evidence of record has not established that the petitioner's proffered position is one for which the *Handbook* reports a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty or its equivalent.

With regard to a professional association in the petitioner's industry, the record contains materials printed from the website of the The AAO here incorporates into this analysis this decisions earlier comments and findings with regard to membership classes. Again, as there discussed, we reject counsel's unsupported assertion that

> Per website, in order to become a professional member, one must have a Master's degree in Business or a related field.

Also, as previously discussed, the AAO has reviewed the materials from the website and finds that they do not aid the petitioner in satisfying the first of the two alternative prongs at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*). According to these materials, there are five classes of membership: (1) professional member; (2) affiliate member; (3) student member; (4) certified member; and (5)

Again, counsel's statement that a master's degree in business or a related field is required in order to become a professional member of is not supported by the record. To the contrary, the materials submitted by counsel indicate that such a degree is one of five alternative requirements that must be met in order to achieve such membership. For example, an individual could achieve such membership by possessing one year of experience as a management consultant, regardless of their educational background. Five years of experience in general management, with no experience as a management analyst and regardless of educational background, would also qualify an individual for professional membership in Therefore, a requirement for professional membership in would not satisfy the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

Finally, and at a more basic level, does not indicate that management analysts are required to possess a bachelor's degree in a specific specialty. Even if it had and even if the petitioner had stated membership as a prerequisite for the petition, the *Handbook* specifically states that "[m]anagement analysts are not required to get certification."

For all of these reasons, the excerpt from website does not satisfy the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

Nor do the seven job vacancy announcements contained in the record of proceeding satisfy the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*). First, the evidence of record does not demonstrate that the positions described in these announcements are "parallel" to the one being

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[11] Available at http://www.imcusa.org (last visited Apr. 2, 2014).

proffered here. For example, the AAO notes that work experience is required for six of these seven positions.[12] Specifically, the AAO notes the following:

- requires at least one year of experience working in a government or healthcare environment, at least one year of experience working in regulatory compliance, at least one year of experience in performing audits, and two to three years of experience working with Medicaid programs;
- requires three years of experience in an audit or risk management function, four years of experience in a compliance-related position, or at least six years of banking experience;
- s requires "1+ to 2 years" of work experience;
- 2+ to 5 years" of work experience;
- requires a minimum of five years of "progressively responsible experience in Information Systems, Project Management[,] and related methodologies"; and
- requires "8+ years of experience performing complex business analysis, and functional implementations."

However, as noted above, by designating the proffered position as a Level I job on the LCA, the petitioner asserted that this position is a comparatively low, entry-level position relative to others within its occupation, which signifies that the beneficiary is only expected to possess a basic understanding of the occupation. Absent evidence to the contrary, the AAO is unable to find that these attributes assigned to the proffered position by virtue of the petitioner's wage-level designation on the LCA would be parallel to the six positions described in these particular job vacancy announcements. Accordingly, the evidence of record fails to establish that the positions described in these announcements are "parallel" to the one being proffered here.

Second, the evidence of record does not demonstrate that any of these seven advertisements are from companies "similar" to the petitioner. As noted above, the petitioner described itself on the Form I-129 as an "information technology solutions provider" with 40 employees, and it provided a NAICS Code of 541511, "Custom Computer Programming Services." The record, however, does not contain any documentary evidence indicating that any of these advertisers are "similar" to the petitioner in size, scope, and scale of operations, business efforts, expenditures, or in any other relevant extent, and several of the announcements affirmatively indicate that such is in fact not the case. For example, appear to be staffing firms; states its "industry" as "government and military"; and describes itself as "one of the world's largest plastics, chemical and refining

[12] The job vacancy announcement from is the only one that does not specify a requirement for work experience. However, as will be noted below, there are other evidentiary deficiencies with this particular job vacancy announcement.

companies." As such, the evidence of record does not establish similarity between the petitioner and any of the companies which placed these seven announcements, other than the announcements themselves.

Moreover, the evidence of record does not establish that the positions being advertised in these job-vacancy announcements require a bachelor's degree in a specific specialty, or the equivalent. For example, would find a general-purpose bachelor's degree in business acceptable. would find acceptable a bachelor's degree in any field. Such evidence supports a conclusion opposite of what is being asserted by the petitioner, indicating instead that the proffered position is not in fact a specialty occupation.

Nor does the record contain any evidence regarding how representative these advertisements are of the usual recruiting and hiring practices of the industries in which these advertisers operate. Once again, without documentary evidence to corroborate the claims made, a petitioner will not satisfy its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

That being said, there is a more basic evidentiary failure that, in itself, reduces the value of the advertisements for consideration under this first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*). Specifically, the advertisements fail to satisfy the first evidentiary element of this prong, which is that the evidence proposed for consideration pertain to organizations and positions within the petitioner's own industry. As noted earlier, the petitioner identified its industry by the NAICS Code of 541511, "Custom Computer Programming Services," and it has not established that any of the advertising organizations are in the same industry.

Therefore, the petitioner has not satisfied the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*), as the evidence of record does not establish a requirement for at least a bachelor's degree in a specific specialty as common (1) to the petitioner's industry in (2) positions that are both (a) parallel to the proffered position and (b) located in organizations that are similar to the petitioner.

Next, the AAO finds that the evidence of record does not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*), which provides that "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."

We here incorporate into this analysis this decision's earlier comments and finding with regard to the relatively abstract information provided about the proffered position and its performance requirements. As there reflected, the evidence of record does not credibly demonstrate that the duties the beneficiary will perform on a day-to-day basis would constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty or its equivalent.

The record of proceeding does not contain evidence establishing relative complexity or uniqueness as aspects of the proffered position, let alone that the position is so complex or unique as to require the theoretical and practical application of a body of highly specialized knowledge such that a

person with a bachelor's or higher degree in a specific specialty or its equivalent is required to perform the duties of that position. Rather, the AAO finds that, as reflected in this decision's earlier analysis of the job descriptions, the evidence of record does not distinguish the proffered position as more complex or unique than other positions falling within the "Management Analysts" occupational category which, the *Handbook* indicates, do not necessarily require a person with at least a bachelor's degree in a specific specialty or its equivalent.

The petitioner's statement that the beneficiary would "assist the management of key initiatives and programs," counsel's reference to "the unusual complexity of the job being offered," and the generalized assertions of record with regard to the complexity inherent in the position and its importance to the petitioner's business operation are all acknowledged, but they are not substantiated by evidence in the record establishing that any of those claimed factors translate into a position so complex or unique as to require the services of a person with at least a bachelor's degree in a specific specialty, or the equivalent.

Further, such assertions are undermined by the fact that the petitioner submitted an LCA certified for a job prospect with a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation. The AAO incorporates here by reference and reiterates its earlier discussion regarding the LCA and its indication that the petitioner would be paying a wage-rate that is only appropriate for a low-level, entry position relative to others within the same occupation, as this factor is inconsistent with relative complexity or uniqueness required to satisfy this criterion. Based upon the wage rate, the holder of the proffered position would only be required to have a basic understanding of the occupation. Moreover, that wage rate indicates that the beneficiary would perform routine tasks requiring limited, if any, exercise of independent judgment; that the beneficiary's work would be closely supervised and monitored; that the beneficiary would receive specific instructions on required tasks and expected results; and that her work would be reviewed for accuracy.

Additionally, given the *Handbook's* indication that positions located within the "Management Analysts" occupational category do not require at least a bachelor's degree in a specific specialty, or the equivalent, as a normal entry requirement, and given the evidentiary deficiencies noted earlier in this decision, we are not persuaded that such a Level I, entry-level position would be so complex or unique relative to other management analyst positions that it could only be performed by an individual with at least a bachelor's degree in a specific specialty or its equivalent.[13]

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[13] The AAO notes again that the petitioner would have been required to offer a significantly higher wage to the beneficiary in order to employ her at a Level II (qualified), a Level III (experienced), or a Level IV (fully competent) level. As noted, the petitioner offered the beneficiary a wage of $45,000 per year, which satisfied the Level I prevailing wage of $38,813 per year for a management analyst in the Phoenix-Mesa-Scottsdale, Arizona Metropolitan Statistical Area at the time the LCA was certified. U.S. Dep't of Labor, Foreign Labor Certification Data Center, Online Wage Library, FLC Quick Search, "Management Analysts," http://www.flcdatacenter.com/OesQuickResults.aspx?code=13-1111&area=38060&year=13&source=1 (last visited Apr. 2, 2014). However, in order to offer employment to the beneficiary at a Level II (qualified) wage-level, which would involve only "moderately complex tasks that require limited judgment," the petitioner would have been required to raise her salary to at least $54,870 per year. The Level III

Consequently, as it has not been shown that the particular position for which this petition was filed is so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty or its equivalent, the evidence of record does not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The AAO turns next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*), which entails an employer demonstrating that it normally requires a bachelor's or higher degree in a specific specialty or its equivalent for the position.

The AAO's review of the record of proceeding under this criterion necessarily includes whatever evidence the petitioner has submitted with regard to its past recruiting and hiring practices and employees who previously held the position in question.

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. 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 the performance requirements of the proffered position.[14] In the instant case, the record does not establish a prior history of recruiting and hiring for the proposed position of only persons with at least a bachelor's degree in a specific specialty or its equivalent.

Were USCIS 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 employer 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 387. In other words, if a petitioner's assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position would not meet the statutory or regulatory definition of a specialty occupation. *See* § 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 therefore 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 387. In this pursuit, the critical element is not the title

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(experienced) prevailing wage was $70,949 per year, and the Level IV (fully competent) prevailing wage was $87,006 per year. *Id.*

[14] Any such assertion would be undermined in this particular case by the fact that the petitioner indicated in the LCA that its proffered position is a comparatively low, entry-level position relative to others within its occupation.

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 a specific specialty or its equivalent as the minimum for entry into the occupation as required by the Act.

According to the court in *Defensor*, "To interpret the regulations any other way would lead to an absurd result." *Id.* at 388. If USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proposed position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.*

The record contains no evidence regarding any previous hires for the proffered position, and the petitioner acknowledged in its July 1, 2013 letter that this is a newly-created position. While a first-time hiring for a position is certainly not a basis for precluding a position from recognition as a specialty occupation, a petitioner who has never before recruited and hired for the position would nonetheless be unable to satisfy the particular criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*).

As the record of proceeding does not demonstrate that the petitioner normally requires at least a bachelor's degree in a specific specialty or its equivalent for the proffered position, it does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*).

Next, the AAO finds that the evidence of record does not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*), which requires the petitioner to establish that the nature of the proffered position's 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 the specific specialty or its equivalent.

Here we incorporate into this analysis our earlier comments and findings with regard to the petitioner's failure to establish both the substantive nature of the duties as they would actually be performed within the context of the petitioner's business operations and also the related applications of substantive knowledge that the nature of those duties would require.

In reviewing the evidence contained in the record of proceeding under this criterion, the AAO also here reiterates its earlier discussion regarding the *Handbook's* entries for positions falling within the "Management Analysts" occupational category. Again, the *Handbook* does not state that a bachelor's or higher degree in a specific specialty, or the equivalent, is normally required to perform the duties of such positions (to the contrary, it supports the opposite conclusion). With regard to the specific duties of the position proffered here, the AAO finds that the record of proceeding lacks sufficient evidence establishing that their nature is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of at least a bachelor's degree in a specific specialty, or the equivalent.

Finally, the AAO finds that both on its own terms and also in comparison with the three higher wage-levels that can be designated in an LCA, by the submission of an LCA certified for a wage-level I, the petitioner effectively attests that the proposed duties are of relatively low complexity as compared to others within the same occupational category. This fact is materially inconsistent with the level of complexity required by this criterion.

As earlier noted, the *Prevailing Wage Determination Policy Guidance* issued by DOL states the following with regard to Level I wage rates:

> **Level I** (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered [emphasis in original].

U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf (last visited Apr. 2, 2014).

The pertinent guidance from DOL, at page 7 of its *Prevailing Wage Determination Policy Guidance* describes the next higher wage-level as follows:

> **Level II** (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones.

Id.

The above descriptive summary indicates that even this higher-than-designated wage level is appropriate for only "moderately complex tasks that require limited judgment." The fact that this higher-than-here-assigned, Level II wage-rate itself indicates performance of only "moderately complex tasks that require limited judgment," is very telling with regard to the relatively low level of complexity imputed to the proffered position by virtue of its Level I wage-rate designation.

Further, the AAO notes the relatively low level of complexity that even this Level II wage-level reflects when compared with the two still-higher LCA wage levels, neither of which was designated on the LCA submitted to support this petition.

The aforementioned *Prevailing Wage Determination Policy Guidance* describes the Level III wage designation as follows:

> **Level III** (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O*NET Job Zones would be indicators that a Level III wage should be considered.
>
> Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. . . .

Id.

The *Prevailing Wage Determination Policy Guidance* describes the Level IV wage designation as follows:

> **Level IV** (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

Id.

Here the AAO again incorporates its earlier discussion and analysis regarding the implications of the petitioner's submission of an LCA certified for the lowest assignable wage-level. Again, by virtue of this submission, the petitioner effectively attested that the proffered position is a low-level, entry position relative to others within the same occupation, and that, as clear by comparison with DOL's instructive comments about the next higher level (Level II), the proffered position did not even involve "moderately complex tasks that require limited judgment" (the level of complexity noted for the next higher wage-level, Level II) relative to other management analysts.

For all of the reasons stated above, the evidence in the record of proceeding fails to establish that the nature of the proposed duties meets the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)*(4)*.

Finally, as discussed, the petitioner previously claimed in the job description submitted in response to the director's RFE that the position requires a bachelor's degree in business administration and "2

years of project management or management consulting experience." Upon review, however, the petitioner has not asserted and the record of proceeding does not support the conclusion that the petitioner's claimed requirement of a general degree plus experience in project management or management consulting is equivalent to a bachelor's or higher degree in a specific specialty.[15]

As the evidence of record does not satisfy at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation.[16] Accordingly, the director's decision recommending denial of the petition will be affirmed.

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[15] If the requirements to perform the duties and job responsibilities of a proffered position are a combination of a general bachelor's degree and experience such that the standards at both section 214(i)(1)(A) and (B) of the Act have been satisfied, then the proffered position may qualify as a specialty occupation. *See Tapis Int'l v. INS*, 94 F. Supp. 2d at 172. The AAO does not find, however, that any position can qualify as a specialty occupation based solely on the claimed requirements of a petitioner. Instead, 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 384. Furthermore, the AAO does not find (1) that a specialty occupation is determined by the qualifications of the beneficiary being petitioned to perform it; or (2) that a position may qualify as a specialty occupation even when there is no specialty degree requirement, or its equivalent, for entry into a particular position in a given occupational category.

First, USCIS cannot determine if a particular job is a specialty occupation based on the qualifications of the beneficiary. A beneficiary's credentials to perform a particular job are relevant only when the job is first found to qualify as a specialty occupation. USCIS is required instead to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether an alien beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. at 560 ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].").

Second, in promulgating the H-1B regulations, the former INS made clear that the definition of the term "specialty occupation" could not be expanded "to include those occupations which did not require a bachelor's degree in the specific specialty." 56 Fed. Reg. at 61112. More specifically, in responding to comments that "the definition of specialty occupation was too severe and would exclude certain occupations from classification as specialty occupations," the former INS stated that "[t]he definition of specialty occupation contained in the statute contains this requirement [for a bachelor's degree in the specific specialty or its equivalent]" and, therefore, "may not be amended in the final rule." *Id.*

[16] The issues in the remaining cases cited by counsel on certification - *Button Depot, Inc. v. U.S. Dept. of Homeland Sec.*, 386 F. Supp. 2d 1140 (C.D. Cal. 2005) and *Fred 26 Importers v. DHS*, 445 F. Supp. 2d 1174 (C.D. Cal. 2006) – were whether USCIS had properly considered certain evidence submitted by the petitioners in those cases. Again, upon review of the entire record of proceeding, and with close attention and due regard to all of the evidence submitted in support of this petition, the AAO finds that the evidence of record does not establish that the proffer of a specialty occupation position is "more likely than not" or "probably" true. In other words, the petitioner has not submitted relevant, probative, and credible evidence that leads the AAO to believe that the petitioner's claim that the proffered position qualifies as a specialty occupation is "more likely than not" or "probably" true. *See Matter of Chawathe*, 25 I&N Dec. at 375-376.

VII. CONCLUSION AND ORDER

The evidence of record does not demonstrate that the proffered position is a specialty occupation and therefore does not overcome the director's recommended basis for denying this petition. Consequently, the director's decision recommending denial of the petition will be affirmed, and the petition will be denied.

Beyond the decision of the director, the petition must also be denied because, as previously discussed, the evidence of record does not demonstrate that the beneficiary is qualified to perform the duties of the proffered position if in fact the petition merited approval. Specifically, the evidence does not establish that the beneficiary has the work experience that the petitioner specified as necessary for the performance of the proffered position.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683; *see also Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd.* 345 F.3d 683.

The director's decision will be affirmed and the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the denial. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act; *Matter of Otiende*, 26 I&N Dec. at 128. Here, that burden has not been met.

ORDER: The director's decision dated December 5, 2013 is affirmed. The petition is denied.

As the AAO has reviewed all evidence contained in the record of proceeding and considered it both separately and in the aggregate, the issues at hand in *Button Depot* and *Fred 26* are not applicable here, and those cases need not be further discussed.