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

PUBLIC COPY

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[redacted]

Date: JUN 0 8 2012 Office: CALIFORNIA SERVICE CENTER [redacted]

IN RE: [redacted]

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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the California Service Center denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a wholesale food distributor. It seeks to continue to employ the beneficiary as a Business Analyst 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).

On October 20, 2009, the director denied the petition determining that the record lacks a reliable evidentiary basis to determine that the petitioner's proffer is bona fide, especially as the petitioner failed to pay the beneficiary the proffered wage for the prior approved periods. On appeal, counsel asserts that wage determinations and enforcement of their payment with respect to H-1B classification are solely the U.S. Department of Labor (DOL)'s responsibility, and thus, does not make the job any less bona fide.

The main issue before the AAO is whether the petitioner has complied with the requirement at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) for a Labor Condition Application (LCA) for the previous approved periods and thus, will more likely than not meet the requirements set forth for the petitioner at 8 C.F.R. § 214.2(h)(4)(iii)(B).

Section 101(a)(15)(H)(i)(b) of the Act provides in pertinent part that:

> an alien . . . who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . . with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 212(n)(1)[.]

Petitioner requirements for H-1B petitions involving a specialty occupation are set forth at 8 C.F.R. § 214.2(h)(4)(iii)(B) which provides in pertinent part that:

> The petitioner shall 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[.]

Regarding attestations contained in the LCA, DOL regulations at 20 C.F.R. § 655.730(d) also state in pertinent part the following:

> An employer's LCA shall contain the labor condition statements referenced in §§ 655.731 through 655.734, and §[§] 655.736 through 655.739 (if applicable), which provide that no individual may be admitted or provided status as an H-1B nonimmigrant

> in an occupational classification unless the employer has filed with the Secretary an application stating that:
>
> (1) The employer is offering and will offer during the period of authorized employment to H-1B nonimmigrants no less than the greater of the following wages[:]
> (i) The actual wage paid to the employer's other employees at the worksite with similar experience and qualifications for the specific employment in question; or
> (ii) The prevailing wage level for the occupational classification in the area of intended employment[.]

In the instant matter, the petitioner requested an extension of the beneficiary's H-1B classification pursuant to section 104(c) of the "American Competitiveness in the Twenty-First Century Act" (AC21) from July 24, 2009 to July 23, 2012 and submitted a Form 9035E LCA in support of the extension request. The certified LCA submitted with the Form I-129 indicates that the Level I prevailing wage for Business Analyst in Los Angeles, California was $18.69 ($38,875.20 per year) and the petitioner offered to pay the beneficiary at the rate of $18.75 per hour ($39,000 per year). Part H. Employer Labor Condition Statements of the LCA states in part that:

> In order for your application to be processed, you MUST read Section H of the Labor Condition Application – General Instructions Form ETA 9035CP under the heading "Employer Labor Condition Statements" and agree to all four (4) labor condition statements summarized below:
>
> (1) **Wage**: Pay nonimmigrants at least the local prevailing wage or the employer's actual wage, whichever is higher, and pay for non-productive time. Offer nonimmigrants benefits on the same basis as offered to U.S. workers[.]

Under this statement, the petitioner marked "Yes" to the following: "I have read and agree to Labor Condition Statements 1, 2, 3, and 4 above and as fully explained in Section H of the Labor Condition Applications – General Instructions – Form ETA 9035CP."

United States Citizenship and Immigration Services (USCIS) records show that the beneficiary has resided in the United States in H-1B classification since July 25, 2003. The petitioner's first H-1B petition for the beneficiary (WAC0226452769) was approved for a period of two years from July 25, 2003 to September 13, 2005 with a proffered wage of $26,748.80 per year, the second H-1B petition (WAC0524651186) was approved for a period of three years from October 4, 2005 to September 13, 2008 with a proffered wage of $32,760.00 per year, and the third petition (WAC0823650384) was approved for a period of one year from September 14, 2008 to July 24, 2009 with a proffered wage of $36,000.00 per year.

On September 1, 2009, the director issued an RFE requesting the petitioner submit additional evidence to establish that the petitioner has complied with the terms and conditions of the LCAs during the previously approved periods. On October 5, 2009, counsel for the petitioner responded to the director's RFE with the petitioner's Form 941 Employer's Quarterly Federal Tax Returns and California Employment Development Department (EDD) Form DE 6 Quarterly Wage and Withholding Reports,

Form W-3 Transmittal of Wage and Tax Statements, Corporate Income Tax Returns and the beneficiary's individual income tax returns, W-2 forms and paystubs. Upon examining the evidence in the record, the director concluded that the beneficiary was not paid the proffered wage for the prior approved periods and the petitioner misstated the wages it will pay the beneficiary, and thus the record lacks a reliable evidentiary basis to determine that the petitioner's offer of employment is bona fide. On appeal, counsel submits a brief without any new or additional evidence.

The record of proceeding before the AAO contains: (1) the Form I-129 filed on July 22, 2009 and supporting documentation, including the LCA certified on July 17, 2006 for employment starting July 24, 2009 and ending July 23, 2012; (2) the director's September 1, 2009 request for additional evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's October 20, 2009 denial decision; and (5) the Form I-290B and a brief in support of the appeal. The AAO has considered the record in its entirety before issuing its decision.

After carefully examining all evidence in the record, the AAO finds that the record does not contain any documentary evidence to establish that the petitioner has complied with the terms and conditions of the prior H-1B petitions, including paying the proffered wage of $26,748.80 per year, during the two-year period from July 25, 2003 to September 13, 2005. The record does not contain the pay records for the period from October 2005 to the end of 2007 and, therefore, the petitioner has not established that it complied with the terms and conditions of the LCA during this period. Moreover, the record contains the petitioner's EDD Form DE 6 Quarterly Wage and Withholding Reports for the first three quarters of 2008 which show that the petitioner paid the beneficiary $7,832.50 in the first quarter, $8,657.43 in the second quarter and $7,527.98 in the third quarter while the petitioner offered to pay $8,190 quarterly on the LCA. Therefore, the petitioner paid the beneficiary $552.09 less than the LCA, attested proffered wage of $24,570 during the three quarters in 2008.

The petitioner's quarterly wage and withholding reports also show that the petitioner paid the beneficiary $7,190.65 in the fourth quarter of 2008, $6,530.62 in the first quarter of 2009 and $6,949.81 in the second quarter of 2009 while the H-1B petition and the underlying LCA indicate that the petitioner attested to pay the beneficiary $36,000 per year or $9,000 per quarter during the period from September 14, 2008 to July 24, 2009. While the certified LCA indicates that the petitioner offered a proffered wage of $36,000 per year or $17.31 per hour during this period, the beneficiary's paystubs for the period from March 21, 2009 to July 10, 2009 show that the petitioner paid the beneficiary at the rate of $13.00 per hour for his regular working hours. Therefore, the evidence in the record shows that the petitioner did not comply with the terms and conditions of the approved H-1B petition and its supporting LCA during the prior approved period from September 14, 2008 to July 24, 2009. The petitioner did not comply with terms and conditions of the previously approved H-1B petitions and their supporting, certified LCAs and thus fails to establish that it would more likely than not comply with the terms and conditions of the instant petition and the LCA submitted in support of this petition filed on behalf of this beneficiary.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry

shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

Moreover, 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Again, the evidence of record shows that the petitioner did not comply with the terms and conditions of the prior approved H-1B petitions and their supporting LCAs. This raises the essential question of whether the petitioner will comply with the terms and conditions of the current H-1B petition and its supporting LCA for the employment period requested in the instant petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.*

The record does not contain any competent objective evidence showing that the petitioner will more likely than not comply with the terms and conditions of the LCA with regard to this petition extension. In other words, as the petitioner has failed to employ the beneficiary in accordance with the terms and conditions of the approved H-1B petition it now seeks to extend, it is simply not credible, absent competent objective evidence to the contrary, that the petitioner will more likely than not comply with the terms and conditions of the extended H-1B employment. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *see Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). 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).

On appeal, counsel did not submit any new evidence showing that the petitioner has complied with the terms and conditions of the prior approved H-1B petitions and their respective LCAs, but asserts instead that wage determinations and enforcement of their payment with respect to H-1B classification are solely DOL's responsibility (citing 20 C.F.R. § 655.810(a)) and thus does not make the job any less bona fide.

The AAO notes that DOL provides remedies for violations of paying wages to nonimmigrants at 20 C.F.R. § 655.810(a). However, the AAO is not determining what remedies DOL or USCIS will provide to those unpaid or less paid nonimmigrants. Instead, it is determining whether the petitioner meets the requirements of filing an H-1B petition, e.g., whether the petitioner has provided sufficient evidence to establish the beneficiary will be employed in and qualified to perform the duties of a specialty occupation in accordance with the terms and conditions as stated in the petition, of which the LCA is a part. *See* 8 C.F.R. § 103.2(b)(1) (stating that "[a]ny evidence submitted in connection with the application or petition is incorporated into and considered part of the relating application or petition."). The DOL regulation at 20 C.F.R. § 655.715 states that "Determinations of specialty occupation and of nonimmigrant qualifications for the H-1B . . . program[] are not made by the Department of Labor, but

by the . . . United States Citizenship and Immigration Services (USCIS) of the Department of Homeland Security in accordance with the procedures of those agencies for progressing visas, petitions, extensions of stay, or requests for change of nonimmigrant status for H-1B or H-1B1 nonimmigrants." As one of the criteria for an H-1B petition involving a specialty occupation, USCIS regulations also set forth that a petitioner must submit an LCA certified by DOL as well as a statement that it will comply with the terms of the LCA for the duration of the alien's authorized period of stay. *See* 8 C.F.R. § 214.2(h)(4)(iii)(B). Paying insufficient wages to an H-1B nonimmigrant beneficiary not only violates the terms and conditions of the prior LCAs, but it is also evidence material to determining whether a petitioner will more likely than not meet the requirements set forth for H-1B petitions involving a specialty occupation for an extension petition. This is because a petitioner's past failure to abide by H-1B terms and conditions relative to a particular beneficiary is relevant to determining the bona fides of an extension petition and whether this same beneficiary will be employed in a specialty occupation position and be paid the required amount attested on the Form I-129 petition submitted with USCIS. Therefore, counsel's assertion on appeal is misplaced.

Thus, the evidence in the record shows that, as the petitioner has failed to comply with terms and conditions of the prior approved H-1B petitions and their respective LCAs, it has failed to establish that it will more likely than not comply with the terms and conditions of the new, extended employment with respect to this beneficiary.

For the reason discussed above, the petitioner failed to establish that it has made a bona fide offer of employment in a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, the AAO will enter an additional basis for denial, i.e., the petition cannot be approved, because the petitioner failed to establish that the proffered position is a specialty occupation.

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

(A) theoretical and practical application of a body of highly specialized knowledge, and

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

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

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

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

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must 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;
>
> *(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 illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

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. 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, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F.3d 384. The critical element is not the title of the position 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.

In its letter of support dated July 20, 2009, the petitioner states that it desires to continue to employ the beneficiary as a business analyst. In addition, the petitioner states that the beneficiary will continue to be responsible for:

> all aspects of [the petitioner's] developing national business operation. In this position, [the beneficiary] will formulate administrative and marketing strategies to increase [the petitioner's] business in the United States as well as oversee market research and provide customer service analysis; will conduct research on social, economic, and cultural background of different regions in the United States and analyze the data and information therefrom to determine the desirability of products in targeted regions for customers; will examine and analyze statistical surveys to forecast market trends; collect reports and information on customer's preference; develop and organize promotion events in targeted cities; and will study and conduct compliance of government regulations in import/export custom regulations.

The petitioner also indicates that the proffered position requires a qualified applicant to possess a university degree in the field of marketing, sales, business administration, business management, or equivalent. The petitioner submitted a copy of the beneficiary's foreign bachelor's degree and college transcripts, as well as a credential evaluation from Silvergate Evaluations Inc. finding that the beneficiary's foreign education is equivalent to a U.S. bachelor's degree in business management.

The petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any of the criteria set forth under 8 C.F.R. § 214.2(h)(4)(iii)(A).

As a preliminary matter, a petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *See Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

To prove that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position

requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).[1]

In this matter, the petitioner claims that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree, i.e., a bachelor's degree in business administration. This assertion is tantamount to an admission that the proffered position is not in fact a specialty occupation. The director's decision must therefore be affirmed and the petition denied on this basis alone.

The AAO turns next to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (hereinafter the *Handbook*), on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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)).

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[1] 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.

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.[2]

A review of relevant sections of the *Handbook* demonstrates that, based on the description of duties provided by the petitioner, the proffered position encompasses the duties of a market research analyst as described as follows in the 2012-2013 edition of the *Handbook*:

> Market research analysts study market conditions in local, regional, or national areas to examine potential sales of a product or service. They help companies understand what products people want, who will buy them, and at what price.
>
> **Duties**
>
> Market research analysts typically do the following:
>
> - Monitor and forecast marketing and sales trends
> - Measure the effectiveness of marketing programs and strategies
> - Devise and evaluate methods for collecting data, such as surveys, questionnaires, or opinion polls
> - Gather data about consumers, competitors, and market conditions
> - Analyze data using statistical software
> - Convert complex data and findings into understandable tables, graphs, and written reports
> - Prepare reports and present results to clients or management
>
> Market research analysts perform research and gather data to help a company market its products or services. They gather data on consumer demographics, preferences, needs, and buying habits. They collect data and information using a variety of methods, such as interviews, questionnaires, focus groups, market analysis surveys, public opinion polls, and literature reviews.
>
> Analysts help determine a company's position in the marketplace by researching their competitors and analyzing their prices, sales, and marketing methods. Using this information, they may determine potential markets, product demand, and pricing. Their knowledge of the targeted consumer enables them to develop advertising brochures and commercials, sales plans, and product promotions.
>
> Market research analysts evaluate data using statistical techniques and software. They must interpret what the data means for their client, and they may forecast

[2] The *Handbook*, which is available in printed form, may also be accessed on the Internet, at http: www.stats.bls.gov/oco/. The AAO's references to the *Handbook* are to the 2012 – 2013 edition available online.

> future trends. They often make charts, graphs, or other visual aids to present the results of their research.

U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Market Research Analysts," http://www.bls.gov/ooh/Business-and-Financial/Market-research-analysts.htm#tab-2 (accessed May 9, 2012).

The *Handbook's* section pertaining to the educational requirements of this occupational category states:

> Market research analysts need strong math and analytical skills. Most market research analysts need at least a bachelor's degree, and top research positions often require a master's degree.
>
> Market research analysts need a bachelor's degree in market research or a related field. Many have degrees in fields such as statistics, math, or computer science. Others have a background in business administration, one of the social sciences, or communications. Courses in statistics, research methods, and marketing are essential for these workers; courses in communications and social sciences—such as economics, psychology, and sociology—are also important.
>
> Many market research analyst jobs require a master's degree. Several schools offer graduate programs in marketing research, but many analysts complete degrees in other fields, such as statistics, marketing, or a Master of Business Administration (MBA). A master's degree is often required for leadership positions or positions that perform more technical research.

Handbook, 2012-13 ed., "Market Research Analysts," http://www.bls.gov/ooh/Business-and-Financial/Market-research-analysts.htm#tab-4 (accessed May 9, 2012).

In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's of higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" 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 business management and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty."[3] Section 214(i)(1)(b) (emphasis added).

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[3] Whether read with the statutory "the" or the regulatory "a," both readings denote a singular "specialty." Section 214(i)(1)(b) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Still, 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.

Here, although the *Handbook* indicates that a bachelor's or higher degree is required, it also indicates that baccalaureate degrees in various fields are acceptable for entry into the occupation. In addition to recognizing degrees in disparate fields, i.e., social science and computer science as acceptable for entry into this field, the *Handbook* also states that "others have a background in business administration." As noted above, 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. Therefore, the *Handbook*'s recognition that a general, non-specialty "background" in business administration is sufficient for entry into the occupation strongly suggests that a bachelor's degree *in a specific specialty* is not a normal, minimum entry requirement for this occupation. Accordingly, as the *Handbook* indicates that working as a market research analyst does not normally require at least a bachelor's degree in a specific specialty or its equivalent for entry into the occupation, it does not support the proffered position as being a specialty occupation.

As the evidence of record does not establish that the particular position here proffered is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties, 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 requires a petitioner to establish that a bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner. Again, factors often considered by USCIS when determining the industry standard include: 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 at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent for entry into the occupation.

In addition, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions.

The petitioner also does not provide any job-vacancy advertisements evidencing a common degree-in-a-specific-specialty requirement in the petitioner's industry for positions that are both: (1) parallel to the proffered position; and (2) located in organizations similar to the petitioner.

The petitioner also failed to 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." Here, the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of business analyst.

Specifically, the petitioner failed to demonstrate how the duties of the business analyst, as described, require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While one or two courses in marketing may be beneficial in performing certain duties of this business analyst position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, are required to perform the duties of the particular position here proffered.

Therefore, the evidence of record does not establish that this position is significantly different from other market research analyst positions such that it refutes the *Handbook's* information to the effect that there is a spectrum of preferred degrees for market research analyst positions, including degrees not in a specific specialty. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than market research analyst positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent. Consequently, as the petitioner fails to demonstrate how the proffered position of market research analyst is so complex or unique relative to other market research analyst positions that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Next, the record of proceeding does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty. Therefore, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).[4]

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[4] While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. 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 degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent. Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. In other words, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than market research analyst positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent.[5]

As the petitioner has failed to satisfy any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), the petitioner has not established that the proffered position is a specialty occupation. For this additional reason, the appeal must be dismissed and the petition denied.

Finally, the AAO does not need to examine the issue of the beneficiary's qualifications because the petitioner has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications further.

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 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.

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[5] It must be noted that the petitioner has designated the proffered position as a Level I position on the submitted Labor Condition Application (LCA), indicating that it is an entry-level position for an employee who has only basic understanding of the occupation. *See* Employment and Training Administration (ETA), *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009). Therefore, it is simply not credible that the position is one with specialized and complex duties, as such a higher-level position would be classified as a Level IV position, requiring a significantly higher prevailing wage.

FURTHER ORDER: The evidence of record indicates (1) that the petitioner violated the terms and conditions of the prior approved H-1B petitions, and (2) the approvals of the prior H-1B petitions involved gross error (WAC 02 264 52769; WAC 05 246 51186; WAC 08 236 50384). As such and in accordance with 8 C.F.R. § 214.2(h)(11)(iii)(B), the director shall issue notices of intent to revoke the approvals of the prior H-1B petitions pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(3) and (5).

FURTHER ORDER: In accordance with 8 C.F.R. § 205.2, the director shall also issue a notice of intent to revoke the approval of the Form I-140 petition (LIN 07 253 56082) and should ultimately revoke said petition unless the petitioner is able to establish its ability to pay the beneficiary the wage proffered in that petition from its priority date, August 13, 2007, until the present. *See* 8 C.F.R. § 204.5(g)(2).