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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

[redacted]

D2

Date: MAY 31 2012 Office: CALIFORNIA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Michael T. Kelly
Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner states that it is a wholesaler of commercial textiles, and it seeks to employ the beneficiary as a part-time market research analyst. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant 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). The director denied the petition, finding that the petitioner had not complied with the requirements for filing a Form I-129, Petition for a Nonimmigrant Worker.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) documentation submitted in response to the RFE; and (4) Form I-290B and supporting documentation.

The issue before the AAO is whether the petitioner established filing eligibility at the time the Form I-129 was received by U.S. Citizenship and Immigration Services (USCIS), in light of the fact that the petition was not filed with a Labor Condition Application (LCA) that had been certified prior to the petition's filing.

General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. §103.2(a)(1) as follows:

> [E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission . . . .

Further discussion of the filing requirements for applications and petitions is found at 8 C.F.R. § 103.2(b)(1):

> *Demonstrating eligibility at time of filing.* An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions. Any evidence submitted in connection with the application or petition is incorporated into and considered part of the relating application or petition.

In matters where evidence related to filing eligibility is provided in response to a director's request for evidence, 8 C.F.R. § 103.2(b)(12) states:

> An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed . . . .

The regulations require that before filing a Form I-129 petition on behalf of an H-1B employee, a petitioner obtain a certified Labor Condition Application (LCA) from the U.S. Department of Labor (DOL) in the occupational specialty in which the H-1B nonimmigrant will be employed. *See* 8 C.F.R. § 214.2(h)(4)(i)(B).

As correctly noted by counsel, USCIS issued correspondence on November 5, 2009 which provided that, in order to accommodate the public in light of ongoing processing delays at DOL, H-1B petitions could be filed with uncertified LCAs for the period from November 5, 2009 through March 4, 2010. *USCIS Memorandum: Temporary Acceptance of H-1B Petitions Without DOL-Certified LCA* (November 5, 2009), http://www.uscis.gov/USCIS/Laws/Memoranda/2009/h-ib-petitions-temporary-acceptance.pdf (accessed Feb. 2, 2012) (emphasis added). This temporary acceptance of uncertified LCAs required petitioners to wait at least seven calendar days from the filing of the LCA before filing the corresponding H-1B petition, and further required petitioners to submit evidence of the filing of the LCA in the form of the e-mail notice from DOL confirming receipt of the LCA on or before the date the H-1B petition was filed.

Moreover, in a subsequently issued question-and-answer posting, USCIS states in pertinent part the following:

> USCIS will not deny an H-1B petition filed during the temporary extension on the basis that the LCA originally filed with [the] petition was certified after the petition was filed, *as long as the case is found to be otherwise eligible.*
>
> * * *
>
> [T]he certified LCA submitted in response to the RFE must be the same LCA that was pending at the time of filing of an H-1B petition receipted under the temporary acceptance procedures. Each LCA has a unique identification number. *Submission of a new certified LCA possessing a different identification number than the LCA referenced upon initial filing will be denied.* The only exception is if the new LCA was certified prior to the filing of the petition.

U.S. Citizenship and Immigration Services, *Questions and Answers: Temporary Acceptance of H-1B Petition Filed without DOL's Certified Labor Condition Applications (LCAs)* (Dec. 8, 2009), http://www.uscis.gov/portal/site/uscis/template.PRINT/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=bf296bc8a6f65210VgnVCM100000082ca60aRCRD&vgnextchannel=6abe6d26d17df110VgnVCM1000004718190aRCRD (accessed Feb. 2, 2012) (emphasis added).

In this case, the petitioner filed the instant petition on Form I-129 with USCIS on December 16, 2009. The petitioner also submitted a copy of an e-mail from DOL confirming that the petitioner had filed an [redacted] on December 9, 2009.

On December 17, 2009, the director issued an RFE and requested evidence of filing and certification of an LCA at the time of filing the petition. In response, counsel submitted a copy of a new LCA [redacted], certified by DOL on December 29, 2009.

On February 16, 2010, the director denied the petition. The director noted that the LCA [redacted] submitted in response to the RFE had a different DOL case number from the LCA [redacted] submitted with the petition, and that the LCA was certified after the petition was filed. Consequently, the director found that the petitioner did not provide a copy of an LCA with the same DOL number of the LCA that was certified prior to the filing of the H-1B petition.

On appeal, counsel contends that the reason for filing a new LCA was DOL's erroneous denial of the initial LCA stemming from "baseless" Federal Employer Identification Number (FEIN) issues. Counsel further states that once the LCA is erroneously denied, a new LCA must be filed incurring a different LCA number, and that USCIS did not allow an adequate remedy for those who send a certified LCA with a different DOL case number due to an erroneous FEIN denial. In support of this contention, counsel submits copies of e-mail correspondence from DOL; a copy of the IRS Form SS-4, Application for Employer Identification Number (Form SS-4); and an unidentified form with the petitioner's address and FEIN.

As discussed earlier, USCIS clearly established that submission of a new certified LCA possessing a different identification number than the LCA referenced upon initial filing will be denied except if the new LCA was certified prior to the filing of the petition.

In this case, in response to the RFE, the petitioner submitted a new certified LCA possessing a different identification number than the LCA submitted with the initial filing. However, the new LCA was not certified prior to the filing of the petition, and, therefore, it does not meet the exception established by USCIS.

Any allegation of DOL error must be raised with DOL. The AAO does not have any jurisdiction over LCA certification issues. Instead, its role is limited to ensuring that that a certified LCA submitted in support of a petition in fact corresponds to that petition and establishes eligibility at the time that the petition is filed. 8 C.F.R. § 103.2(b)(1); *see* 20 C.F.R. § 655.705(b).

Nevertheless, even if the denial of an LCA could be appealed to the AAO, there is insufficient evidence that this LCA was denied in error. Contrary to counsel's assertion that the initial LCA was denied due to DOL error, a review of the evidence submitted on appeal does not show DOL error. In fact, the record does not even contain evidence of denial of the initial LCA [redacted] and the reasons for its denial. The record only contains DOL's e-mail dated December 22, 2009, which states that the FEIN for JC Chemical Inc. has been verified and that "the employer may now

submit a ***new*** ETA Form 9035E for processing" (emphasis added). The record also has a confirmation printout from the iCERT Portal dated December 22, 2009 that a new LCA was submitted by the petitioner.

Furthermore, counsel submitted the IRS Form SS-4, which contains the petitioner's name and address, and FEIN, and an unnamed document with the petitioner's address and FEIN, as evidence of documents submitted to DOL to verify its FEIN. The record does not contain correspondence from DOL requesting such documents or the reasons for the request other than counsel's assertion that DOL's questioning of the petitioner's FEIN was "baseless." However, the AAO notes that the petitioner's address on the Form SS-4 differs from its current address, which suggests that DOL's request may not have been "baseless." For the unnamed document, while the address and the FEIN correspond to the petitioner's current information, the AAO is unable to discern the purpose and authenticity of such an unidentified document. Without further evidence, the AAO is unable to identify DOL error in allegedly denying the initial LCA. 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).

The Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA at the time of filing. Alternatively, the temporary public accommodation implemented by USICS on November 5, 2009 allowed the petitioner to supplement the record with evidence of an approved LCA subsequent to the filing of the petition in accordance with the specific guidelines set forth above. However, the petitioner failed to satisfy these requirements and, instead, submitted an LCA that was both filed and certified after the filing of the petition in this matter. 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).

For the reasons discussed above, the petitioner failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B), and, therefore, the director was correct in denying the petition on the basis specified in her decision. Therefore, the appeal will be dismissed, and the petition will be denied.

Beyond the decision of the director, and in the exercise of its *de novo* review function,[1] the AAO has identified two additional issues that also separately and independently preclude approval of this petition, namely, the failures of the evidence in the record of proceeding (1) to establish the proffered position as a specialty occupation, and (2) to establish that the beneficiary holds at least a

[1] The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

bachelor's degree, or the equivalent, in any specialty, let alone one closely related to the proffered position. Further, then, even if the petitioner had satisfied the temporary LCA-acceptance requirements outlined above, the petitioner would not otherwise be eligible for the benefit sought in this matter, making this temporary accommodation inapplicable to this case.

The AAO will first address the specialty occupation issue.

Section 214(i)(l) of the Immigration and Nationality Act (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 [(2)] which 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) (hereinafter *Defensor*). 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.

In his December 14, 2009 letter of support, filed with the Form I-129, the petitioner's president provided the following as the "principal duties" of the proffered position, to which the petitioner assigned the title "market research manager":

1. Develop research objectives, select methodologies, plan research projects, analysis and reporting in order to identify business opportunities.
   a. Strategic choice analysis, information acceleration and other analysis tools
   b. Employ regression analysis, forecasting, segmentation analysis, price elasticity, and statistics
   c. Create methodologies for data gathering of market trends and consumer/company preferences

2. Use analysis methods to help determine pricing and product offering ventures
   a. Use company costing and sales data (internal and external) to determine optimum pricing on textile products
   b. Identify markets where textiles may be procured at a lower cost without sacrificing quality
   c. Employ research methodologies to identify potential new products through industry research and analysis

3. Data analysis presentation
   a. Interpret and present research findings in succinct, insightful, and relevant manner to ensure company president can make informed strategic decisions from research

4. Actively monitor national and international business issues in textile and textile manufacturing industries in which company competes
   a. Identify and monitor competitors and research market conditions or changes in the industry that may affect sales
   b. Analyze market structure and economic climate for global textile industry to identify areas of expansion

5. Perform rigorous quality control in all research activities
   a. Remain current in quantitative statistical analytical tools and data presentation techniques

At the outset, the AAO finds that, as reflected in the above excerpt from the petitioner's letter of support, the petitioner describes the duties of the proffered position in terms of generalized functions that appear generic to the market research analyst occupation in general. As such, the AAO additionally finds, they do not distinguish the proposed duties, or the proffered position that they comprise, as more unique, specialized, and/or complex than market research analyst positions which may share those same generalized functions and yet not require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty, which requirement is essential for a specialty occupation as defined at section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).

The AAO also observes that the petitioner has not supplemented the position and duty descriptions with persuasive evidence that their actual performance in the particular context of the petitioner's business operations would require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty.

The AAO will first turn to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), which is satisfied if the petitioner establishes that a baccalaureate or higher degree, or its equivalent, in a specific specialty, is normally the minimum requirement for entry into the particular position for which the petition was filed.

The AAO recognizes the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (hereinafter referred to as the *Handbook*) as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.[2]

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[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 online edition.

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, which the 2012-2013 edition of the *Handbook* describes as follows:

> 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 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 19, 2012).

The *Handbook's* section "How to Become a Market Research Analyst" opens with this summary statement:

> 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.

The Education segment of the above referenced section states:

> Market research analysts typically 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 19, 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).

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

[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.

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 or its equivalent in a specific specialty for entry into the occupation, the *Handbook* 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 "[t]he degree requirement" for at least 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.

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 at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

The petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement of at least a bachelor's degree in a specific specialty or its equivalent. Also, 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.

Accordingly, the petitioner has not satisfied the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*)

Next, the AAO finds that 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."

As reflected in this decision's earlier comments regarding the generalized and generic nature of the petitioner's descriptions of the proffered position and its duties, the AAO finds that the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered

position. Specifically, the petitioner failed to demonstrate how the market research analyst duties 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 it claims are so complex and unique. While one or two courses in marketing may be beneficial in performing certain duties of a market research analyst position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in business or related field (with a focus in market research), is required to perform the duties of the particular position here proffered.

As reflected in this decision's earlier comments regarding the generalized and generic nature of the petitioner's descriptions of the proffered position and its duties, the record of proceeding lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than market and survey researchers or other closely related 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, 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).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a degree or its equivalent for the position. The AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

To merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position. Further, it should be noted that the record of proceeding must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position.[4]

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

In the instant matter, the petitioner has not provided evidence of its past recruiting and hiring practices as well as information regarding employees who previously held the position. Therefore, the evidence 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).

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 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 a degree in a specific specialty.

Therefore, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). For this additional reason also, the petition must be denied.

Finally, now address the second issue not addressed by the director's decision that, nonetheless, also requires that the petition be denied. As earlier indicated in this decision, the petitioner has also failed to establish that the beneficiary has attained the equivalent of at least a bachelor's degree in any specific specialty. This fact precludes approval of the petition even if the petitioner had established the proffered position as a specialty occupation (which it has not), for one may not possess the equivalent of at least bachelor's degree in a specific specialty if one does not possess the equivalent of a bachelor's degree at all, regardless of specialty.

As was noted above, section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

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

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recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered 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.* at 388.

The degree referenced by section 214(i)(1)(B) of the Act, 8 U.S.C. § 1184(i)(1)(B), means one in a specific specialty that is characterized by a body of highly specialized knowledge that must be theoretically and practically applied in performing the duties of the proffered position.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

(A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,

(B) completion of the degree described in paragraph (1)(B) for the occupation, or

(C) (i) experience in the specialty equivalent to the completion of such degree, and

(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In implementing section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must also meet one of the following criteria in order to qualify to perform services in a specialty occupation:

(*1*) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(*2*) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(*3*) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or

(*4*) Have [a] education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and [b] have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

In order to equate a beneficiary's credentials to a U.S. baccalaureate or higher degree under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), the provisions at 8 C.F.R. § 214.2(h)(4)(iii)(D) require one or more of the following:

> (*1*) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
>
> (*2*) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
>
> (*3*) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials; [5]
>
> (*4*) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
>
> (*5*) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. . . .

The evidence in this record of proceeding provides no basis for establishing the beneficiary's qualifications under any one of the first three criteria at 8 C.F.R. § 214.2(h)(4)(iii)(C). Further, it is clear that, to establish the beneficiary's qualifications under the relies, mistakenly, upon the beneficiary's experience, particularly, the 12-plus years of marketing analyst experience as referenced in the September 7, 2009 letter from the General Manager of [redacted]

The particular regulation pertinent to non-USCIS evaluation of a beneficiary's experience to establish a beneficiary qualifications under the general umbrella of 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) is the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(*1*), which recognizes as competent to render such evaluations only "an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience." The evidence of record does

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[5] The petitioner should note that, in accordance with this provision, the AAO will accept a credentials evaluation service's evaluation of *education only*, not experience.

not establish that the person opining on the educational equivalency of the beneficiary's experience is such an official. Accordingly, the petitioner has not established that person's competency to evaluate experience under the governing regulations, and, consequently, fails to establish probative value for the evaluation of the beneficiary's experience. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Further, the AAO finds that even if the petitioner had established its evaluator as "an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience," as required by the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(*1*), the opinion that he provided would have no merit.

Additionally, the evaluation in question otherwise merits no probative weight, as it lacks an adequate factual foundation for its ultimate conclusion. The author of the evaluation in question reached based his opinion to a material and decisive extent upon the letter from the General Manager of [redacted] However, the AAO finds that the letter describes the beneficiary's work experience in generalized terms that do not provide substantial information about the substantive nature of the actual work performed by the beneficiary or about the applications of market-research-analyst related knowledge that the beneficiary applied. Further, that General Manager's letter neither identifies the particular position-titles that the beneficiary held nor indicates the educational attainments of others in the organization that have held the beneficiary's positions. Additionally, the General' Manager's letter does not even establish the foundation of his comments, that is, whether they are based upon the General Manager's personal knowledge and observation, upon personnel files maintained at [redacted] and/or upon some other source. As such, the AAO finds, the letter from the General Manager of [redacted] does not merit the weight that the evaluation's author attributed to it.

Thus, the AAO observes that if the petitioner had demonstrated that the proffered position required a minimum of a bachelor's degree or the equivalent in a specific specialty, the petitioner would be obliged, in order for the visa petition to be approvable, to demonstrate, not only that the beneficiary has a bachelor's degree or the equivalent, but that the beneficiary has a minimum of a bachelor's degree or the equivalent *in that specific specialty. See Matter of Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968).

In the instant case, however, the petitioner has not demonstrated that the beneficiary has the even the equivalent of any U.S. bachelor's degree. Therefore, even if the petitioner had demonstrated that the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty, it would have failed to demonstrate that the beneficiary is qualified to perform in the proffered position. The petition must also be denied on this additional basis.

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 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 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, 8 U.S.C. § 1361. Here, that burden has not been met.

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