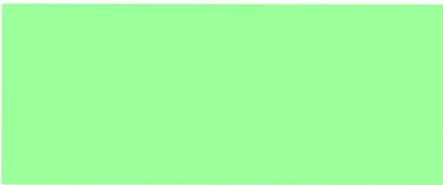
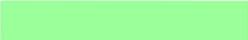




U.S. Citizenship
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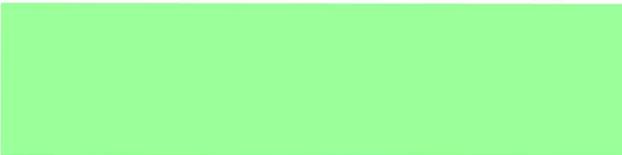


DATE: JUN 21 2013 OFFICE: VERMONT SERVICE CENTER FILE: 

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 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 in accordance with the instructions on 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the Vermont Service Center on November 21, 2011. In the Form I-129 visa petition, the petitioner describes itself as a retail specialty store established in 1991. In order to employ the beneficiary in what it designates as a market research analyst position, the petitioner seeks to classify her 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 on February 6, 2012, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. The petitioner subsequently filed a motion to reconsider. The director reviewed the motion and issued a letter affirming the prior denial of the petition. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements. In support of this assertion, counsel submitted a brief and additional evidence.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; (5) the petitioner's motion to reconsider and additional evidence; (6) the director's decision on the motion to reconsider; and (7) the Form I-290B pertaining to the instant appeal and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services as a market research analyst to work on a full-time basis at a rate of pay of \$36,000 per year. In a support letter dated November 17, 2011, the petitioner stated that the proffered position involves the following duties:

1. Attend staff conferences to provide management with information and proposals concerning the promotion, distribution, design, and pricing of company products or services;
2. Collect and analyze data to identify customers and areas in the market to branch out into;
3. Collect and analyze data on customer demographics, preferences, needs, and buying habits to identify potential markets and factors affecting product demand;
4. Prepare reports of findings, illustrating data graphically and translating complex findings into written text;
5. Measure and assess customer and employee satisfaction;

6. Seek and provide information to help companies determine their position in the marketplace;
7. Gather data on competitors and analyze their prices, sales, and method of marketing and distribution;
8. Monitor industry statistics and follow trends in trade literature;
9. Devise and evaluate methods and procedures for collecting data, such as surveys, opinion polls, or questionnaires, or arrange to obtain existing data;
10. Forecast and track marketing and sales trends, analyzing collected data;
11. Measure the effectiveness of marketing, advertising, and communications programs and strategies[.]

The AAO notes that, with the exception of the second duty listed, these duties are nearly identical to those listed on the Occupational Information Network (O*NET) OnLine Summary Report for the occupation "Market Research Analysts and Marketing Specialists." See U.S. Department of Labor, Employment & Training Administration, O*NET OnLine, 13-2011.01 – Market Research Analysts and Marketing Specialists, on the Internet at <http://www.onetonline.org/link/summary/13-1161.00> (last visited June 18, 2013).

In its letter of support accompanying the initial I-129 petition, the petitioner stated the minimum educational requirements for the proffered position as a "Bachelor's degree or higher in Business Administration." The petitioner claimed that the beneficiary is qualified to perform services in the proffered position by virtue of her U.S. master's degree and her internship with the petitioner. The petitioner provided a copy of a diploma from [REDACTED] indicating that the beneficiary was awarded a Master of Business Administration. The petitioner also submitted copies of foreign diplomas and transcripts. No evaluation of these foreign credentials was provided.

The petitioner also provided evidence in support of the petition, including a copy of a letter offering employment to the beneficiary; a block-and-line organizational chart for the petitioner's business operations; a printout from the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* regarding the occupation of "Market and Survey Researchers; a printout of the O*NET OnLine Summary Report for the occupation "Market Research Analysts and Marketing Specialists"; the beneficiary's resume; and documents related to the beneficiary's immigration status.

In addition, the petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification "Market Research Analysts and Marketing Specialists" - SOC (ONET/OES Code) 13-1161, at a Level I (entry level) wage.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on December 1, 2011. In the RFE, the director notified the petitioner that additional evidence was needed to establish eligibility for the benefit sought. The petitioner was asked to submit probative evidence to establish that a specialty occupation position exists for the beneficiary. Furthermore, the director acknowledged that the petitioner had submitted a job description, but notified the petitioner that it was not persuasive in establishing that the proffered position is a

specialty occupation. The director requested the petitioner submit a "detailed description of the proffered position, to include approximate percentages of time for each duty the beneficiary will perform." The petitioner was also asked to submit evidence regarding its business operations.

On January 26, 2012, counsel responded to the director's RFE by providing a letter and additional evidence. Specifically, counsel's submission included the following: (1) a letter from the petitioner dated January 19, 2012; (2) a letter from [REDACTED] of the [REDACTED] dated December 8, 2011; (3) printouts of several internet job postings; (4) printouts from an internet "blog"; (5) photographs of the petitioner's locale; (6) printouts of screenshots of what appears to be a web-based application called [REDACTED]; (7) printouts of e-mail correspondence between the beneficiary and other individuals, dated December 19-27, 2011; (8) copies of news articles that mention the petitioner; (9) a printout of e-mail correspondence from the beneficiary dated January 2, 2012 and printouts of surveys from www.surveymonkey.com; (9) a document entitled "[REDACTED]"; and (10) copies of previously submitted documents.

In response to the RFE, the provided a revised description of the proffered position. Specifically, the petitioner repeated the original duties, and provided the following description of "a typical day for the Market Research Analyst" to "comprehensively detail [the previously submitted] duties":

- Daily Reporting and Routine Check (5%)
 - On a daily basis the Market Research Analyst will review and analyze the previous year's sales on that day and quarter. The data will be input into the tasks to do in the next business day.
 - The Market Research Analyst then moves into checking emails and replying to any urgent ones from clients and drawing up any quotes for clients that are pending and getting them out as soon as possible.
 - Each day the Market Research Analyst is required to check LinkedIn and Facebook to reply to questions and check on the effectiveness of the advertising campaigns in terms of Return on Investment.
 - In order to gauge the effectiveness of the information gathered from the marketing efforts, the Market Research Analyst uses Google Analytics to draw up reports on what is working and what is not and what the next step should be.
- Customer Analysis (35%)
 - [T]he Market Research Analyst duties shall include creating and implementing surveys and personal interviews, and collecting and analyzing data on consumer demographics, preferences, needs and buying habits for customer analysis.
 - The Market Research Analyst delivers this information via reports and meetings within [the petitioner's] organization.
 - The Market Research Analyst will also measure and assess customer and employee satisfaction and develop contingency plans for unforeseen developments that arise continuously in business.
 - Additionally, [t]he Market Research Analyst will also take into account

population growth and consumers' tastes to drive demand and explain these changes with charts and reports. Based on these findings, she will make suggestions for plans to take to best serve these changes and in the market.

- Marketing Analysis (20%)
 - The [beneficiary] shall study the local market of [redacted] and surrounding areas for recent trends in competition and intensity of competitive rivalry within similar markets.
 - The Market Research Analyst will prepare reports of findings with the data obtained and gathered and illustrate graphically and translate the complex findings into written text as to explain to associates the impacts of the changes and what the next step for the company is.
 - Data on competitors will also be gathered and analyzed. Such data includes price points for items, sales for each quarter and methods used for marketing and distribution.
 - With the information gathered and reported, the Market Research Analyst will begin prospecting new clients via referrals or mutual contacts using e-mail and telephone.
 - [The beneficiary] will also begin suggesting new price points for the company to list products at and promotions [the petitioner] should hold to entice customers [to the petitioner's] location rather than going to a competitor.
- Risk Analysis (5%)
 - With the SWOT [Strengths, Weaknesses/Limitations, Opportunities and Threats] method, the Market Research Analyst will assess potential risk factors and recommend adverse risk solutions that will reduce the potential risk that might be caused by losing business to a competitor or by changing products or the way the business is operated.
- Product Research and Brand Development (5%)
 - The Market Research Analyst will assist [the petitioner's manager/owner] in formulating, directing, and coordinating in marketing activities and policies to promote products and services.
 - [The beneficiary] will work with advertising and promotions managers to ensure these activities and directives are in place and working as planned and forecasted.
 - [The beneficiary] will be responsible for communicating with domestic and international vendors and whole sellers on a variety of products and discussing with them their views of current market trends as well.
 - The Market Research Analyst will forecast and track marketing and sales trends and analyze the collected data.
- Advertising and Other Promotional Activities (10%)

- This component of the position requires the active role of promoting the business to various ethnic groups in the [REDACTED] area and surrounding cities as well.
 - The Market Research Analyst must market the services of the company; this includes placing classified advertisements and maintaining reputation usually generated by word of mouth publicity.
 - Accumulating the data is done by computer research and the data is compiled into computer generated documents.
 - The Market Research Analyst will also be required to meet with commercial clients for contracts and orders on a demand basis.
 - The Market Research Analyst will assist [the petitioner's manager/owner] in planning promotional programs to attract new clients such as scheduling newspaper ads or coupons, direct-mail marketing, internet promotion.
 - [The beneficiary] will assist [the petitioner's manager/owner] in contacting special event vendors such as special event facilities, florists and special event planners to strike profitable business deals.
- E-Commerce Project (20%)
 - Within the E-Commerce Project, the Market Research Analyst will coordinate with the offshore development team, [REDACTED] to put together an online market, so that [the petitioner] can sell its products online and manage its store date [sic].
 - [The beneficiary] will test the functionality of the website and evaluate the value it is generating for the company and how to better promote it.
 - The Market Research Analyst will eventually manage the set-up of the online ordering system and payment terminals for E-Commerce once the website is in place by [the] developers and also arrange with shipping carriers to decide on prices to ship these orders to clients that are placed on [the] website.
 - The Market Research Analyst will also develop marketing strategies for the website on local publication agencies according to the data and decisions derived from customer analysis, market analysis and business goals.

(For clarity, the AAO has slightly changed the format of the description of the duties of the proffered position as provided by the petitioner into the above bullet list. The AAO considered the description of duties as provided by the petitioner in its entirety prior to issuing this decision.)

The director reviewed the information provided in response to the RFE. Although the petitioner and counsel claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring 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 director denied the petition on February 6, 2012.

On March 8, 2012, the petitioner filed a motion to reconsider the director's decision. In support of the motion, the petitioner submitted a brief from counsel along with copies of previously provided documents. The director reviewed the motion to reconsider, and determined that the petitioner had not overcome the grounds for the denial. The director affirmed the previous decision to deny the petition. Counsel subsequently filed the instant appeal of the denial of the H-1B petition.¹

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, the AAO will make some preliminary findings that are material to the determination of the merits of this appeal.

The AAO first notes that on appeal, counsel asserts that the petitioner provided sufficient evidence establishing that the proffered position qualifies as a specialty occupation, but the director required a higher burden than the preponderance of the evidence standard of proof. With respect to the preponderance of the evidence standard, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), states in pertinent part 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.

* * *

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case.

* * *

¹ With the appeal, counsel provided copies of previously submitted documents and new evidence. With regard to the new documentation submitted on appeal that was encompassed by the director's RFE, the AAO notes that this evidence is outside the scope of the appeal. The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. See 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). 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)(1), (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).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted it with the initial petition or in response to the director's request for evidence. *Id.* The petitioner has not provided a valid reason for not previously submitting the evidence. Under the circumstances, the AAO need not consider the sufficiency of such evidence submitted for the first time on appeal.

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.

Thus, in adjudicating the petition pursuant to the preponderance of the evidence standard, USCIS examines 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. The "preponderance of the evidence" standard does not relieve the petitioner from satisfying the basic evidentiary requirements set by regulation. The standard of proof should not be confused with the burden of proof. Specifically, the petitioner bears the burden of establishing eligibility for the benefit sought. A petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. 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. As will be discussed, in the instant case, that burden has not been met.²

When determining whether a position is a specialty occupation, the AAO must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. To ascertain the intent of a petitioner, U.S. Citizenship and Immigration Services (USCIS) looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, 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."

² The AAO reviewed the record in its entirety. Notably, the evidence submitted fails to establish that the petitioner's proffered position qualifies for the requested classification under the applicable statutory and regulatory provisions. The AAO reminds counsel that it is not the volume of documentation that establishes eligibility for the benefit sought, but rather the relevance, probative value, and credibility of the documentation – both individually and within the context of the totality of the evidence.

The petitioner stated the minimum educational requirement for the proffered position as a "Bachelor's degree or higher in Business Administration." The AAO observes that this educational requirement is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly to the duties and responsibilities of the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a general-purpose degree or 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 (Comm'r 1988).

As previously mentioned, to demonstrate 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. 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, including 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).³

Again, the petitioner in this matter 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.

Further, upon review of the record of proceeding, the AAO notes that the enclosed LCA does not appear to correspond to the claimed duties and requirements of the proffered position. Consequently, as will be discussed below, the petitioner has failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed.

More specifically, the petitioner provided an LCA in support of the instant petition that indicates the

³ 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: otherwise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

Id.

occupational classification for the position is "Market Research Analysts and Marketing Specialists" at a Level I (entry level) wage. Wage levels should be determined only after selecting the most relevant O*NET code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on 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 Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a 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 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.

The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. A Level I wage rate is described by DOL as follows:

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.

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.

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.

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 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.

In the instant case, the petitioner and its counsel repeatedly claim that the nature of the proffered position involves complex, unique and/or specialized tasks. In its letter dated January 19, 2012, the petitioner asserted that the beneficiary must apply "*extensive autonomous application of individual professional knowledge to particular fact situations.*" Further, the petitioner indicated that "[t]he tasks that [the beneficiary] will be managing are highly complex sophisticated tasks that require constant decision making which [the beneficiary] must make independently and immediately." The petitioner also described the tasks of the proffered position as "highly complex," and stated that in order for the manager/owner to shift his focus to the expansion of the petitioner's business operations, the beneficiary "will be overseeing and directing all marketing and advertising matters for [the petitioner], generating complex business documentation and counseling clients." The AAO further notes that the petitioner submitted a letter from [REDACTED] of the [REDACTED] in response to the director's RFE. This letter states that the proffered position involves "sophisticated data analysis and consistent application of complex principles to render beneficial decisions based on the discretion of the professional." The AAO observes that the petitioner has repeatedly emphasized that the proffered position requires the beneficiary to perform complex tasks, exercising substantial independent judgment. Furthermore, the petitioner submitted an organizational chart depicting the hierarchy of its business operations, which indicates that the beneficiary report directly to the manager and that the petitioner intends to hire "2+" IT and marketing support positions who will report to the beneficiary. The complexity of the position and the level of independent judgment required to perform the duties of the proffered position appear to surpass the expectations of a Level I position as described above, where the employee works under close supervision, performing routine tasks that require only a basic understanding of the occupation and limited exercise of judgment. In addition, rather than the beneficiary's work being "monitored and reviewed for accuracy," as would be appropriate for a Level I position, the petitioner is relying on the accuracy of the beneficiary's work product to make business decisions about the direction and expansion of the company.

Additionally, in [REDACTED] opinion letter, dated December 8, 2011 (submitted by the petitioner in response to the RFE, in support of the motion to reconsider, and again on appeal), [REDACTED] indicated that the proffered position "requires a person who has the specialized knowledge to assemble and assess complex personnel and business data and from its analysis draw conclusions and formulate crucial personnel strategies that carry with them the risk or reward of high performance or disastrous production." In its letter dated January 19, 2012, the petitioner indicated that the beneficiary will work on "sophisticated and complex projects." The petitioner further indicated that the beneficiary will be "overseeing all marketing and advertising efforts for a business that is growing at a very fast pace," and that "[t]he operations require oversight and management of a wide array of tasks including tasks requiring knowledge in accounting, business theory and methodology, statistical analysis, human resources and information management." However, the AAO again notes that the petitioner designated the position as a Level I (entry level) position. Here, the represented level of expertise required to perform the duties of the proffered position appears to be at odds with a Level I position, i.e., a position that requires "only a basic understanding of the occupation," commensurate with that expected of a "worker in training" or an individual participating in an "internship."

Further, the AAO notes that on appeal, in support of the instant petition, counsel submitted a letter dated July 20, 2012 from the office of [REDACTED]. The letter indicates that the beneficiary's "education in business and marketing, and her fluency in Indian languages are the qualifications that [the petitioner's owner] found suitable for [the proffered position]." The AAO notes that a language requirement other than English is generally considered a special skill for all occupations, with the exception of Foreign Language Teachers and Instructors, Interpreters, and Caption Writers. In the instant case, the petitioner has not established that the foreign language requirement has been reflected in the wage-level for the proffered position.

Thus, upon review of the assertions made by the petitioner, the AAO must question the level of complexity, independent judgment and understanding actually required for the proffered position as the LCA is certified for a Level I entry-level position. This characterization of the position and the claimed duties and responsibilities as described by the petitioner conflict with the wage-rate element of the LCA selected by the petitioner, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, the selected wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

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); *Patel v. Boghra*, 369 Fed.Appx. 722, 723 (7th Cir. 2010). 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]").

The AAO notes that the prevailing wage of \$32,531 per year on the LCA corresponds to a Level I position for the occupational category of "Marketing Research Analysts and Marketing Specialists" for [REDACTED].⁶ Notably, if the proffered position had been designated at a higher level, the prevailing wage at that time would have been \$41,475 per year for a Level II position, \$50,440 per year for a Level III position, and \$59,384 per year for a Level IV position.

⁶ For additional information regarding the prevailing wage for Market Research Analysts and Marketing Specialists in [REDACTED], see the All Industries Database for 7/2011 - 6/2012 for this occupational category at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatabase.com/OesQuickResults.aspx?code=131161&area=36420&year=12&source=11> (last visited June 18, 2013).

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 simply submit an LCA for a different wage level at a lower prevailing wage than the one that it claims it is offering to the beneficiary. Therefore, the petitioner has failed to establish that it would pay the beneficiary an adequate salary for her work, as required under the Act, if the petition were granted.

This aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the petitioner's assertions regarding the demands, level of responsibilities and requirements of the proffered position. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

As noted below, 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 the Department of Labor [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.

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 . . . 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, provided the proffered position was in fact found to be a higher-level and more complex position as claimed elsewhere in the petition, the petitioner would have failed to submit a valid LCA that corresponds to the claimed duties and requirements of the proffered position; that is, specifically, 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.

The statements regarding the claimed level of complexity, independent judgment and understanding required for the proffered position are materially inconsistent with the certification of the LCA for a Level I entry-level position. This conflict undermines the overall credibility of the petition. The AAO finds that, fully considered in the context of the entire record of proceedings, the petitioner failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed.

As such, a review of the enclosed LCA indicates that the information provided therein does not correspond to the level of work and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such higher level work and responsibilities, which if accepted as accurate would result in the beneficiary being offered a salary below that required by law. As a result, even if it were determined that the proffered position were a higher-level and more complex position as described and claimed elsewhere in the petition in support of the petitioner's assertions that this position qualifies as a specialty occupation, the petition could still not be approved for these additional reasons.⁷

For the foregoing reasons, a review of the enclosed LCA indicates that the information provided does not correspond to the level of work and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and requirements in accordance with the pertinent LCA regulations. As a result, even if it were determined that the petitioner overcame the director's basis for denial of the petition (which it has not), the petition could not be approved for this independent reason.

The AAO will now specifically address the director's basis for denial of the petition, namely that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, and for the specific reasons described below, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the

⁷ Fundamentally, it appears that (1) the petitioner previously claimed to DOL that the proffered position is a Level I, entry-level position to obtain a lower required wage; and (2) the petitioner is now claiming to USCIS that the position is a higher-level and more complex position in order to support its claim that the position qualifies as a specialty occupation. The petitioner cannot have it both ways. Either the position is more senior and complex (based on a comparison of the employer's job requirements to the standard occupational requirements) and thereby necessitates a higher required wage or it is an entry-level position for which the lower wage offered to the beneficiary in this petition is acceptable. To permit otherwise would be directly contrary to the U.S. worker protection provisions contained in section 212(n)(1)(A) of the Act and its implementing regulations.

applicable statutory and regulatory requirements.

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

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

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

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must 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 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), 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 at 147 (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.

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO now turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO will first review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position.

The petitioner stated that the beneficiary would be employed in a market research analyst position. However, 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.

The AAO recognizes DOL's *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁸ As previously mentioned, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Market Research Analysts and Marketing Specialists."

The AAO reviewed the chapter of the *Handbook* entitled "Market Research Analysts," including the sections regarding the typical duties and requirements for this occupational category. However, the *Handbook* does not indicate that "Market Research Analysts" comprise an occupational group for which at least a bachelor's degree *in a specific specialty*, or its equivalent, is normally the minimum requirement for entry.

The subchapter of the *Handbook* entitled "How to Become a Market Research Analyst" states the following about this occupational category:

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.

Education

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.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Market Research Analysts, on the Internet at <http://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm#tab-4> (last visited June 18, 2013).

When reviewing the *Handbook*, the AAO must again note that the petitioner designated the wage level of the proffered position as a Level I position on the LCA. As previously discussed, this designation is indicative of a comparatively low, entry-level position relative to others within the occupation and signifies that the beneficiary is only expected to possess a basic understanding of the occupation and will perform routine tasks that require limited, if any, exercise of judgment. In accordance with the relevant DOL explanatory information on wage levels, the beneficiary will be

⁸ All of the AAO's references are to the 2012-2013 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

closely supervised and her work closely monitored and reviewed for accuracy. Furthermore, she will receive specific instructions on required tasks and expected results. Thus, the petitioner has not established that the beneficiary will serve in a high-level or leadership position.

The *Handbook* does not state that a baccalaureate or higher degree in a specific specialty, or its equivalent is normally the minimum requirement for entry into the occupation. This passage of the *Handbook* reports that market research analysts have degrees and backgrounds in a wide-variety of disparate fields. The *Handbook* states that employees typically need a bachelor's degree in market research or a related field, but the *Handbook* continues by indicating that many market research analysts have degrees in fields such as statistics, math, or computer science. According to the *Handbook*, other market research analysts have a background in fields such as business administration, one of the social sciences, or communications. The *Handbook* notes that various courses are essential to this occupation, including statistics, research methods, and marketing. The *Handbook* states that courses in communications and social sciences (such as economics, psychology, and sociology) are also important.

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" 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 disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty," 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.⁹ Section 214(i)(1)(B) of the Act (emphasis added).

Here, although the *Handbook* indicates that an advanced degree is typically needed for these positions, it also indicates that baccalaureate degrees in various fields are acceptable for entry into the occupation. In addition to recognizing degrees in disparate fields and backgrounds (i.e., social science and computer science) as acceptable for entry into this occupation, the *Handbook* also states that "others have a background in business administration." As previously discussed, 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. As noted *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. 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

⁹ 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. As just stated, this also includes even seemingly disparate specialties provided the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558. 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 normally the 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 qualifying as a specialty occupation.

With the initial Form I-129 petition, the petitioner provided an O*NET Summary Report for the occupational category "Market Research Analysts and Marketing Specialists" to support the assertion that the proffered position qualifies as a specialty occupation. The AAO reviewed the report but finds that the petitioner's reliance on the report is misplaced. That is, O*NET assigns this occupation a Job Zone Four rating, which groups it among occupations that are described as follows: "[m]ost of these occupations require a four-year bachelor's degree, but *some do not* (emphasis added)." O*NET does not report that for those occupations with an academic degree requirement, that such a degree must be in a *specific specialty* directly related to the occupation. As previously discussed, 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 duties and responsibilities of the position. Further, "most" is not indicative that a position normally requires at least a bachelor's degree in a specific specialty, or its equivalent, (the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1)), or that a position is so specialized and complex as to require knowledge usually associated with attainment of a baccalaureate or higher degree in a specific specialty (the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4)).¹⁰ Notably, O*NET indicates that some of these occupations do not require a four-year bachelor's degree.

The AAO notes that on appeal, counsel asserts that "[t]he question of whether or not a Market Research Analyst is a specialty occupation has also been previously answered by USCIS when it did so on December 20, 1999." Counsel cites a document entitled "NSC [Nebraska Service Center] Liaison Minutes." The AAO finds that counsel's reliance on "minutes" from what appears to be a September 29, 1999 "NSC Liaison Teleconference" is misplaced. The teleconference took place in over a decade ago and does not provide any information as to how the requirements of the occupation have evolved since 1999. Furthermore, the NSC no longer adjudicates H-1B petitions

¹⁰ The first definition of "most" in *Webster's New Collegiate College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of such positions require a four-year bachelor's degree, it could be said that "most" of the positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner, which as previously noted has been designated on the LCA as a Level I (entry) position. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "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." § 214(i)(1) of the Act.

and, therefore, the memorandum is not followed by any USCIS officers even as a matter of internal, service center guidance.

Counsel also asserts that the Specific Vocational Preparation (SVP) level assigned to the occupation ("7.0 to < 8.0") indicates that the proffered position qualifies as a specialty occupation. The AAO reviewed the O*NET OnLine information entitled "O*NET OnLine Help: Specific Vocational Preparation (SVP)," which provides the following regarding SVP levels:

Specific Vocational Preparation, as defined in Appendix C of the *Dictionary of Occupational Titles*, is the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation.

This training may be acquired in a school, work, military, institutional, or vocational environment. It does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs.

Specific vocational training includes training given in any of the following circumstances:

1. Vocational education (high school; commercial or shop training; technical school; art school; and that part of college training which is organized around a specific vocational objective);
2. Apprenticeship training (for apprenticeable jobs only);
3. In-plant training (organized classroom study provided by an employer);
4. On-the-job training (serving as learner or trainee on the job under the instruction of a qualified worker);
5. Essential experience in other jobs (serving in less responsible jobs which lead to the higher grade job or serving in other jobs which qualify).

The following is an explanation of the various levels of specific vocational preparation:

Level Time

1. Short demonstration only
2. Anything beyond short demonstration up to and including 1 month
3. Over 1 month up to and including 3 months
4. Over 3 months up to and including 6 months
5. Over 6 months up to and including 1 year
6. Over 1 year up to and including 2 years
7. Over 2 years up to and including 4 years
8. Over 4 years up to and including 10 years

9. Over 10 years

Note: The levels of this scale are mutually exclusive and do not overlap.

Upon review of the above noted information, the AAO observes that an SVP rating of 7 to less than (" $<$ ") 8 does not indicate that at least a four-year bachelor's degree is required for an occupational category that has been assigned such a rating or, more importantly, that such a degree must be in a specific specialty directly related to the occupation. Rather, the SVP rating simply indicates that the occupation requires over 2 years up to and including 4 years of training of the wide variety of forms of preparation described above, including experiential training.¹¹ Therefore, the information provided in the printout is not probative of the proffered position qualifying as a specialty occupation.

The fact that a person may be employed in a position designated as that of a market research analyst and may be involved in using some market research skills and knowledge to help an enterprise achieve its goals in the course of his or her job is not in itself sufficient to establish the position as one that qualifies as a specialty occupation. It is incumbent on the petitioner to provide sufficient evidence to establish that the particular position that it proffers would necessitate services at a level requiring 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 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." 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. 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

As previously stated, USCIS does not simply rely on a position's title to determine whether a particular position qualifies as a specialty occupation. Rather, USCIS considers the duties of a proffered position, the nature of the petitioning entity's business operations, and all other relevant factors to make its determination. Again, 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.

The petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding, particularly in light of the Level I wage designation on the LCA, do not indicate that the position is one for which a baccalaureate or higher degree in a specific specialty, or

¹¹ An SVP rating of "7 to $<$ 8" is less than 8 and, thus, does not include "[o]ver 4 years up to and including 10 years."

its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO will review the record of proceeding regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common 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 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports an industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the AAO incorporates by reference the previous discussion on the matter. Also, there are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement.

In support of the petitioner's assertion that the proffered position is a specialty occupation position, the record of proceeding contains several job announcements and an opinion letter. However, upon review of the evidence, the AAO finds that the petitioner's reliance on the job announcements and letter is misplaced.

In the Form I-129, the petitioner stated that it is a retail specialty store established in 1991, and has 7 employees.¹² The petitioner stated its gross annual income as approximately \$1.6 million and its net annual income as approximately \$179,000. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 445110 – "Supermarkets and Other Grocery (Except Convenience) Stores."¹³ The U.S. Department of Commerce, Census Bureau website describes this NAICS code as follows:

This industry comprises establishments generally known as supermarkets and grocery stores primarily engaged in retailing a general line of food, such as canned and frozen

¹² In response to the RFE, in a letter dated January 19, 2012, the petitioner stated that it employs "3 full-time employees and other temporary staff." The petitioner provided a list of positions that indicates that it employs 10 individuals, excluding the beneficiary. The petitioner did not indicate which of the positions are full-time positions.

¹³ NAICS is used to classify business establishments according to type of economic activity, and each establishment is classified to an industry according to the primary business activity taking place there. *See* U.S. Dept of Commerce, U.S. Census Bureau, NAICS, on the Internet at <http://www.census.gov/eos/www/naics/> (last visited June 18, 2013).

foods; fresh fruits and vegetables; and fresh and prepared meats, fish, and poultry. Included in this industry are delicatessen-type establishments primarily engaged in retailing a general line of food.

See U.S. Dep't of Commerce, U.S Census Bureau, 2007 NAICS Definition, 445110 – Supermarkets and Other Grocery (Except Convenience) Stores on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited June 18, 2013).

The AAO notes that under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), the petitioner must establish that "the degree requirement is common to *the industry in parallel positions* among *similar organizations* (emphasis added)." That is, this prong requires the petitioner to establish that a requirement of a bachelor's degree in a specific specialty, or its equivalent, 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 response to the RFE, the petitioner submitted several job announcements. However, the documentation does not establish the proffered position qualifies as specialty occupation under this criterion of the regulations.

Here, none of the advertisements submitted by the petitioner indicate that the advertising organizations are either supermarkets or specialty retail stores.¹⁴ The AAO notes that the petitioner submitted advertisements from the financial, healthcare, manufacturing, insurance, and advertising industries, among others.¹⁵ Most of the advertisements appear to be dissimilar organizations, and, furthermore, some of the advertisements are devoid of sufficient information regarding the advertising employers to conduct a legitimate comparison of the organizations to the petitioner.¹⁶

¹⁴ Examples of these advertisements include those from [redacted]; and [redacted]. The advertisements from [redacted] and [redacted] both recruiting firms, are devoid of information regarding the companies seeking to fill the advertised positions.

¹⁵ For example, the petitioner submitted advertisements from [redacted] (an insurance agency); [redacted] (an ESL school); [redacted] (a management and consulting services company); [redacted] (a healthcare management company); [redacted] (a manufacturing company); [redacted] (a technology market research and strategy consulting firm); [redacted] (a market research firm); [redacted] (management consultants in pharmaceuticals and biotech); [redacted] (healthcare services); [redacted] (a healthcare information technology vendor); [redacted] (a financial services company); [redacted] (an educational organization); [redacted] (a healthcare market research company); [redacted] (healthcare consultants); [redacted] (described as associated with the manufacturing and publishing industries); and an unnamed company described as a behavior and opinion research firm.

¹⁶ Examples of these advertisements include those from [redacted] and [redacted]. The advertisements from [redacted] and [redacted] both recruiting firms, are devoid of information regarding the companies seeking to fill the advertised positions.

The AAO notes that the advertisement from [REDACTED] indicates that it is a corporation that "operates four major divisions with chains that include [REDACTED] and [REDACTED]," along with other chains in Canada and Europe, totaling more than 2,800 stores." The AAO again notes that the petitioner has described itself as a specialty retail store with seven employees. The advertisements do not appear to be for organizations similar to the petitioner in the same industry. Notably, for the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such information, evidence submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and an organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner and counsel to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion. As previously discussed, 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. 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

Further, many of the advertised positions do not appear to be parallel to the proffered position. For example, the advertisement from [REDACTED] research seeks an individual to "[p]rovide [its] clients in the supplier and investor communities with strategic advice on RFID [Radio Frequency Identification], Mobile & Wireless or Embedded Hardware & Systems technology, market, channel and partner development opportunities and requirements." The advertisement from [REDACTED] indicates that it seeks an individual to "manage a robust Freedom of Information Act request program with government entities," among other duties. The posting from [REDACTED] indicates that it seeks a candidate with "[e]xperience conducting in-depth data analyses using traditional and advanced methods, including the use of SPSS, SAS, Minitab or other statistical software products." The AAO observes that these duties are not parallel to the duties of the proffered position, as described by the petitioner.

In addition, contrary to the purpose for which they were submitted, the advertisements do not demonstrate that a bachelor's degree in a *specific specialty* is common in the petitioner's industry. Some of the postings request a "BA/BS" degree or a "bachelor's degree," but fail to require a degree in a specific specialty. As previously discussed, since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558. Other postings indicate a wide range of acceptable majors, such as statistics, psychology, public health, mathematics, or "a social science." Thus, the advertisements do not demonstrate that a bachelor's degree in a specific specialty is common to the petitioner's industry under this criterion of the regulations.

Furthermore, the petitioner fails to establish the relevancy of the provided examples to the issue here.¹⁷ That is, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from these advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.¹⁸

In addition to the job advertisements, the petitioner a letter in support of the instant petition from [REDACTED] from the [REDACTED]. In his letter, dated December 8, 2011, [REDACTED] "offer[s] [his] expert opinion that the position of Market Research Analyst for [the petitioner], a specialty grocer, is a specialized professional occupation requiring at a very minimum the attainment of a four-year university level bachelor's degree in the *specific* field of Marketing or Business with an emphasis in Marketing." [REDACTED] states that his opinion is based upon a review of the duties of the proffered position that were provided with the initial Form I-129 petition. The AAO notes that this list of duties, which is included in [REDACTED] letter, is largely copied from O*NET OnLine Summary Report for Market Research Analysts and Marketing Specialists. There is no indication from the letter that [REDACTED] reviewed the subsequent list of duties provided by the petitioner in response to the RFE. Notably, the petitioner's January 19, 2012 letter is dated *after* [REDACTED] prepared his letter.

Further, the AAO notes that the minimum educational requirement for the proffered position stated by [REDACTED] is not the same as that indicated by the petitioner. Specifically, in its letter dated November 17, 2011 submitted in support of the initial Form I-129 petition, the petitioner stated that the minimum education requirement for the proffered position is a "bachelor's degree or higher in

¹⁷ As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed.

¹⁸ According to the *Handbook's* detailed statistics on market research analysts, there were approximately 282,700 persons employed as market research analysts and marketing research specialists in 2010. *Handbook*, 2012-13 ed., available at <http://www.bls.gov/ooh/Business-and-Financial/Market-research-analysts.htm#tab-6> (last accessed June 18, 2013). Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the job postings with regard to the common educational requirements for entry into parallel positions in similar organizations. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

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

business administration." [REDACTED] indicates that the education required to perform the duties listed of the proffered position is a "bachelor's degree in the specific field of Marketing or Business with an emphasis in Marketing."

Upon review of the opinion letter, there is no indication that [REDACTED] possesses any knowledge of the petitioner's proffered position and its business operations beyond that which was provided in the petitioner's initial letter of support. There is no evidence that [REDACTED] has visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. He does not demonstrate or assert in-depth knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise. The very fact that he attributes various attributes to such a generalized treatment of the proffered position undermines the credibility of his opinion.

Furthermore, it does not appear that [REDACTED] is aware that the petitioner designated the proffered position as a Level I (entry) position in the LCA. As previously discussed, this designation is indicative of a comparatively low, entry-level position relative to others within the occupation and signifies that the beneficiary is only expected to possess a basic understanding of the occupation. The petitioner's designation of the position under this wage level signifies that the beneficiary will be expected to work under close supervision and receive specific instructions on required tasks and expected results. Additionally, the beneficiary will be expected to perform routine tasks that require limited, if any exercise of judgment. Moreover, the beneficiary's work will be closely monitored and reviewed for accuracy. It appears that [REDACTED] would have found this information relevant for the opinion letter. Again, without this information, the petitioner has not demonstrated that [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position.

Additionally, the AAO notes that, while [REDACTED] may, in fact, be a recognized authority on various topics, he has failed to provide sufficient information regarding the basis of his claimed expertise on this particular issue. Neither his self-endorsement nor his extensive resume establish his expertise pertinent to the recruiting and hiring practices of organizations seeking to fill positions similar to the proffered position in the instant case. Without further clarification, it is unclear how his education, training, skills or experience would translate to expertise or specialized knowledge regarding the current recruiting and hiring practices of *supermarkets or specialty retail stores* (as designated by the petitioner on the Form I-129 petition and with the NAICS code) similar to the petitioner for marketing analyst positions. [REDACTED] has not demonstrated or asserted in-depth knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise. His opinion does not relate his conclusions to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for the conclusions about the educational requirements for the particular position here at issue.

Moreover, there is no indication that [REDACTED] has published any work or conducted any research or studies pertinent to the educational requirements for market research analysts in the petitioner's industry for similar organizations, and no indication of recognition by professional organizations

that he is an authority on those specific requirements. [REDACTED] claims that his opinion is based on his "many years of education and experience in the field of Marketing"; however, the opinion letter contains no evidence that it is based on scholarly research conducted by [REDACTED] in the specific area upon which he is opining. Notably, [REDACTED] curriculum vitae reflects that the majority of his research relates to logistics and supply chain management. [REDACTED] provides no documentary support for his assertions regarding the education required for the position (e.g., statistical surveys, authoritative industry or government publications, or professional studies). He asserts a general industry educational standard for organizations similar to the petitioner, but he fails to provide the precise basis for his conclusion and his statements are not supported by copies or citations of the research material used.¹⁹

The AAO may, in its discretion, use an advisory opinion or statement submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). As a reasonable exercise of its discretion the AAO discounts the advisory opinion letter as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). For efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the opinion letter into its analyses of each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Thus, based upon a complete review of the record of proceeding, the AAO finds that the petitioner has not established that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. Thus, for the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

The AAO acknowledges that the petitioner and its counsel may believe that the proffered position qualifies as specialty occupation under this criterion of the regulations. In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted various documents, including evidence regarding its business operations. For example, the petitioner submitted an organizational chart, printouts of the petitioner's future website, photos of the petitioner's locale, a marketing plan, and samples of the beneficiary's work product. The petitioner also submitted a blog post and newspaper articles regarding the petitioner's move to a different location. In addition, the petitioner submitted an opinion letter from [REDACTED] discussed at length

¹⁹ The AAO notes that the term recognized authority means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must include how the conclusions were reached, as well as the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

above. The AAO reviewed the record of proceeding in its entirety. However, upon review of the record, the AAO finds that the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of market research analyst.

A review of the record of proceeding indicates that the petitioner has failed to credibly demonstrate that the duties the beneficiary will be responsible for or perform on a day-to-day basis 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. Additionally, the AAO finds that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, the AAO incorporates by reference and reiterates its earlier discussion that the LCA indicates that the position is a low-level, entry position relative to others within the occupation. Based upon the Level I wage rate, the beneficiary is only required to have a basic understanding of the occupation. Moreover, the wage rate indicates that the beneficiary will perform routine tasks that require limited, if any, exercise of independent judgment; her work will be closely supervised and monitored; she will receive specific instructions on required tasks and expected results; and her work will be reviewed for accuracy.

Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."²⁰

The petitioner failed to establish how the beneficiary's responsibilities and day-to-day duties are so complex or unique that the position can be performed only by an individual with a bachelor's degree in a specific specialty, or its equivalent. Thus, based upon the record of proceeding, including the LCA, it does not appear that the proffered position is so complex or unique that it can only be performed by an individual who has completed a baccalaureate program in a specific discipline that directly relates to the proffered position. Specifically, the petitioner fails to demonstrate how the duties of the position 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 it may believe are so complex and unique. While a few related courses may be beneficial, or even required, in performing certain duties of the position,

²⁰ For additional information regarding wage levels as defined by DOL, 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.

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, is required to perform the duties of the proffered position. The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

The AAO observes that the petitioner has indicated that the beneficiary's educational background and prior work experience with the petitioner will assist her in carrying out the duties of the proffered position.²¹ However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. In the instant case, the petitioner does not establish which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner failed to demonstrate that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent. Consequently, 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 bachelor's degree in a specific specialty, or its equivalent, for the position. To this end, 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 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. Upon review of the record of proceeding, the petitioner has not established a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

While a petitioner may believe or otherwise assert that a proffered position requires a specific 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 petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty, or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. In

²¹ Notably, the beneficiary lists her job title for the position with the petitioner as "Assistant Business Development Manager" and claims that she "provide[s] assistance as required to other Analysts of the Department" and "[c]onducts meetings with all levels of managements." The AAO notes that the job duties as stated by the beneficiary are not supported by the documentation provided by the petitioner.

other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent, to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 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 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 petitioner stated in the Form I-129 petition that it has 7 employees and was established in 1991 (approximately twenty years prior to the filing of the H-1B petition). In support of the initial Form I-129 petition, the petitioner submitted an organizational chart which indicates the education level of each individual employed by the petitioner. The AAO observes that the manager holds a degree in engineering, the assistant manager holds a degree accounting as well as a diploma in banking and law, and the remaining eight employees are students or possess high school diplomas. The organizational chart does not indicate that anyone else serves in the proffered position, and the petitioner has indicated that the proffered position is a new position. The educational level of employees who hold positions that are not the proffered position is not relevant to the instant issue of whether the proffered position qualifies as a specialty occupation. The documentation does not establish that the petitioner normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position.

Upon review of the record, the petitioner has not provided sufficient evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is

usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

The AAO acknowledges that the petitioner and counsel may believe that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. Moreover, the AAO reviewed the documentation submitted by the petitioner regarding the proffered position and its business operations (including an organizational chart, printouts of the petitioner's future website, photos of the petitioner's locale, a marketing plan, samples of the beneficiary's work product, news articles and a blog regarding the petitioner), and the opinion letter from [REDACTED] but finds that they fail to establish that the proffered position qualifies as a specialty occupation under this criterion of the regulations. More specifically, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position.

Furthermore, the AAO also reiterates its earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four assignable levels). That is, the Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category of "Market Research Analysts," and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, DOL indicates that a Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, it is simply not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, as previously mentioned, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

The petitioner has submitted inadequate probative evidence to satisfy this criterion of the regulations. Thus, the petitioner has not established that the duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The AAO, therefore, concludes that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As a final note, the AAO acknowledges that on appeal counsel provides a list of cases that he claims are relevant to the instant petition. Specifically, counsel states that "[the instant] case also should be approved because it is a specialty occupation based on prior USCIS approvals of similar positions and recognized AAU and federal Court Precedent approvals of similar positions." The AAO notes that of the cases listed, most are unpublished AAO decisions, one is a published federal district court case, and one contains an incomplete citation. The AAO notes that counsel does not identify any specific similarities between the facts of the cited cases and the instant petition. 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. 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I. & N. Dec. 190. The AAO notes that the petitioner has not provided copies of the cited decisions or

copies of any underlying evidence from these cases that would establish that the facts of these cases are analogous to the facts presented in the instant matter. Furthermore, any suggestion that USCIS must request and review the case file relevant to every unpublished decision cited by counsel, 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. Moreover, 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.

Regarding the cited district court cases, the AAO 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 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. Here, counsel has not provided any specifics as to how the cited cases are relevant to the instant matter. Citations alone without any argument or supporting documentation are not persuasive in establishing that the underlying facts of any particular published decision are analogous to those of the instant petition. As previously noted, the burden of proof for the benefit sought in this matter lies with the petitioner. See 8 U.S.C. § 1361; see also *Matter of Treasure Craft of California*, 14 I. & N. Dec. 190.

For the reasons related in the preceding discussion, the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

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).

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.