



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **AUG 08 2014** OFFICE: VERMONT SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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

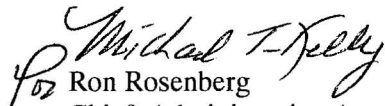
ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

  
Ron Rosenberg  
Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as a 1400-plus employee carbon steel manufacturing/refining company established in 2007. In order to newly employ the beneficiary in a full-time position to which it assigned the job title "Account Representative Special Products" 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 June 12, 2013, concluding that the evidence of record did not establish that the proffered position is a specialty occupation

The record of proceeding contains the following: (1) the Form I-129 and supporting documentation; (2) the director's Request for Evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's decision denying the petition; and (5) the Form I-290B, a brief, and supporting documentation.

As will be discussed below, we find that, upon review of the entire record of proceeding, the evidence of record does not overcome the director's grounds for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

## I. STANDARD OF REVIEW

Counsel correctly notes that the "preponderance of the evidence" is the standard of review to be applied in USCIS adjudication and appeal proceedings. As a preliminary matter, unless the law specifically provides that a different standard applies, we follow the preponderance of the evidence standard as specified in the controlling precedent decision *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). In pertinent part, that decision states the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

\* \* \*

The "preponderance of the evidence" of "truth" is made based on the factual circumstances of each individual case.

\* \* \*

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative

value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. See *INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

*Id.*

Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, we find that the director's determination that the evidence of record does not establish the proffered position as a specialty occupation was correct. Upon reviewing the entire record of proceeding, including all of the submissions on appeal, we find that the evidence of record does not establish that is "more likely than not" or "probably" true that the position described as the subject of this petition is a specialty occupation position. In other words, as the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads us to believe that the petitioner's claim that the proffered position qualifies as a specialty occupation is "more likely than not" or "probably" true.

## II. PROCEDURAL HISTORY

The petitioner's March 25, 2013 letter of support, which was filed with the Form I-129, described the proffered position as follows:

### **ABOUT THE POSITION**

The position of Account Representative Special Products is a professional title that involves the application of economic, international business, and marketing principles to conduct Petitioner's business in the NAFTA market. Petitioner's parent company, [REDACTED], constructed this facility with the goal of obtaining a 5% share of the NAFTA steel market. Therefore, it is necessary to employ highly skilled analysts in its sales and marketing team in order to gauge the accuracy of pricing and volume to produce profits, introduce and maintain an appropriate public image of [the petitioning company] to potential customers in this market, and analyze the nature and needs of these customers in order to develop a broad consumer base for our steel products. This Account Representative must gauge and analyze competitive influences in the NAFTA market in order to increase Petitioner's share, develop, analyze, and monitor sales and marketing activity to ensure that [the petitioning company's] message is appropriately

disseminated to the public, and foster customer communications with all areas of Petitioner's operation to ensure that customers already acquired in this market are kept.

The petitioner went on to state that performance of the above-referenced duties requires "a Bachelor's Degree in a business or marketing field as an entry-level requirement for this position. "

The Labor Condition Application (LCA) which the petitioner submitted as corresponding to this petition had been certified for use with a job offer falling within the "Market Research Analysts" occupational category, at a Level II prevailing wage rate.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 23, 2013. The petitioner was asked to submit probative evidence to establish that the proffered position qualified as a specialty occupation. The director outlined some of the types of specific evidence that could be submitted.

In response to the RFE, the petitioner presented a refined description of the position and its constituent duties, which we shall discuss later in this decision.

The director reviewed the petitioner's RFE response, but found it insufficient to establish eligibility for the benefit sought. The director denied the petition on June 12, 2013.

The petitioner thereafter filed a timely appeal, which is the matter now before us for a decision.

### III. SPECIALTY OCCUPATION ISSUE

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

#### A. Law

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

Section 214(i)(1) of the 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 result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher

degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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.

## B. Preliminary Findings

### 1. Regarding the Position and its Duties, as Described in the Record of Proceeding.

As noted above, the petitioner stated on the Form I-129 that it has been doing business as a carbon steel manufacturing/refining company since 2007, that it currently employs 1400-plus individuals, and that it has a gross annual income of \$240 million. (The petitioner's net annual income was left blank.) Neither the nature of the petitioner's business, its strength and standing as a business entity, nor its ability to provide work for the beneficiary is in question. Rather, the issue before us is whether the evidence of record shows that it is more likely than not that the particular position that is the subject of this petition, and as described in the petition, is a specialty occupation.

The Labor Condition Application (LCA) which the petitioner submitted as corresponding to this petition had been certified for use with a job offer falling within the "Market Research Analysts" occupational category, at a Level II prevailing-wage rate.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 23, 2013. The petitioner was asked to submit probative evidence to establish that the proffered position qualified as a specialty occupation. The director outlined some of the types of specific evidence that could be submitted.

In response to the RFE, the petitioner presented a refined description of the position and its constituent duties, which we shall discuss later in this decision.

As already noted, the petitioner's March 25, 2013 letter of support, which was filed with the Form I-129, described the proffered position as follows:

### **ABOUT THE POSITION**

The position of Account Representative Special Products is a professional title that involves the application of economic, international business, and marketing principles to conduct Petitioner's business in the NAFTA market. Petitioner's parent company, [REDACTED] constructed this facility with the goal of obtaining a 5% share of the NAFTA steel market. Therefore, it is necessary to employ highly skilled analysts in its sales and marketing team in order to gauge the accuracy of pricing and volume to produce profits, introduce and maintain an appropriate public image of [the petitioning company] to potential customers in this market, and analyze the nature and needs of these customers in order to develop a broad consumer base for our steel products. This Account Representative must gauge and analyze competitive influences in the NAFTA market in order to increase Petitioner's share, develop, analyze, and monitor sales and marketing activity to ensure that [the petitioning company's] message is appropriately disseminated to the public, and foster customer communications with all areas of Petitioner's operation to ensure that customers already acquired in this market are kept.

The petitioner went on to state that to perform the above-referenced duties requires "a Bachelor's Degree in a business or marketing field as an entry-level requirement for this position."

The petitioner's response to the RFE presented the duties of the proffered position as follows:

- Monitor and analyze price developments in the NAFTA market for comparable products so that he/she can propose and implement appropriate pricing changes for [the petitioner's] special products.
- Study the profiles of potential customers in the NAFTA market to determine whether they are a source of demand for our special products, whether they can generate more revenue for [the petitioner] through this demand, and whether we can market "package deals" for our regular products along with our special products to these customers.
- Analyzing customer and general market response to [the petitioner's] advertising, marketing, and sales strategies in the NAFTA market and proposing adjustments to these strategies based on data collected in order to maximize the effect of [the petitioner's] messaging and branding.
- Attending periodic meetings to present reports on market analysis and to receive information and updates on [the petitioner's] product quality, inventory, and sales/revenue goals.

- Deal directly with existing and potential customers in order to: gather data that contributes to market analysis; gather data about customers' financial solvency in order to determine eligibility for credit and to determine the best possible prices for our products; and communicate [the petitioner's] commitment to product quality to customers.
- Respond to customer inquiries in the course of gathering data.
- Work on marketing strategy projects for new special products.

Overall, about 40% of this Account Representative's time is spent dealing directly with customers, either over the phone, by e-mail, or through personal meetings. The remaining 60% of his/her time is spent analyzing data gathered from these customers and the marketplace as a whole in order to pursue new business, analyze and adjust pricing and marketing strategies, and determine where and how [the petitioner's] revenues can be increased. The Account Representative's sales and customer service work is a by-product of the primary objective of this position—increasing [the petitioner's] share in the NAFTA market.

We find that, as evident in the RFE-reply's description of the proffered position's duties, quoted immediately above, the petitioner describes the proffered position and its constituent duties in terms of generalized functions – such as "Monitor[ing] and analyz[ing] price developments in the NAFTA market for comparable products"; "Analyzing customer and general market response to [the petitioner's] advertising, marketing, and sales strategies in the NAFTA market"; and "Attending periodic meetings to present reports on market analysis." While such relatively abstract, functional descriptions may be enough to characterize the proffered position as belonging to the Market Research Analysts occupational group, they do not provide sufficiently detailed information to establish either (1) what substantive work would be involved in their actual performance, or (2) what educational level of a body of highly specialized knowledge in any specific field the beneficiary would have to apply to perform them. For instance, the evidence of record does not convey how the beneficiary would "monitor and analyze price developments." Likewise, the evidence of record does not substantively describe the analysis that the beneficiary would perform on customer and general market responses or what methodologies the beneficiary would be expected to apply in performing that function. So too, the evidence in the record of proceeding does not explain either the substantive content of the marketing reports or any necessary connection between (a) whatever knowledge would be used to present such reports and (b) the claimed requirement for at least a bachelor's degree in a specific specialty.

In addition, based on the evidence that has been provided, we find that the petitioner has not established relative complexity, specialization and/or uniqueness as distinguishing aspects of either the proposed duties or the position that they are said to comprise. In other words, as generally and generically described as they are in the record, neither the proffered position nor its constituent duties are developed as sufficiently complex, specialized, and/or unique as to distinguish them from positions

within the "Market Research Analysts" occupational group that can be performed by persons without at least a bachelor's degree in a specific specialty or that do not consist of duties whose nature requires the application of knowledge usually associated with attainment of no less than a bachelor's degree in a specific specialty closely related to the duties of the proffered position.

The petitioner has not provided sufficiently detailed descriptions, documentary evidence and/or explanation to establish that the proffered position is so complex or specialized that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty. So too, the generalized and relatively abstract level at which the petitioner describes the nature of the duties that would be performed if this petition were approved does not show that the position's duties are 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.

Put another way, we find that the evidence of record does not develop relative complexity, specialization, and/or uniqueness as distinguishing characteristics of the proffered position, let alone as factors elevating the position or its duties above other positions in the Market Research Analysts group, or their constituent duties, that do not require a person with at least a bachelor's degree level of knowledge in a specific specialty. While the petitioner and counsel may claim that, by virtue of their claimed level of specialization, complexity, and/or uniqueness, the nature of the proposed duties and the position that they are said to comprise elevate them above positions in the Market Research Analysts occupational group not requiring at least a bachelor's degree in a specific specialty, the evidence of record does not support these claims. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Again, as evident in the job description quoted above, the record of proceeding presents the duties comprising the proffered position in terms of relatively abstract and generalized functions. More specifically, they lack sufficient detail and concrete explanation to establish the substantive nature of the work and associated applications of specialized knowledge that their actual performance would require within the context of the petitioner's particular business operations. Take for example the following task:

Analyzing customer and general market response to [the petitioner's] advertising, marketing, and sale strategies in the NAFTA market and proposing adjustments to these strategies based on data collected in order to maximize the effect of [the petitioner's] messaging and branding.

The evidence of record contains neither substantive explanation nor documentation showing the substantive nature of the work and associated applications of specialized knowledge that would be

involved in the referenced task. Likewise, we see that the petitioner does not provide substantive information with regard to the particular work, methodologies, and applications of knowledge that would be required for the percentage-assigned duties, such as "dealing directly with customers, either over the phone, by e-mail, or through personal meetings –about 40%." Thus, we conclude that, as generally described as all of the elements of the constituent duties are, they do not - even in the aggregate - establish that the proffered position requires the services of a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

In addition, we also here specifically state that we see no probative value in the appeal's Exhibit 3 documents, which the Exhibit 3 coversheet labels as:

Examples of data and analyses the Account Representative must perform using the required body of specialized knowledge.

The first of the two Exhibit 3 documents consists of a 35-page, copyrighted article from [REDACTED] which is entitled [REDACTED]

[REDACTED] The petitioner provides no documentary evidence or explanation to support its contention that whatever data and analysis is presented in, or was used to prepare, this complicated article about stock pricing, the S&P 500, and investors' perceptions regarding the stock market and steel actually reflect work that the beneficiary would be expected to perform.

The second document included in Exhibit 3 is a ten-page "Industry Note," copyrighted and published by a firm named [REDACTED] and the disclosure information at pages 8-10 of the report indicates that [REDACTED] is "a US-registered broker-dealer." The report indicates that it was prepared by an "Equity Analyst" and an "Equity Associate" on the [REDACTED] staff and that it was generated, at least in part, by third-party sources. The title of this report is [REDACTED]

[REDACTED] We see that the petitioner is mentioned several times, particularly with regard to a "slab shortage." While this document indicates that steel and steel-scrap supplies fluctuate with time, and so too market prices, the document does not relate any particular methodologies used in its production, and it does not establish any obvious connection between the work used to prepare the "Industry Note," on the one hand, and the substantive work that the petitioner's Account Representative Special Products would perform.

Neither the petitioner nor any document provided within this record of proceeding substantiates what particular analyses and methodologies were used to produce either of the two documents *or* that, in fact, the proffered position requires the application of such methodologies and analyses. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

## 2. Regarding the Evaluation of the Position's Educational Requirements

In support of the assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted a July 10, 2013 "Expert Opinion Evaluation" document that it obtained from a Professor [REDACTED]. That opinion states in part:

This evaluation will serve to demonstrate that the position of Account Representative Special Products requires that the candidate have the specialized knowledge through advanced post-secondary educational programs or through progressively responsible work experience in the field of Economics, or a closely related field such as Business Administration.

\* \* \*

Companies seeking to employ an Account Representative Special Products require prospective candidates to have a strong foundation in the field of Economics, or a closely related field such as Business Administration, which can only be obtained through a Bachelor's degree or progressively responsible experience in the field of Economics, or a closely related field, such as Business Administration. The skills, knowledge, and analytical thinking acquired through the acquisition of a Bachelor's degree or its equivalent is considered necessary by people in the industry seeking to hire an Account Representative Special Products in the field of Economics, or a closely related field, such as Business Administration, and thus the degree is considered an industry standard requirement for the position. The position requires that the person perform the following duties:

- Market and sell [the petitioner's] special products in the NAFTA market;
- Monitor and analyze price developments in the NAFTA market for comparable products so that he/she can propose and implement appropriate pricing changes for [the petitioner's] special products;
- Study the profiles of potential customers in the NAFTA market to determine whether they are a source of demand for the company's special products to these customers;
- Analyze customer and general market response to [the petitioner's] advertising, marketing, and sales strategies in the NAFTA market and proposing adjustments to these strategies based on data collected in order to maximize the effect of [the petitioner's] messaging and branding;

- Attend periodic meetings to present reports on market analysis and to receive information and updates on [the petitioner's] product quality, inventory, and sales/revenue goals;
- Deal directly with existing and potential customers in order to: gather data that contributes to market analysis, gather data about customers' financial solvency in order to determine eligibility for credit and to determine best possible prices for our products and communicate [the petitioner's] commitment to product quality to customers;
- Respond to customer inquiries in the course of gathering data;
- Work on marketing strategy projects for new special products[.]

We reviewed the letter in its entirety. However, as discussed below, this self-titled "Expert Opinion Evaluation" is neither persuasive nor probative towards establishing that the proffered position qualifies as a specialty occupation position.

Professor [REDACTED] states that he is "qualified to comment on the position of Account Representative Special Products in the field of Economics, or a closely related field of Business Administration" because of (1) the present and many past academic positions that he holds or has held at various United States institutions of higher learning that he lists in his submission, and also (2) his "more than sixteen years of professional experience in the field of Economics or a closely related field such as Business Administration." We also see that Professor [REDACTED] asserts that his "previously and currently held positions in Economics, or a closely related field such as Business Administration, and [his] academic training" qualify him to "determine whether the position requires the candidate to have specialized knowledge in the position of Account Representative Special Products."

While Professor [REDACTED] lists bases for his claim to special knowledge or expertise, his evaluation letter does not explain how any of the listed bases equip him to provide an authoritative opinion on the educational requirements of the particular position here at issue.

We next look to the [REDACTED] letter that Professor [REDACTED] submits as an endorsement. We find, first, that it was produced over a year before the date of the evaluation document that is at issue here (June 10, 2012 versus July 10, 2013). As such, we accord no weight to the [REDACTED] letter other than as substantiating part of the professor's employment experience. We also see that the only relevance that the [REDACTED] endorsement letter would have had would be to show that Professor [REDACTED] held the academic position specified in that letter. The rest of the letter deals with Professor [REDACTED] involvement, at the time of the letter, in an area not at issue here (namely, evaluating work experience for award of possible academic credit.)

Next, we look at the March 3, 2013 letter from a letter from a professor at [REDACTED], New York. The letter attests that Professor [REDACTED] was, at that time, serving as an adjunct professor at that institution. Aside from the date differential, we accord no evidentiary weight to this document either, other than its value in substantiating another portion of Professor [REDACTED] work history. The

reason is that this [REDACTED] letter also addresses Professor [REDACTED] involvement in evaluating experience for possible award of academic credit – an area which is not an issue in this appeal.

Next, we look to Professor [REDACTED] resume'. As extensive as the resume' may be, it is not self-evident how any of the entries in the resume' would establish Professor [REDACTED] as either a recognized authority or as someone otherwise especially equipped to provide an authoritative, reliable, and helpful opinion on the educational requirements for the particular position that is the subject of this petition.

It is the petitioner's burden to establish Professor [REDACTED] as someone whose input on the specialty occupation issue deserves some deference as both reliable and helpful to us in resolving the specialty occupation issue. For all of the reasons discussed above, we find that the petitioner has not met that burden.

Next, we find no indication in the Professor [REDACTED] evaluation document that he possesses any substantive knowledge of the actual work that would be involved in the performance of the proffered position as he outlined it in the portion of his evaluation quoted above. In this regard, we here incorporate into this section of our analysis our earlier comments and findings regarding the evidentiary deficiencies of the generalized and relatively abstract terms in which the record of proceeding presents the proffered position and its duties – for the professor here quotes such generalized and relatively abstract terms as defining the position upon which he opines.

In this regard, we also find that the content of the "Expert Opinion Evaluation" neither states nor reflects any particularized knowledge of the petitioner's marketing operations or the extent and complexity of the particular matters that the beneficiary would address as a marketing analyst working in the context of those operations. In the same vein, we note, for instance, that Professor [REDACTED] does not indicate that he visited the petitioner's business, interviewed any pertinent officials of the petitioner about the particular work and work requirements that that would be involved in the actual performance of the proffered position, studied any work products generated by the petitioner that would reflect the requirements of the proffered position, or made any substantial effort to inform himself about the substantive aspects of the particular position that is the subject of this petition.

Further, it must be noted that there is no indication that the petitioner advised Professor [REDACTED] that the petitioner characterized the proffered position as one for an employee who has a good understanding of the occupation but who will only perform moderately complex tasks that require limited judgment (as indicated by the Level II wage-level on the LCA). The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance."<sup>1</sup> A Level II wage rate is described by

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<sup>1</sup> 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. DOL emphasizes that these guidelines should not be implemented in a mechanical

DOL as follows:

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

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](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

Thus, in submitting an LCA certified for a Level II wage, the petitioner has indicated that the proffered position is a comparatively low-level position relative to others within the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, the selected wage rate indicates that the beneficiary is only required to perform "moderately complex tasks that require limited judgment." It appears that Professor [REDACTED] would have found this information relevant for the opinion letter. In any event, we find this to be a relevant factor that was not addressed. Moreover, without this information, the petitioner has not demonstrated that Professor [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately determine the educational requirements based upon the job duties and responsibilities.

We also find that, as with the other pronouncements in his evaluation document, Professor [REDACTED] cites no studies, surveys, industry publications, DOL resource, or any authoritative source for his statements about company and industry hiring and recruiting practices. For this reason also, the so-called "Expert Opinion Evaluation" merits neither deference nor weight with regard to the specialty occupation issue.

In summary, and for each and all of the reasons discussed above, we conclude that the opinion letter rendered by Professor [REDACTED] is not probative evidence towards establishing the proffered position as a specialty occupation, or, for that matter, towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

We, in our discretion, may use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). As a reasonable exercise of its discretion we discount the advisory opinion letter as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

For efficiency's sake, we hereby incorporate the above discussion and analysis into each of the bases in this decision for dismissing the appeal.

C. Application of the Criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)

Having made the above preliminary findings, we turn now to the application of each supplemental, alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

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

We recognize DOL's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.<sup>2</sup> As noted above, the LCA that the petitioner submitted in support of this petition was certified for a job offer falling within the "Market Research Analysts" occupational category, and we will accordingly analyze the proffered position as such.

The *Handbook* states the following with regard to general duties of market research analysts:

Market research analysts study market conditions to examine potential sales of a product or service. They help companies understand what products people want, who will buy them, and at what price. . . .

Market research analysts typically do the following:

- Monitor and forecast marketing and sales trends
- Measure the effectiveness of marketing programs and strategies
- Devise and evaluate methods for collecting data, such as surveys, questionnaires, and opinion polls
- Gather data about consumers, competitors, and market conditions
- Analyze data using statistical software
- Convert complex data and findings into understandable tables, graphs, and written reports

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<sup>2</sup> The *Handbook*, which is available in printed form, may also be accessed online at <http://www.bls.gov/ooh>. This office's references to the *Handbook* are from the 2014-15 edition available online.

- Prepare reports and present results to clients and management.

Market research analysts perform research and gather data to help a company market its products or services. They gather data on consumer demographics, preferences, needs, and buying habits. They collect data and information using a variety of methods, such as interviews, questionnaires, focus groups, market analysis surveys, public opinion polls, and literature reviews.

Analysts help determine a company's position in the marketplace by researching their competitors and analyzing their prices, sales, and marketing methods. Using this information, they may determine potential markets, product demand, and pricing. Their knowledge of the targeted consumer enables them to develop advertising brochures and commercials, sales plans, and product promotions.

Market research analysts evaluate data using statistical techniques and software. They must interpret what the data means for their client, and they may forecast future trends. They often make charts, graphs, and other visual aids to present the results of their research.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Market Research Analysts," <http://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm#tab-2> (last visited July 23, 2014).

We find that the proffered position and its constituent duties as described in the record of proceeding generally comport with a position within the Market Research Analysts occupational group as discussed in the *Handbook*. Thus, we look to see what the *Handbook* relates about educational requirements for entering this occupational category.

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

Most market research analysts need at least a bachelor's degree. Top research positions often require a master's degree. Strong math and analytical skills are essential.

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, and computer science. Others have backgrounds in business administration, 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.

Some 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 and marketing, and/or earn a Master of Business Administration (MBA). A master's degree is often required for leadership positions or positions that perform more technical research.

*Id.* at <http://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm#tab-4> (last visited July 23, 2014).

The *Handbook's* information regarding entrance into this occupational category do not support a finding that a bachelor's degree, or the equivalent, in a specific specialty is normally required. First, the *Handbook* specifically states that "[m]ost market research analysts need at least a bachelor's degree." The first definition of "most" in *Webster's New College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of market research analyst positions require at least a bachelor's degree, it could be said that "most" market research analyst 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. 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.

Additionally, as evident in the above-quoted section on educational requirements, the *Handbook* indicates that baccalaureate degrees within a wide range of apparently unrelated fields are acceptable for entry into the occupation. We find that the range of degree and "background" fields referenced in the *Handbook* do not constitute a specific specialty: such a wide range of acceptable majors or academic concentrations is not indicative of a position requiring the theoretical and practical application of a distinct body of highly specialized knowledge in a specific specialty, as required by section 214(i)(1) of the Act and its implementing regulation at 8 C.F.R. § 214.2(h). A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question.

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

highly specialized knowledge is essentially an amalgamation of these different specialties.<sup>3</sup> Section 214(i)(1)(B) of the Act (emphasis added).

Here, although the *Handbook* indicates that a bachelor's or higher degree is required for most market research analyst positions, it also indicates that baccalaureate degrees in various and apparently unrelated fields are acceptable for entry into the occupation. In addition to recognizing degrees in disparate fields, i.e., social science and computer science as acceptable for entry into this field, the *Handbook* also states that "others have a background in business administration." As noted above, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147. Therefore, the *Handbook's* recognition that a general, non-specialty "background" in business administration is sufficient for entry into the occupation strongly suggests that a bachelor's degree in a specific specialty is not a standard, minimum entry requirement for this occupation. Accordingly, as the *Handbook* indicates that entry into the Market Research Analysts occupational group does not normally require at least a bachelor's degree in a specific specialty or its equivalent, the *Handbook* does not support the particular position proffered here as being one for which a bachelor's or higher degree, or the equivalent, in a specific specialty is normally the minimum requirement for entry.

Therefore, absent evidence of a direct relationship between the claimed degrees required and the duties and responsibilities of the position, it cannot be found that the proffered position requires anything more than a bachelor's degree without any requirement for a specific academic major. As explained above, 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. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

Next, the *Handbook's* indication that a bachelor's degree in business administration or "background" in "business administration" would provide sufficient preparation for a career as a market research analyst is further evidence that a bachelor's degree in a specific specialty, or the equivalent, is not required for this 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, 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). Although a general-purpose bachelor's degree, such as a degree in business administration without further

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<sup>3</sup> 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.

specification, 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.

Accordingly, as the *Handbook* indicates that entry into the Market Research Analyst occupational group does not normally require at least a bachelor's degree in a specific specialty or its equivalent, it does not support the proffered position as satisfying this first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). That is, in light of the *Handbook's* information on the range of acceptable educational credentials for entry into the market research analyst occupational group, a position's inclusion within this group is not in itself sufficient to establish that position as one for which a baccalaureate or higher degree in a specific specialty or its equivalent is normally a minimum requirement for entry.

Next, we are not persuaded by counsel's reference to the Occupational Information Network (O\*NET OnLine), in the response to the director's RFE. O\*NET OnLine is not particularly useful in determining whether a baccalaureate degree in a specific specialty, or its equivalent, is a requirement for a given position, as O\*NET OnLine's pertinent Job Zone designations makes no mention of the specific field of study from which a degree must come. As was noted previously, we interpret 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. Also, the Specialized Vocational Preparation (SVP) rating is meant to indicate only the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. For all of these reasons, the references made by counsel to O\*NET OnLine are of little evidentiary value to the issue presented on appeal.

When, as here, the *Handbook* does not support the proposition that the proffered position of "Account Representative Special Products" under the "Market Research Analysts" occupational group satisfies this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise satisfies the criterion, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that supports a favorable finding with regard to this criterion. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

We here refer the petitioner back to our earlier comments and findings with regard to Professor [REDACTED] letter. As noted above, we find that the letter from Professor [REDACTED] does not establish that the proffered position is a specialty occupation.

As the evidence in the record of proceeding does not establish that at least a baccalaureate degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the

particular position that is the subject of this petition, the petitioner has not satisfied the criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, we find that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common for positions that are identifiable as being (1) in the petitioner's industry, (2) parallel to the proffered position, and also (3) located in organizations that are similar to the petitioner.

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

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Also, the record contains no letters or affidavits from firms or persons in the industry attesting to such a requirement. Further, there is no evidence of a professional association having made a bachelor's degree in a specific specialty, or the equivalent, a minimum requirement for entry.

Next, we find that the job-vacancy announcements submitted by counsel do not satisfy this alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), either. That is, neither the job-vacancy announcements themselves nor any other evidence within the record of proceeding establish that those advertisements pertain to positions that are parallel to the proffered position, as required for evidence to merit consideration under the first alternative prong is position. In this regard, we make several specific findings.

First, while some of the advertisements bear the title "Market Research Analyst," the occupational group identified in the petitioner's certified LCA, it is the nature of the duties comprising the advertised positions that would determine whether those positions are in fact parallel to the proffered position. However, we see that the duty descriptions of the advertised positions and their constituent duties are not substantially similar to the proffered position's duties as stated in the petitioner's letters. We also see that the extensive IT experience that some of the job advertisements specify as hiring requirements suggests that they involve the application of greater occupational knowledge than the proffered position.<sup>4</sup> So, the job-vacancy advertisements do not establish that the advertised positions are "parallel" to the proffered position.

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<sup>4</sup>By way of example, the [REDACTED] advertisement for a "Business Development Representative" states "Minimum 3 years experiences in aviation, engine or related fields required." The [REDACTED] advertisement for an "Account Manager" states "Minimum of 5-7 years sales experience." The [REDACTED] advertisement for a "Product Marketing Specialist" states "5+ years of experience in a related sales and/or marketing job function. The extensive experience that these job advertisements specify as hiring

In addition, the submitted advertisements do not all specify a requirement for a bachelor's or higher degree in a specific specialty or its equivalent. By way of example, the [REDACTED] advertisement for a "Sales Administrative Analyst (Sales and Marketing) Job" only states "4 Year Degree" without any specification of any particular academic major. Likewise, the [REDACTED] advertisement for a "Commodity Research Financial Analyst" specifies a "Bachelor's Degree" with no indication that the bachelor's degree must be in any particular area or equivalent to a bachelor's or higher degree in a specific specialty. In addition, the [REDACTED] advertisement for a "Market Research Analyst" only states a "4 Year Degree" as the educational requirement.

As the submitted vacancy-announcements are not probative evidence towards satisfying this criterion, further analysis of their content is not necessary.

Therefore, the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common for positions that are identifiable as being (1) in the petitioner's industry, (2) parallel to the proffered position, and also (3) located in organizations that are similar to the petitioner.

Next, we find that the evidence of record does not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree."

The statements of counsel and the petitioner with regard to the claimed complex and unique nature of the proffered position are acknowledged. However, as reflected in our earlier comments and findings regarding the record's description of the duties comprising the proffered position, the petitioner has not provided sufficient evidence to establish why it is more likely than not that the proffered position can only be performed by a person with at least a bachelor's degree in a specific specialty or its equivalent. We here refer the petitioner back to our comments and findings with regard to the generalized and relatively abstract terms in which the proposed duties and the position that they are said to comprise were presented. They simply do not establish a level of complexity or specialization that would elevate the proffered position above positions in the Market Research Analysts occupational group that the *Handbook's* information indicates can be performed by persons without a bachelor's or higher degree, or the equivalent, in a specific specialty.

Counsel and the petitioner's assertions are further undermined by the fact that the petitioner submitted an LCA certified for a job prospect with a wage-level that is only appropriate for an employee who has a good understanding of the occupation but who will only perform moderately complex tasks that require limited judgment.

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requirements suggests that they involve the application of greater occupational knowledge than the proffered position, a Level II position.

As the evidence of record therefore fails to establish how the beneficiary's responsibilities and day-to-day duties comprise a position so complex or unique that the position can be performed only by an individual with at least a bachelor's degree in a specific specialty or its equivalent, the petitioner has not satisfied the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

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

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. Additionally, the record must establish that the imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the proffered position.<sup>5</sup>

Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position would not meet the statutory or regulatory definition of a specialty occupation. *See* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

The director's April 23, 2013 RFE specifically requested the petitioner to document its past recruiting and hiring history with regard to the proffered position. The RFE included the following detailed request for such documentation:

If you publicized the job opening, submitting tear sheets or other advertising documentation may help establish the educational requirements for the proffered position of account representative.

If you have previously employed individuals in the position of account representative submit documentary evidence such as W-2 Forms and copies of degrees and transcripts.

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<sup>5</sup> Any such assertion would be undermined in this particular case by the fact that the petitioner submitted an LCA that had been certified for a Level I wage-level, which is appropriate for use with a comparatively low, entry-level position relative to others within the same occupation.

Thus, the director provided the petitioner with an additional opportunity to establish a history of recruiting and hiring for the proffered position only individuals with a bachelor's or higher degree in a specific specialty, or the equivalent. In response to the RFE, the petitioner stated that it had "not advertised this position to the public," that it did not have "a hiring history for this position," but that it did "have another Account Representative position in this department for which we do require a bachelor's degree." The petitioner identified this person as "current employee, Ms. [REDACTED]" and stated that she "holds a bachelor's degree, a copy of which is attached along with an organizational charge showing her comparable placement to the Beneficiary."

The petitioner did not provide Ms. [REDACTED] job duties and day-to-day responsibilities to support its claim that Ms. [REDACTED] position is the same as the proffered position. The petitioner did not provide any substantive information corroboratively detailing Ms. [REDACTED] actual job duties, her pay level, and other relevant factors such as when Ms. [REDACTED] employment in the position began; whether she had her degree by that time; and the educational requirements, if any, that the petitioner may have specified in recruiting efforts for the job in which Ms. [REDACTED] is now employed. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). Thus, we accord little to no weight to the petitioner's unsubstantiated assertions about Ms. [REDACTED]

Moreover, the petitioner should note that we do not regard one previous hire as establishing the course of consistent recruiting and hiring practices over time that would establish the claimed recruiting and hiring degree-requirement as something that the petitioner normally imposes, as is required by this criterion.

We next note that, on appeal, counsel further asserts that [REDACTED] are "two comparatively situated employees who analyze the market for [the] Petitioner's pipe and tool sales." We note that counsel submits copies of [REDACTED] diplomas indicating that these two persons hold U.S. bachelor's degrees in "Commerce and Business Administration." However, counsel did not submit probative evidence establishing that they are in fact employed by the petitioner (e.g., pay records, wage reports) and that they perform the same position as the one that is the subject of this petition. In this regard, the petitioner should also realize that the language of this criterion limits its scope "to the position," and that, consequently, evidence about "comparable" positions is not relevant in the application of this criterion. Further, as counsel's assertions about the positions held by Mr. [REDACTED] and Mr. [REDACTED] are not substantiated by documentary evidence, we note again that, without documentary evidence to support her claims, the assertions of counsel will not satisfy the petitioner's burden of proof, as the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. Also, we note again that going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

Moreover, with regard to the evidence of U.S. bachelor's degrees in "Commerce and Business Administration," we observe that, as reflected in this decision's earlier discussions about the range of acceptable degrees indicated in the *Handbook*, acceptance of such generalized or general-purpose degrees is not evidence of a requirement for at least a bachelor's degree in a specific specialty.

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

Next, we find that the evidence of record does not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires the petitioner to establish that the nature of the proffered position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in the specific specialty or its equivalent.

As reflected in this decision's earlier discussions and findings regarding record's duty descriptions - which we hereby incorporate into this present analysis - the nature of the proposed duties as described in the record of proceeding do not show the level of specialization and complexity required to satisfy this criterion. As generically and generally as they were described, the duties of the proposed position are not presented with sufficient detail and explanation to establish the substantive nature of the duties as they would be performed in the specific context of the petitioner's particular business operations. Also as a result of the generalized and relatively abstract level at which the duties are described, the record of proceeding does not establish their nature as so specialized and complex that their performance would require knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty, or the equivalent. By the same token and as evident in the duty descriptions themselves, the nature of the proposed duties are not developed with sufficient substantive detail to distinguish them from the nature of the duties of positions within the Marketing Research Analysts occupational group whose performance does not require the application of knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty.

Furthermore, we reiterate our earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA at a Level II wage. That is, the Level II wage designation is indicative of a lower level position relative to others within the occupational category and hence one not likely distinguishable by relatively specialized and complex duties. Without further evidence, petitioner has not demonstrated that its proffered position is one with specialized and complex duties. For instance, such a position would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a 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."

For the reasons discussed above, we conclude that the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), as the evidence of record has not established that the duties of the proffered position are 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. The evidence in the record of proceeding fails to establish that the proposed duties meet the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As the petitioner has not satisfied at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation. Accordingly, the appeal will be dismissed, and the petition will be denied.

#### D. Regarding Decisions Referenced by Counsel

We have considered all of counsel's arguments but were not persuaded by them. Here we will discuss court decisions central to counsel arguments on appeal, as well as some decisions cited prior to the appeal.

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

We agree with the aforementioned proposition that "[t]he knowledge and not the title of the degree is what is 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 (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in the specific specialty (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added). For the aforementioned reasons, however, the petitioner has failed to meet its burden and establish that the particular position offered in this matter requires a bachelor's or higher degree in a specific specialty, or its equivalent, directly related to its duties in order to perform those duties.

In any event, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*.<sup>6</sup> We also

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<sup>6</sup> It is noted that the district judge's decision in that case appears to have been based largely on the many factual errors made by the service center in its decision denying the petition. We further note that the service center director's decision was not appealed to this office. Based on the district court's findings and description of the record, if that matter had first been appealed through the available administrative process we may very well have remanded the matter to the service center for a new decision for many of the same

note that, in contrast to the broad precedential authority of the case law of a United States circuit court, we are not bound to follow the published decision of a United States district court in matters arising even within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before us, the analysis does not have to be followed as a matter of law. *Id.* at 719.

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

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

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

Instead, USCIS must examine the actual employment requirements and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. Again, in this pursuit, the critical element is not the title of

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reasons articulated by the district court if these errors could not have been remedied by us in our *de novo* review of the matter.

the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent as the minimum for entry into the occupation as required by the Act.

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

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

Second, in promulgating the H-1B regulations, the former INS made clear that the definition of the term "specialty occupation" could not be expanded "to include those occupations which did not require a bachelor's degree in the specific specialty." 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991). More specifically, in responding to comments that "the definition of specialty occupation was too severe and would exclude certain occupations from classification as specialty occupations," the former INS stated that "[t]he definition of specialty occupation contained in the statute contains this requirement [for a bachelor's degree in the specific specialty or its equivalent]" and, therefore, "may not be amended in the final rule." *Id.* In any event, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Tapis Int'l v. INS*.

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

In the interests of a comprehensive review, we will here address some decisions cited by counsel prior to the director's decision.

We are not persuaded by counsel's comments on *Unical Aviation, Inc. v. INS*, 248 F. Supp. 2d 931 (D.C. Cal 2002). The material facts of the present proceeding are distinguishable from those in *Unical*. Specifically, *Unical* involves: (1) a position for which there was a companion position held by a person with a Master's degree; (2) a record of proceedings that included an organizational chart showing that all of its employees in the marketing department held bachelor's degrees; and, in the court's words, (3) "sufficient evidence to demonstrate that there is a requirement of specialized study for [the beneficiary's] position." Also, the proffered position and related duties in the present proceeding are different from those in *Unical Aviation, Inc.*, where the beneficiary was to liaise with airline and Maintenance Repair Organization ("MRO") customers in China for supply of parts and services; analyze and forecast airline and MRO demands to generate plans to capture business; provide after-sales services to customers in China; and develop new products and services for the China market. Moreover, there is no indication in the record of proceeding that the petitioner is in the same industry or is in any way similar in size or type of business as *Unical Aviation, Inc.*

Further, in *Unical Aviation* the Court partly relied upon *Augut, Inc. v. Tabor*, 719 F. Supp. 1158 (D. Mass. 1989), for the proposition that Immigration and Naturalization Service (INS, now USCIS), had not used an absolute degree requirement in applying the "profession" standard at 8 U.S.C. § 1101(a)(32) for determining the merits of an 8 U.S.C. § 1153(a)(3) third-preference visa petition. That proposition is not relevant here, because the H-1B specialty occupation statutes and regulations, not in existence when INS denied the *Augut, Inc.* third-preference petition, mandate not just a baccalaureate or higher degree, or its equivalent, but a degree "in the specific specialty." section 214(i)(1) of the Act; *see also* 8 C.F.R. § 214.2(h)(4)(ii). We also note that, in contrast to the broad precedential authority of the case law of a United States circuit court, this office is not bound to follow the published decision of a United States district court in matters arising even within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before us, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Finally, we note that, prior to the director's decision, counsel referred to an unpublished decision from this office relating to a market research analyst in the context of a Form I-140, Immigrant Petition for Alien Worker as a Member of the Professional Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to 203(b)(2) of the Immigration and Nationality Act. A copy of said decision was also provided by counsel. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision relating to a Form I-140. While 8 C.F.R. § 103.3(c) provides that this office's precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

### III. CONCLUSION AND ORDER

Again, as the petitioner has not satisfied at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation. Accordingly, the appeal is dismissed.

An application or petition that fails to comply with the technical requirements of the law may be denied by this office 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 we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of our 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, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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