

(b)(6)



U.S. Citizenship
and Immigration
Services

DATE: JUL 17 2014

OFFICE: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner:

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.

I. INTRODUCTION

On the Form I-129 visa petition, the petitioner describes itself as a seven-employee full service marketing, advertising, and public relations company¹ established in 2008.² In order to employ the beneficiary in what it designates as a full-time global business development strategist position at a salary of \$30,000 per year,³ the petitioner seeks to classify him 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 found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on May 9, 2013. Within the RFE, the director outlined the specialty occupation regulatory criteria and requested specific documentation to establish that the proffered position qualifies for classification as a specialty occupation. The director denied the petition, concluding that the evidence of record failed to establish that the proffered position qualifies for classification as a specialty occupation.

The record of proceeding before us contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B and supporting documentation.

Beyond the decision of the director, we find that the petitioner provided as the supporting LCA for this petition an LCA which does not correspond to the petition, in that: (1) the LCA was certified for a wage level below that which is compatible with the level of responsibility the petitioner claimed for the proffered position through its descriptions of its constituent duties; and (2) the occupational category for which the LCA was certified (Advertising Sales Agents) does not correspond to the proffered position and its constituent duties as described in the record of proceeding. This aspect of the petition

¹ The petitioner provided a North American Industry Classification System (NAICS) Code of 541810, "Advertising Agencies." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "541810 Advertising Agencies," <http://www.naics.com/naics-code-description/?code=541810> (last visited July 9, 2014).

² The petitioner explained that although it was reorganized in 2008, it has actually been in business since 1986.

³ The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for use with a job prospect within the "Advertising Sales Agents" occupational classification, SOC (O*NET/OES) Code 41-3011, and a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels.

undermines the credibility of the petition as a whole and any claim as to the proffered position or the duties comprising it as being particularly complex, unique, and/or specialized.⁴

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

II. STANDARD OF PROOF

In the exercise of our administrative review in this matter, as in all matters that come within our purview, the AAO follows the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010), unless the law specifically provides that a different standard applies. 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. at 375-76.

⁴ The AAO conducts appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and we identified this issue in the course of that review.

Again, we conduct our review of service center decisions on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d at 145. In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon our review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support counsel's contentions that the evidence of record requires that the petition at issue be approved. 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 that the proffered position is a specialty occupation was correct. Upon our review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, we find that the evidence of record does not establish that the claim of a proffer of a specialty occupation position is "more likely than not" or "probably" true. In other words, as the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads 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.

In similar fashion, as indicated by our supplemental finding made on appeal regarding the LCA, the evidence of record also does not lead us to believe the petitioner's implicit claim that the LCA submitted by the petitioner corresponds to the petition is "more likely than not" or "probably" true.

III. LAW

To meet its burden of proof in establishing the proffered position as a specialty occupation, the evidence of record must establish that the employment the petitioner 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.

IV. ANALYSIS

Based upon a complete review of the record of proceeding, we agree with the director and find that the evidence fails to establish that the position as described constitutes a specialty occupation.

A. The Proffered Position and its Constituent Duties

In a March 31, 2013 letter submitted in support of the petition,⁵ the petitioner stated that the beneficiary will be responsible for the following duties:

[H]e will be responsible for overseeing the development of profitable new client and vendor partnerships. He will be responsible for the direct sale of our marketing, advertising, and public relations services. He will manage multiple media platforms and contribute to the development and refinement of our agency's vision.

Additionally, [the beneficiary] will devise monetizing strategies for the effective deployment of multimedia advertising campaign, while providing ongoing financial and business analysis. He will strategize, develop, review, and report on the execution of our business development program, and will liaise with the executive team to implement strategic and operational sales plans.

Moreover, [the beneficiary] will work with our team to produce efficient and effective marketing, advertising, and promotional plans and develop budgets for advertising campaigns. He will develop leads for prospective clients, and perform market research in his assigned industry categories. Further, he will prepare and deliver sales presentations to new and existing clients, providing information on available advertising options to increase sales. [The beneficiary] will also utilize

⁵ In a letter dated March 31, 2013, counsel for the petitioner stated that a letter from [REDACTED] in support of petition was submitted with the petition; however, the record of proceeding does not contain this letter.

professional networks and industry forums in order to generate new multimedia advertising business.

In response to the director's RFE, the petitioner submitted a letter from [REDACTED] dated June 7, 2013. In her letter, Ms. [REDACTED] stated that the proffered position is a newly created position and that the beneficiary would be "required to direct and oversee [the petitioner's] global business development strategy, enabling me to focus more on my day to day responsibilities as CEO." Ms. [REDACTED] described the duties and requirements of the proffered position as follows:

The Global Business Development Strategist will be responsible for planning, estimating, organizing, promoting, and selling the services of [the petitioner] based upon customer, competitor, and company analysis. The position requires the utilization of multi-platform advertising and public relations techniques to develop new sales and maximize profitability. More specifically, 30% of the Global Business Development Strategist's time will be spent developing leads for prospective clients and gaining in-depth knowledge of client industries and associations. Another 30% will be spent delivering in-person sales presentations to qualified leads. During client interactions, the Global Business Development Strategist will interact with personnel on various levels of the client organization, including business owners, Chief Executive Officers, Chief Operating Officers, Marketing Directors, Business Development Directors, Digital Media Specialists, and Brand Managers. These responsibilities of the position require a sophisticated level of understanding of the advertising industry, especially the inner workings of the Client-Agency-Media buying partnership. Qualified candidates will draw upon their educational background to understand and analyze how to advertising function fits into different industry categories to maximize effective use of media further, an advanced knowledge of marketing and market research gained through the attainment of at least a Bachelor's degree in Media, Advertising, Communication, or a related field is required to effectively develop and deliver sales presentations tailored to each client's specific needs.

The Global Business Development Strategist will spend 10% of his time devising monetizing strategies for the effective deployment of multiplatform campaigns, 10% of his time performing financial and business analysis, and 2.5% on formulating budgets for multimedia campaign planning and execution. These duties lie at the core of any effective business development effort, and require a deep understanding of market dynamics, along with the insight to determine the scope of leveraging resources for increased profits. With regard to the position, these concepts apply both to our agency and the client company. A constant relationship must be maintained between the agency and the client in terms of financial assessment and business analysis. This requires a mastery of the market factors that affect business and consumer behavior in response to advertising, which is most easily obtained by completing a degree in Media, Advertising, or Communication.

Furthermore, the Global Business Development Strategist will spend 10% of his time strategizing, developing, reviewing, and reporting on business development activities. He will liaise with company management to discuss strategic and operational plans for 5% of his time, and will spend the remaining 2.5% working to ensure efficient and effective marketing, advertising, and promotional planning. These activities require clear knowledge of how an advertising agency functions, along with an understanding of the overlapping domains of marketing, advertising, and promotions.

In addition, the petitioner submitted a letter, dated May 23, 2013, from [REDACTED], Vice President, [REDACTED], in which Ms. [REDACTED] summarized the duties of the proffered position and concluded that to perform such duties "requires one to attain a formal educational background of a bachelor's degree in a relevant field such as media advertising."

The petitioner also submitted a letter, dated May 23, 2013, from [REDACTED], an instructor and a Ph.D. candidate at [REDACTED]. We note that the content and the language of Ms. [REDACTED] letter are very similar to Ms. [REDACTED] letter and it summarizes the duties of the proffered position with an identical language that contained in Ms. [REDACTED] letter. Ms. [REDACTED] arrived at a similar conclusion, "[t]o fulfill these duties one must possess the equivalent of a bachelor's degree in a field such as media or advertising."

The record also contains a letter, dated June 11, 2013, from [REDACTED], Ph.D., CFA, an Associate Professor of Finance and MBA Director at the [REDACTED]. Dr. [REDACTED] states that he was "informed" about the duties of the proffered position and that "[i]t would be [his] opinion that in order to perform the duties of [the proffered position] one would at the very least need a Bachelor's degree such as [the beneficiary's]."

B. The Letters Submitted as Expert Testimony

We will first address the letters from Ms. [REDACTED] and Ms. [REDACTED]. As stated earlier, these two letters are virtually identical in language and content. Both letters summarize the duties proposed for the global business development strategist position and state their authors' belief that the duties require at least a bachelor's degree in media or advertising to perform them. Upon review, we find that these letters do not constitute probative evidence of the proffered position satisfying any criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A).⁶ Similarly, Dr. [REDACTED] concludes

⁶ The use of identical language and phrasing across the various letters suggest that the language in the letters is not the authors' own. *Cf. Surinder Singh v. BIA*, 438 F.3d 145, 148 (2d Cir. 2006) (upholding an adverse credibility determination in asylum proceedings based in part on the similarity of the affidavits); *Mei Chai Ye v. U.S. Dept. of Justice*, 489 F.3d 517, 519 (2d Cir. 2007) (concluding that an immigration judge may reasonably infer that when an asylum applicant submits strikingly similar affidavits, the applicant is the common source).

that the proffered position requires a Bachelor's degree, but does not include an analysis demonstrating how he arrived at his conclusion.

At the outset, we note that these letters are not accompanied by, and do not expressly state the full content of, whatever documentation, personal observations, and/or oral transmissions upon which they may have been based. For example, their authors do not indicate whether they visited the petitioner's business premises or spoke with anyone affiliated with the petitioner, so as to ascertain and base their opinions upon, the substantive nature and educational requirements of the proposed duties as they would be actually performed. Nor did they specify and discuss any studies, treatises, surveys, authoritative industry sources or relevant other authoritative publications, and, significantly, they did not discuss the pertinent occupational information provided in the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*). It appears as though authors did not base their opinions on any objective evidence, but instead simply summarized the duties of the global business development strategist position as provided by the petitioner. We find that, for these reasons alone, and independent of the other material deficiencies to be noted below, these letters are not probative evidence of the proffered position satisfying any of the criteria described at 8 C.F.R. § 214.2(h)(4)(iii)(A).

However, even if these foundational deficiencies were not present, these letters would still not satisfy any of the criteria described at 8 C.F.R. § 214.2(h)(4)(iii)(A). First, it is noted that authors did not discuss the duties of the proffered position in any substantive detail. To the contrary, they simply summarized the duties of the global business development strategist position in a bullet-point fashion and concluded in very brief letters that one must possess a bachelor's degree in media or advertising to perform the duties of this position without providing an in-depth discussion on how they arrived at their conclusions. The extent of meaningful analysis involved in the formulation of their letters, therefore, is not apparent.

Furthermore, none of the authors indicates whether they considered, or were even aware of, the fact that the petitioner submitted an LCA certified for a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation which, signifies that the beneficiary is only expected to possess a basic understanding of the occupation. We consider this a significant omission, in that it suggests an incomplete review of the position in question and a faulty factual basis for the author's ultimate conclusions regarding the educational requirements of the positions upon which they opine.

As noted earlier, the LCA submitted by the petitioner in support of the instant position was certified for use with a job prospect within the "Advertising Sales Agents" occupational category, SOC (O*NET/OES) Code 41-3011, and a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels. The *Prevailing Wage Determination Policy Guidance* issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide

experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.⁷

The proposed duties' level of complexity, uniqueness, and specialization, as well as the level of independent judgment and occupational understanding required to perform them, are questionable, as the petitioner submitted an LCA certified for a Level I, entry-level position. The LCA's wage-level indicates that the proffered position is actually a low-level, entry position relative to others within the same occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to possess a basic understanding of the occupation; that he will be expected to perform routine tasks requiring limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results. The authors' omission of such an important factor as the LCA wage-level significantly diminishes the evidentiary value of their assertions.

For all of these reasons, we find that the letters from Ms. [REDACTED], Ms. [REDACTED] and Dr. [REDACTED] are not probative evidence towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

We may, in our discretion, 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).

C. The LCA Submitted by the Petitioner in Support of the Petition

We will next address the supplemental finding we have made on appeal, which independently precludes approval of this petition: our finding that the LCA submitted by the petitioner in support of this petition does not correspond to the petition and does not establish that the petitioner will pay the beneficiary an adequate salary.

As noted, the LCA submitted by the petitioner in support of the instant position was certified for use with a job prospect within the "Advertising Sales Agents" occupational classification, SOC (O*NET/OES) Code 41-3011, and a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels. Wage levels should be determined only after selecting the most

⁷ U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf (last visited July 9, 2014).

relevant O*NET code classification. A prevailing wage determination is then made by selecting one of four wage levels for an occupation based upon a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.⁸

Prevailing wage determinations start at Level I (entry) and progress to a wage that is commensurate with that of Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.⁹ 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 petitioner has classified the proffered position at a Level I wage. Pursuant to the *Prevailing Wage Determination Policy Guidance* set forth previously, Level I wage is only appropriate for a position requiring only "a basic understanding of the occupation" expected of a "worker in training" or an individual performing an "internship." That designation indicates further that the beneficiary will only be expected to "perform routine tasks that require limited, if any, exercise of judgment." However, we find that many of the duties and job requirements described by counsel and the petitioner exceed this threshold.

For example, in its June 7, 2013 letter the petitioner referenced the "sophisticated level of understanding of the advertising industry" required for the position, and stated that the beneficiary would "direct and oversee our global business development strategy." The petitioner also stressed the importance of the position to the company.

⁸ For additional information on wage levels, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf (last visited July 9, 2014).

⁹ 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 similar fashion, counsel stressed the "complicated and unique" nature of the proposed duties on the Form I-290B, and in his appellate brief he discussed "the sophisticated and complicated nature of the position."

These stated duties and related claims indicate that the beneficiary will be required to exercise extensive independent judgment in the proffered position, which conflicts with the Level I wage-rate designation.

We therefore question the level of complexity, independent judgment and understanding actually required for the proffered position, as the LCA was 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 he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he 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]").

It is noted that the petitioner would have been required to offer a significantly higher wage to the beneficiary in order to employ him at a Level II (qualified), a Level III (experienced), or a Level IV (fully competent) level. Again, the petitioner has offered the beneficiary a wage of \$30,000 per hour, which satisfied the Level I (entry level) prevailing wage in the [REDACTED] Statistical Area at the time the LCA was certified.¹⁰ However, in order to offer employment to the beneficiary at a Level II (qualified) wage-level, which would involve only "moderately complex tasks that require limited judgment," the petitioner would have been

¹⁰ U.S. Dep't of Labor, Foreign Labor Certification Data Center, Online Wage Library, FLC Quick Search, "Advertising Sales Agents," <http://www.flcdatcenter.com/OesQuickResults.aspx?code=41-3011&area=42540&year=13&source=1> (last visited July 9, 2014).

required to raise his salary to at least \$40,269 per year. The Level III (experienced) prevailing wage was \$50,544 per year, and the Level IV (fully competent) prevailing wage was \$60,819 per year.¹¹

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 an adequate salary for the beneficiary's work, as required under the Act, if the petition were granted for a higher-level and more complex position as claimed elsewhere in the petition.

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. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile 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).

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

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

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

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

Certification by 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

¹¹ *Id.*

classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.¹²

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

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, 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. We find 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 LCA submitted by the petitioner 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. Thus, even if it were determined that the petitioner had overcome the director's ground for denying this petition (which it has not), the petition could still not be approved.

¹² *See also* 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991) ("An approved labor condition application is not a factor in determining whether a position is a specialty occupation").

The petitioner's certification of the LCA under the O*NET occupational code classification of "Advertising Sales Agents" constitutes a second reason why the submitted LCA does not correspond to the petition, as the proposed duties as described in the record of proceeding apparently do not comprise a position which falls within the Advertising Sales Agents occupational category designated in the LCA. On the Form I-290B, counsel argued that "the duties of that position [an advertising sales agent] have nothing to do with the position which is the basis of the H-1B petition." In his appellate brief, counsel asserts the following:

[T]he Director substantially relies on the inapplicable job title of the position of "Advertising Sales Agent" [.]

Counsel goes on to differentiate the duties of the proffered position from those of positions falling within the "Advertising Sales Agents" occupational category for which the LCA was certified, and claims that the duties of the proffered position are more closely match those of positions falling within the "Public Relations Managers Specialists" occupational category. Counsel does not, however, explain why the petitioner submitted an LCA certified for a job prospect falling within the "Advertising Sales Agents" occupational category if the proffered position is not in fact such a position.

DOL guidance specifies that when ascertaining the proper occupational classification, a determination should be made by "consider[ing] the particulars of the employer's job offer and compar[ing] the full description to the tasks, knowledge, and work activities generally associated with an O*NET-SOC occupation to insure the most relevant occupational code has been selected." See *Prevailing Wage Determination Policy Guidance*, *supra*. In this case, counsel argues that the beneficiary would not be working in a position that falls within the occupational category for which the LCA was certified. As such, the evidence of record does not establish that this LCA actually corresponds to this petition for this additional reason.

D. Review of the Director's June 25, 2013 Decision Denying the Petition

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

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.¹³ As noted

¹³ The *Handbook*, which is available in printed form, may also be accessed online at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are from the 2014-15 edition available online.

above, the LCA that the petitioner submitted in support of this petition was certified for a job offer falling within the "Advertising Sales Agents" occupational category.¹⁴

The *Handbook* states the following with regard to the duties of positions falling within the "Advertising Sales Agents" occupational category:

Advertising sales agents, also called *advertising sales representatives*, sell advertising space to businesses and individuals. They contact potential clients, make sales presentations, and maintain client accounts.

Duties

Advertising sales agents typically do the following:

- Locate and contact potential clients to offer their firm's advertising services
- Explain to clients how specific types of advertising will help promote their products or services in the most effective way possible
- Provide clients with estimates of the costs of advertising products or services
- Process all correspondence and paperwork related to accounts
- Prepare and deliver sales presentations to new and existing clients
- Inform clients of available options for advertising art, formats, or features and provide samples of previous work for other clients
- Deliver advertising or illustration proofs to clients for approval
- Prepare promotional plans, sales literature, media kits, and sales contracts
- Recommend appropriate sizes and formats for advertising

Most advertising sales agents work outside the office occasionally, meeting with clients and prospective clients at their places of business. Some may make telephone sales calls as well—calling prospects, attempting to sell the media firm's advertising space or time, and arranging follow-up appointments with interested prospects.

¹⁴ As noted above, counsel claims on appeal that the duties of the proffered position are actually more similar to those of positions falling within the "Public Relations Managers and Specialists" occupational category. If this argument were accepted, the petition would be automatically denied over the failure of the LCA to correspond to the petition. Furthermore, even if the proffered position were established as falling within the "Public Relations Managers and Specialists" occupational category, a review of the excerpt from the 2012-13 edition of the *Handbook* submitted by counsel does not indicate that, simply by virtue of its occupational classification, such a position qualifies as a specialty occupation in that the *Handbook* does not state a normal minimum requirement of a U.S. bachelor's or higher degree in a specific specialty or its equivalent for entry into the occupation of public relations managers and specialists. As such, absent evidence that the position of global business development strategist satisfies one of the alternative criteria available under 8 C.F.R. § 214.2(h)(4)(iii)(A), the instant petition could not be approved for this additional reason.

A critical part of building relationships with clients is learning about their needs. Before the first meeting with a client, a sales agent gathers background information on the client's products, current clients, prospective clients, and the geographic area of the target market.

The sales agent then meets with the client to explain how specific types of advertising will help promote the client's products or services most effectively. If a client wishes to proceed, the advertising sales agent prepares and presents an advertising proposal to the client. The proposal may include an overview of the advertising medium to be used, sample advertisements, and cost estimates for the project.

Because of consolidation among media industries, agents increasingly sell several types of ads in one package. For example, agents may sell ads that would be found in print editions as well as online editions for a particular publication such as a newspaper.

In addition to maintaining sales and overseeing their accounts, advertising sales agents' other duties include analyzing sales statistics and preparing reports about clients' accounts. They keep up to date on industry trends by reading about new and existing products, and they monitor the sales, prices, and products of their competitors.

In many firms, the advertising sales agent drafts contracts, which specify the cost and the advertising work to be done. Agents also may continue to help the client, answering questions or addressing problems the client may have with the proposal.

Sales agents may also be responsible for developing sales tools, promotional plans, and media kits, which they use to help make a sale. In other cases, firms may have a marketing team that sales agents work with to develop these sales tools.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Advertising Sales Agents," <http://www.bls.gov/ooh/sales/advertising-sales-agents.htm#tab-2> (last visited July 9, 2014).

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

Although a high school diploma is typically enough education for an entry-level advertising sales position, some employers prefer applicants with a bachelor's degree. Proven sales success and communication skills are essential. Most training for advertising sales agents takes place on the job.

Education

Although a high school diploma is typically the minimum education requirement for an entry-level advertising sales position, some employers prefer applicants with a college degree. Publishing companies with large circulations or broadcasting stations with a large audience may prefer workers with at least a college degree. Courses in marketing, communications, business, and advertising are helpful. For those who have a proven record of successfully selling other products, educational requirements are not likely to be strict.

Training

Most training takes place on the job and can be either formal or informal. In most cases, an experienced sales manager instructs a newly hired advertising sales agent who lacks sales experience. In this one-on-one environment, supervisors typically coach new hires and observe them as they make sales calls and contact clients. Supervisors then advise the new hires on ways to improve their interaction with clients. Employers may bring in consultants to lead formal training sessions when agents sell to a specialized market segment, such as automotive dealers or real estate professionals.

Advancement

Agents with proven leadership ability and a strong sales record may advance to supervisory and managerial positions, such as sales manager, account executive, or vice president of sales. Successful advertising sales agents may also advance to positions in other industries, such as corporate sales.

Important Qualities

Communication skills. Advertising sales agents must be persuasive during sales calls. In addition, they should listen to the client's desires and concerns, and recommend an appropriate advertising package.

Initiative. Advertising sales agents must actively seek new clients, keep in touch with current clients, and expand their client base, in order to meet sales quotas.

Organizational skills. Agents work with many clients, each of whom may be at a different stage in the sales process. Agents must be well-organized to keep track of their clients or potential clients.

Self-confidence. Advertising sales agents should be confident when calling potential clients (cold calls). Because potential clients are often unwilling to commit on a first call, agents often must continue making sales calls, even if rejected at first.

Id. at <http://www.bls.gov/ooh/sales/advertising-sales-agents.htm#tab-4> (last visited July 9, 2014).

The *Handbook* does not report that a baccalaureate or higher degree, in a specific specialty, or its equivalent is normally the minimum requirement for entry into positions within this occupational category. On the contrary, this passage of the *Handbook* reports that although a high school diploma is typically the minimum education requirement for an entry-level advertising sales agent position,¹⁵ some employers prefer applicants with a college degree. Furthermore, the *Handbook* does not state a requirement for a bachelor's degree in a specific specialty; rather it states that courses in marketing, communications, business, and advertising are helpful in this 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 (1) to the petitioner's industry; and (2) for positions within that industry that are both: (a) parallel to the proffered position, and (b) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

Here and as already discussed, the evidence of record does not establish that the petitioner's 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, as we discussed earlier, the letters from Ms. [REDACTED] Ms. [REDACTED] and Dr. [REDACTED] are not probative evidence towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). While the assertions of the petitioner, Ms. [REDACTED] Ms. [REDACTED] and Dr. [REDACTED] with regard to an industry-wide recruiting and hiring standard are acknowledged, the record contains no evidence to support those assertions. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

¹⁵ As discussed above, by virtue of its wage-level designation on the LCA, the petitioner effectively attested that the proffered position is an entry, low-level position relative to others in the occupation.

We also find that the petitioner's reliance upon the job vacancy advertisements is misplaced. In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner submitted copies of six advertisements as evidence that its degree requirement is standard amongst its peer organizations for parallel positions in the insurance sales industry. The advertisements provided, however, establish at best that although a bachelor's degree may be generally required, a bachelor's degree in a *specific specialty* or its equivalent is not. Furthermore, the [REDACTED] announcement for "Senior Business Development Manager, Advertising Sales Partnerships Job" indicates that the employer would accept eight years of relevant experience post high school in lieu of a bachelor's degree plus four years of experience. Even though this position is a senior level position, it does not require a minimum of a bachelor's degree in a specific specialty, which undermines the petitioner's contention that a bachelor's degree in a specific specialty is an industry standard for the proffered position which, as indicated by the wage-level designation on the LCA, is an entry-level position.

In addition, even if all of the job postings indicated that a bachelor's or higher degree in a specific specialty or its equivalent were required, the petitioner fails to establish that the submitted advertisements are relevant in that the posted job announcements are not for parallel positions in similar organizations in the same industry. The postings lack sufficient information regarding the actual employers to conduct a legitimate comparison of the organizations to the petitioner. The petitioner failed to supplement the record of proceeding to establish that the advertising organizations are similar to it. That is, the petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organizations. Without such evidence, job advertisements submitted by a petitioner are generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. It is not sufficient for the petitioner to claim that the organizations are similar and in the same industry without providing a legitimate basis for such an assertion. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici* at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190). Furthermore, the petitioner did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. Moreover, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices. Finally, we note that five of these positions require work experience. The proffered position, however, is a Level I, entry-level position.

As such, even if the job announcements supported the finding that the position of global business development strategist required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.¹⁶

¹⁶ Also, although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from less than a dozen job postings with regard to the common educational requirements for entry into parallel positions in similar religious organizations. See

As a result, the petitioner has not established that similar companies in the same industry routinely require at least a bachelor's degree in a specific specialty or its equivalent for parallel positions.

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

In the instant case, the evidence of record does not credibly demonstrate relative complexity or uniqueness as aspects of the proffered position. Specifically, it is unclear how the global business development strategist, as described, necessitates the theoretical and practical application of a body of highly specialized knowledge such that a person who has attained a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them. Rather, we find that, as reflected in this decision's earlier quotation of duty descriptions from the record of proceeding, the evidence of record does not distinguish the proffered position from other positions falling within the "Advertising Sales Agents" occupational category, which, the *Handbook* indicates, do not necessarily require a person with at least a bachelor's degree in a specific specialty or its equivalent to enter those positions.

We incorporate here by reference and reiterate our earlier discussion regarding the LCA and its indication that the petitioner would be paying a wage-rate that is only appropriate for a low-level, entry position relative to others within the occupation, as this factor is inconsistent with the analysis of the relative complexity and uniqueness required to satisfy this criterion. Based upon the wage rate selected by the petitioner, the beneficiary is only required to have a basic understanding of the occupation. Moreover, that wage rate indicates that the beneficiary will perform routine tasks requiring limited, if any, exercise of independent judgment; that the beneficiary's work will be closely supervised and monitored; that he will receive specific instructions on required tasks and expected results; and that his work will be reviewed for accuracy.

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").

Accordingly, given the *Handbook's* indication that typical positions located within the "Advertising Sales Agents" occupational category do not require at least a bachelor's degree in a specific specialty, or the equivalent, for entry, it is not credible that a position involving limited, if any, exercise of independent judgment, close supervision and monitoring, receipt of specific instructions on required tasks and expected results, and close review *would* contain such a requirement.

Finally, we observe that the petitioner has indicated that the beneficiary's course work and degrees make him qualified for the proffered position. 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 proposed duties, if any, would render the proffered position so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. Again, the petitioner did not 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.

For all of these reasons, it cannot be concluded that the evidence of record satisfies the second alternative prong of 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 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 a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the proffered position.¹⁷

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

¹⁷ Any such assertion would be undermined in this particular case by the fact that the petitioner indicated in the LCA that its proffered position is a comparatively low, entry-level position relative to others within the same occupation.

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 petitioner concedes that the proffered position is a newly created position. Although the fact that a proffered position is a newly-created one is not in itself generally a basis for precluding a position from recognition as a specialty occupation, certainly an employer that has never recruited and hired for the position cannot satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a demonstration that it normally requires a bachelor's degree, or the equivalent, in a specific specialty for the position.

The petitioner submitted an organizational chart and a table indicating the educational background of its employees. On appeal, counsel asserts that the petitioner "requires degrees of virtually all of its employees." We find counsel's assertion unpersuasive as the regulation requires the petitioner to demonstrate a hiring history for *the proffered position*. Therefore, the educational qualifications of other employees in dissimilar positions are irrelevant to our analysis under this criterion.

We find that the record of proceeding does not establish the prior history of recruiting and hiring required to satisfy this particular criterion. Accordingly, 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.

Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position's duties. In other words, the proposed duties have not been described with sufficient specificity to show that their nature is more specialized and complex than market research analyst positions whose duties are not of a nature so specialized and complex that their performance requires knowledge usually associated with a degree in a specific specialty. In reviewing the record of proceeding under this criterion, we reiterate our earlier discussion regarding the *Handbook's* entries for positions falling within the "Advertising Sales Agents" occupational category. Again, the *Handbook* does not indicate that a bachelor's degree in a specific specialty, or the equivalent, is a standard, minimum requirement to perform the duties of such positions (to the contrary, it indicates precisely the opposite), and the record indicates no factors that would elevate the duties proposed for the beneficiary above those discussed for similar positions in the *Handbook*. With regard to the specific duties of the position proffered here, we find that the record of proceeding lacks sufficient, credible evidence establishing that they are so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a bachelor's degree in a specific specialty, or the equivalent.

Moreover, we incorporate our earlier discussion regarding the wage-level designation on the LCA, which is appropriate for duties whose nature is less complex and specialized than required to satisfy this criterion. We find that both on its own terms and also in comparison with the three higher wage-levels that can be designated in an LCA, by the submission of an LCA certified for a wage-level I, the petitioner effectively attests that the proposed duties are of relatively low complexity as compared to others within the same occupational category. This fact is materially inconsistent with the level of complexity required by this criterion.

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

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

U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf (last visited July 9, 2014).

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

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

Id.

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

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

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

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

Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. . . .

Id.

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

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

Id.

As already noted, by virtue of this submission, the petitioner effectively attested to DOL that the proffered position is a low-level, entry position relative to others within the same occupation, and that, as clear by comparison with DOL's instructive comments about the next higher level (Level II), the proffered position did not even involve "moderately complex tasks that require limited judgment" (the level of complexity noted for the next higher wage-level, Level II).

For all of these reasons, 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 evidence of record does not satisfy at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation. Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

Next, 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*.¹⁸ We also 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. See also *Health Carousel, LLC v. U.S. Citizenship & Immigration Services*, ___ F. Supp. 2d ___ (S.D. Ohio 2014) (agreeing with AAO's analysis of *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*).

¹⁸ 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 us. 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 reasons articulated by the district court if these errors could not have been remedied by us in our *de novo* review of the matter.

Counsel further refers to our unpublished decisions in which we determined that the proffered positions in those matters qualified as a specialty occupation. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions. While 8 C.F.R. § 103.3(c) provides that our precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

We do not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the proffered position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. Therefore, we need not and will not address the beneficiary's qualifications further.

V. CONCLUSION AND ORDER

As set forth above, we agree with the director's findings that the evidence of record does not demonstrate that the proffered position qualifies for classification as a specialty occupation. Accordingly, the director's decision will not be disturbed. 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.

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.

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.