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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

DATE: JUN 11 2014

OFFICE: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:  
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (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. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on April 4, 2013. In the Form I-129 visa petition and supporting documentation, the petitioner describes itself as an education technology company established in 2011. In order to employ the beneficiary in what it designates as an IT market research analyst position, 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 denied the petition on November 13, 2013, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

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

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

Later in this decision, we will also address additional, independent grounds, not identified by the director's decision, that preclude approval of this petition. Specifically, beyond the decision of the director, we find that the petitioner (1) failed to establish that it would pay the beneficiary an adequate salary for his work if the petition were granted; and (2) failed to submit a Labor Condition Application (LCA) that corresponds to the petition. For these additional reasons, the petition may not be approved, with each considered as an independent and alternative basis for denial.<sup>1</sup>

## I. FACTUAL AND PROCEDURAL BACKGROUND

In this matter, the petitioner stated on the Form I-129 that it seeks the beneficiary's services as an IT market research analyst to work on a full-time basis at an annual salary of \$70,000. In a support letter dated April 2, 2013 the petitioner stated the following regarding the duties and requirements of the proffered position:

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

[The beneficiary's] duties will be:

- Creating and maintaining a marketing dashboard of key performance indicators that measure and report on usage and current marketing activities
- Designing and leading marketing projects, including integrated campaigns designed to scale user growth and build deep engagement
- Representing the voice of the user and market to provide high value, evidence-based feedback for collaboration with Product and Content teams
- Coordinating with marketing, Content, and Product team members to ensure successful and targeted execution of various marketing activities including: events, web seminars, nurturing campaigns, and contests, and
- Developing high quality marketing collateral and presentations for various internal and external stakeholders.

The performance of these duties requires a computer professional with at least a bachelor's degree in a computer science or engineering field.

The petitioner indicated that the beneficiary is qualified to perform services in the proffered position by virtue of his education. In support of this assertion, the petitioner provided an evaluation of the beneficiary's academic credentials prepared by [REDACTED] which indicates that the beneficiary has attained the equivalent of a U.S. Bachelor of Science degree in computer science. The petitioner also provided copies of the beneficiary's foreign diploma and transcripts.

In addition, the petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The LCA designation for the proffered position corresponds to the occupational classification "Market Research Analyst" - SOC (ONET/OES Code) 13-1161, at a Level II wage.

The petitioner also submitted documents regarding its business operations, including a business license, an unsigned copy of the petitioner's lease, select unsigned quarterly and annual tax returns, and photos of the petitioner's locale.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on August 29, 2013. In the RFE, the director specifically requested that the petitioner submit probative evidence to establish that the proffered position qualifies as a specialty occupation. The director outlined the evidence to be submitted.

On September 24, 2013, the petitioner and counsel responded to the director's RFE. In a letter dated January 12, 2013, the petitioner provided the following revised description of duties the proffered position [discussions of the beneficiary's qualifications to perform each duty have been omitted<sup>2</sup>]:

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<sup>2</sup> A beneficiary's qualifications to perform services in a proffered position are only relevant if the position is determined to qualify as a specialty occupation position. As will be discussed below, the petitioner has not established that the proffered position qualifies as a specialty occupation.

**1. Creating and maintaining a marketing dashboard of key performance indicators that measure and report on usage and current marketing activities**

This responsibility requires a good understanding and knowledge of database structures and the SQL platform to be able to formulate and run database queries to collect, compile and analyze usage and performance data reports. Furthermore, structure and analyzing user behavior requires a deep statistical knowledge and excellent mathematical skills.

Time Spent/Week: 25%

**2. Designing and leading marketing projects, including integrated campaigns designed to scale user growth and build deep engagement.**

The above responsibility requires functional knowledge of Internet HTML Language to develop HTML-based Emails and Web Pages and hence a bachelor degree in Computer Science is preferred for this responsibility. Also, [the petitioner uses] Marketo as [its] primary Marketing Automation system.

Time Spent/Week: 25%

**3. Representing the voice of the user and market to provide high value, evidence-based feedback for collaboration with Product and Content teams**

This is an integral part of the job where the candidate is required to have a strong technical background in internet technology and a strong analytical skill set to deeply understand the [petitioner's] product. . . . The job requires interacting with the Software Development Lead to devise an analytically driven user experience feedback. And it requires understanding Software Product Development life Cycles such that integration of marketing can be initiated while developing the product itself.

Time Spent/Week: 20%

**4. Coordinating with marketing, content, and product team members to ensure successful and targeted execution of various marketing activities including: events, web seminars, nurturing campaigns, and contests.**

This responsibility requires the candidate to have a technical background with strong analytical skill-set to create highly targeted marketing campaigns based on the usage and performance data analysis, and help users derive maximum benefit and tracking and analyzing marketing programs to optimize overall results and increase product adoption.

Time Spent/Week: 15%

## 5. Developing high quality marketing collateral and presentations for internal and external stakeholders

This responsibility requires the candidate to generate data-driven marketing presentations and materials that are used internally and externally for modeling and documenting the usage, performance, effectiveness and overall growth of the product usage, and its effect on various areas of the company's growth and potential.

Time Spent/Week: 15%

In addition to the September 18, 2013 letter, the petitioner provided a letter from the petitioner's parent company in India. The letter states that the beneficiary has been employed with the parent company since August 12, 2009 in a position also entitled IT Market Research Analyst. The duties of that position are described in similar terms to those of the proffered position, as described in the September 18, 2013 letter.

In response to the RFE, the petitioner provided a letter from [REDACTED] Vice President of Human Resources for [REDACTED] Inc. In this letter, Mr. [REDACTED] states that he is familiar with the job duties and requirements for an IT market research analyst in the IT industry. Mr. [REDACTED] describes the typical duties of this type of position, and states that, in his experience, the minimum education required for this position is a bachelor's degree in computer science or engineering, or a computer related field. He indicates that he has read the job description for the proffered position and believes that performance of the duties of the proffered position requires "the education provided in a computer-related bachelor's degree."

The director reviewed the information provided in the initial H-1B petition and in response to the RFE. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The director denied the petition on November 13, 2013.

The petitioner, through new counsel, subsequently submitted an appeal of the denial of the H-1B petition. On appeal, counsel asserts that the proffered position "shares more characteristics with a Software Developer, Data Engineer, or Business Intelligence Engineer, rather than a 'Market Research Analyst'" as defined in DOL's *Occupational Outlook Handbook (Handbook)*. Counsel discusses the duties of the position, and concludes that "in determining the appropriate [*Handbook*] position that the [proffered] position fits into, it is clear that 'market research analysis' does not characterize the position's duties."

Counsel further asserts the following regarding the appropriate occupational code for the proffered position:

A specific separate occupational code does not yet exist for [positions such as "Data

Engineers," "Data Analysts," "Business Intelligence Engineers," and related positions], but at [REDACTED] "Data Engineer" positions, the duties of which are identical to the offered position, are routinely issued prevailing wages by the U.S. Department of Labor in the category of "Software Developer, Applications" (OES jobcode 15-1132). We attach as Exhibit 2 a recent certified Prevailing Wage Determination for this position, reflecting 15-1132 as the appropriate category.

Counsel reviews the duties of a Software Developer, as described in the Handbook, and concludes, "These duties are much closer to the primary nature of [the beneficiary's] role as builder of Market Research IT infrastructure, versus performance of qualitative market research analysis."

In addition to counsel's brief, the appeal submission contains an ETA Form 9141 Application for Prevailing Wage Determination filed on behalf of [REDACTED] LLC for a Data Engineer II position. The Form 9141 indicates that DOL determined that Amazon's Data Engineer II position corresponds to SOC (ONET/OES) code 15-1132, Software Developers, Applications at a Level II wage. The appeal submission also contains printouts of several online job postings; an opinion letter from Mr. [REDACTED] of [REDACTED] a printout from the My Case Status page of the USCIS website; and copies of previously submitted documents.

## II. SPECIALTY OCCUPATION

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, and for the specific reasons described below, we agree with the director and find that the evidence fails to establish that the position, as described, constitutes a specialty occupation.

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

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

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

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

*Specialty occupation* means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics,

physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this 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.

To ascertain the intent of a petitioner, USCIS looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

Thus, a crucial aspect of this matter is whether the petitioner has adequately described the duties of the proffered position, such that USCIS may discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through at least a baccalaureate degree in a specific discipline, or its equivalent. The AAO finds that the petitioner has not done so.

More specifically, the petitioner has provided conflicting descriptions of the proffered position such that the AAO is unable to ascertain the nature of the proffered position.

In the initial submission accompanying the Form I-129 petition, the petitioner provided a letter dated April 2, 2013 that contains a description of the duties of the proffered position. Specifically, the petitioner indicated that the beneficiary would be responsible for the following:

- Creating and maintaining a marketing dashboard of key performance indicators that measure and report on usage and current marketing activities
- Designing and leading marketing projects, including integrated campaigns designed to scale user growth and build deep engagement
- Representing the voice of the user and market to provide high value, evidence-based feedback for collaboration with Product and Content teams

- Coordinating with marketing, Content, and Product team members to ensure successful and targeted execution of various marketing activities including: events, web seminars, nurturing campaigns, and contests, and
- Developing high quality marketing collateral and presentations for various internal and external stakeholders.

Although generically described, this description of the proffered position indicates that the beneficiary is expected to perform substantive marketing duties, such as designing marketing campaigns; collaborating on marketing activities including events, web seminars, campaigns, and contests; and developing marketing collateral and presentations.

The petitioner provided an LCA in which it classified the position under the occupational category of Marketing Research Analysts and Marketing Specialists, SOC (ONET/OES Code) 13-1161. Also on the LCA, the petitioner indicated that it would pay the beneficiary an annual salary of \$70,000, which is slightly more than the certified prevailing wage of \$69,202 per year for a Level II market research analyst in Burlingame, California during the relevant period. DOL instructions for the completion of the LCA direct the petitioner to utilize the code "which most clearly describes the work to be performed."<sup>3</sup>

The AAO recognizes DOL's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>4</sup> The section of the *Handbook* entitled "What Market Research Analysts Do," attributes the following duties to this occupational classification:

#### Duties

Market research analysts typically do the following:

- Monitor and forecast marketing and sales trends
- Measure the effectiveness of marketing programs and strategies
- Devise and evaluate methods for collecting data, such as surveys, questionnaires, 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
- Prepare reports and present results to clients and management

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<sup>3</sup> For additional information on proper completion of an LCA, see DOL ETA Form 9035CP – General Instructions for the 9035 & 9035E, available on the Internet at [http://www.foreignlaborcert.doleta.gov/pdf/ETA\\_Form\\_9035CP.pdf](http://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9035CP.pdf) (last visited May 21, 2014).

<sup>4</sup> For additional information regarding market research analyst positions, see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2013-14 ed., Market Research Analysts, on the Internet at <http://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm#tab-2> (last visited May 21, 2014).

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, on the Internet at <http://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm#tab-2> (last visited May 21, 2014).

In the RFE, the director informed the petitioner that the *Handbook* does not indicate that that at least a bachelor's degree in a *specific specialty* is the minimum education required for entry into the occupation, and requested that the petitioner provide additional evidence to establish that the position qualifies as a specialty occupation.

In response to the RFE, the petitioner provided a letter, which, as noted above, elaborates on the duties of the proffered position. In the letter, the petitioner emphasized the technical aspects of the duties, but failed to adequately describe the specific tasks that the beneficiary is expected to perform. For example, the petitioner stated that the beneficiary will be responsible for "[c]reating and maintaining a marketing dashboard of key performance indicators that measure and report on usage and current marketing activities." In response to the RFE, the petitioner indicated that performance of this duty requires knowledge of database structures and SQL platforms. However, the petitioner failed to provide a description or explanation of its "marketing dashboard," or describe any specific tasks involved in the creation and maintenance of this instrument.

Similarly, the petitioner indicating that the proffered position involves "[d]esigning and leading marketing projects, including integrated campaigns to scale user growth and build deep engagement." However the petitioner did not provide specifics regarding the "marketing projects" or "campaigns." The beneficiary's role in these assignments has not been developed.

In regard to the duty described as "[c]oordinating with marketing, content, and product team members to ensure successful and targeted execution of various marketing activities including: events, web seminars, nurturing campaigns, and contests," the petitioner stated that the beneficiary would "create highly targeted marketing campaigns based on the usage and performance data analysis, and help users derive the maximum benefit and tracking and analyzing marketing

programs to optimize overall results and increase product adoption." Again, the petitioner has not adequately described the specific tasks involved in the performance of this duty such that we may determine what the beneficiary will be doing on day-to-day basis.

As additional evidence in support of the petitioner's assertion that the proffered position qualifies as a specialty occupation, in response to the RFE the petitioner provided a letter from Mr. [REDACTED] described above, which states the duties of IT market research analysts "in the IT industry." Mr. [REDACTED] attests that individuals in these positions:

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

We note that these duties are copied virtually verbatim from the duties of a market research analyst as described in the *Handbook* and noted above. Thus, they do not provide any further insight into the actual tasks associated with the proffered position, other to reinforce the petitioner's claim that the position pertains to the occupational category of market research analyst.

However, on appeal, the petitioner, through counsel, now asserts that the proffered position does not belong to the occupational category of market research analysts. Rather, counsel states that the proffered position is actually more closely associated with the occupational category of "Software Developer, Applications," SOC (ONET/OES Code) 13-1161. Further, counsel provides a prevailing wage determination for a position that he states involves duties that are "identical to the offered position." We reviewed the prevailing wage determination in its entirety, including the Addendum containing the job duties. These duties are described as follows:

Design, develop, implement, test, document, and operate large-scale, high-volume, high-performance data structures for business intelligence analytics program.

Implement data structures using best practices in data modeling, ETL/ELT process design, SQL expertise, Database expertise, and expertise in OLAP technologies (such as Oracle Essbase). Provide on-line reporting and analysis using OBIEE business intelligence tools and a logical abstraction layer against large, multi-dimensional datasets and multiple sources.

Gather business and functional requirements and translate these requirements into robust scalable, operable solutions that work well within the overall data architecture.

Analyze source data systems and drive best practices in source teams. Participate in the full development life cycle, end-to-end, from design, implementation and testing, to documentation, delivery, support, and maintenance.

Produce comprehensive, usable dataset documentation and metadata. Evaluate and make decisions around dataset implementations designed and proposed by peer data engineers. Evaluate and make decisions around the use of new or existing software products and tools and mentor junior data engineers.

Although counsel describes this position as "identical" to the proffered position, we find significant inconsistencies between this position and the various descriptions of the proffered position contained in the record. Notably, this position does not mention the design and leadership of marketing projects, such as campaigns, that the petitioner previously indicated would occupy 25% of the beneficiary's time. Nor does it indicate that the position involves the development of high quality marketing collateral and presentations, as the petitioner previously indicated would occupy 15% of the beneficiary's time. Thus, it appears that the petitioner is now offering the beneficiary a different position than that which was originally described.

We note that a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978).

In support of the assertion that the proffered position qualifies as a specialty occupation, the petitioner and counsel provided an opinion letter from Mr. [REDACTED] of [REDACTED]. Mr. [REDACTED] bases his discussion of the proffered position on "the employer's detailed description of the duties required for the subject position of 'IT Market Research Analyst.'" The document that Mr. [REDACTED] consulted was not provided. Mr. [REDACTED] states that based on his professional experience he has "cultivated familiarity with the duties performed by such data analytics specialists in professional business environments. Based on this experience, he attributes the following characteristics to the proffered position:

The position involves a variety of technical duties, from the design, development and maintenance of business IT tools to the design and coding of web pages and interface prototypes for marketing applications, data gathering, and analytics (using software and database tools), and marketing project execution (with an emphasis on data mining and analysis to assess software product usage, analysis of product/marketing touch points, and integration of marketing needs within the software product.

We note that the relevant inquiry at issue is whether the particular position proffered by the petitioner qualifies as a specialty occupation. There is no indication from Mr. [REDACTED]'s letter that he possesses any specific knowledge of the petitioner's proffered position and its business operations beyond that which has been provided to USCIS by the petitioner. For instance, there is no evidence

that Mr. [REDACTED] has visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. He does not demonstrate or assert in-depth knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise.

The various descriptions of the proffered position provided by the petitioner, when considered together, do not adequately convey the substantive work that the beneficiary will perform within the petitioner's business operations. In establishing a position as qualifying as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in the context of the petitioner's business activities, demonstrate a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition.

In the instant case, it is not evident that the proposed duties as described in this record of proceeding, and the position that they comprise, merit recognition of the proffered position as a specialty occupation. To the extent that they are described, the AAO finds the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire period requested, so as to persuasively support the claim that the position's actual work would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific specialty directly related to the duties and responsibilities of the proffered position, or its equivalent. The job description fails to communicate (1) the actual work that the beneficiary would perform on a day-to-day basis; (2) the complexity, uniqueness and/or specialization of the tasks; and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. The petitioner failed to provide sufficient details regarding the demands, level of responsibilities and requirements necessary for the performance of the duties of the proffered position.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

For the reasons related in the preceding discussion, the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that

the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

### III. ADDITIONAL ISSUES BEYOND THE DIRECTOR'S DECISION

Upon review of the record of proceeding, we find that there are additional issues not identified in the director's decision that preclude approval of this petition. Specifically, beyond the decision of the director, the AAO finds that the petitioner (1) failed to submit a Labor Condition Application (LCA) that corresponds to the petition; and (2) failed to establish that it would pay an adequate salary for the beneficiary's work, as required under the applicable statutory and regulatory provisions. Thus, the petition cannot be approved for these reasons as well. They are considered independent and alternative bases for denial of the petition.

We note that the petitioner did not submit a certified Labor Condition Application (LCA) that properly corresponds to the petition. In the instant case, the petitioner has characterized the duties of the proffered position as pertaining to multiple occupational categories. As previously stated, the petitioner submitted an LCA in support of the instant petition designating the proffered position under the occupational classification "Market Research Analysts" - SOC (ONET/OES Code) 13-1161. The petitioner stated in the LCA that the wage level for the proffered position was Level II and claimed that the prevailing wage in Burlingame, California for the proffered position was \$69,202 per year. The LCA was certified by DOL and signed by the petitioner on April 2, 2013.

On appeal, as described above, the petitioner and counsel represented that the duties of occupational classification of "Software Developers, Applications" are "much closer to the primary nature of [the beneficiary's role]" than those of market research analysts. Counsel describes SOC (ONET/OES Code) 15-1132 as "the appropriate category" for the proffered position.

When the duties of a proffered position involve more than one occupational category, DOL provides clear guidance for selecting the most relevant O\*NET code classification. The "Prevailing Wage Determination Policy Guidance" states the following:

In determining the *nature of the job offer*, the first order is to review the requirements of the employer's job offer and determine the appropriate occupational classification. The O\*NET description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification . . . . If the employer's job opportunity has worker requirements described in a combination of O\*NET occupations, the SWA should default directly to the relevant O\*NET-SOC occupational code for the highest paying occupation. For example, if the employer's job offer is for an engineer-pilot, the SWA shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

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

Thus, if the petitioner believed its position was described as a combination of occupations, then according to DOL guidance the petitioner should have chosen the relevant occupational code for the highest paying occupation. The prevailing wage for "Market Research Analysts" is significantly lower than the prevailing wage for "Software Developers, Application."

As stated on the LCA, the Online Wage Library lists the prevailing wage for "Market Research Analysts" as \$69,202 per year at the time the petition was filed in this matter, for a Level II position in the area of intended employment. The prevailing wage for a Level II "Software Developers, Applications" SOC (ONET/OES Code) 15-1132 position is listed as \$92,789 per year.<sup>5</sup> Thus, according to DOL guidance, if the petitioner believed its position was a combination of the occupations, it should have chosen the relevant occupational code for the highest paying occupation. However, the petitioner selected the occupational category for the lowest paying occupational category for the proffered position on the LCA. Notably, the petitioner indicated on the Form I-129 that it would pay the beneficiary a full-time annual salary of \$70,000. This is an insufficient salary for a position that the petitioner represents pertains to an occupational category with a prevailing wage of \$92,789.

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).

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct occupational category 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. 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.

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, the petitioner has failed to submit an LCA that corresponds to the claimed duties and requirements of the proffered position, that is, specifically, that corresponds to the occupational category that the petitioner ascribed to the proffered position and to the wage corresponding to such a level of work, responsibilities and requirements in accordance with the pertinent LCA regulations.

Therefore, for these reasons, even if it were determined that the petitioner overcame the director's basis for denial of the petition (which it has not), the petition could not be approved.

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<sup>5</sup> For additional information regarding the prevailing wage for this occupation in San Mateo County (Burlingame, CA), see the All Industries Database for 7/2012 - 6/2013 at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatcenter.com/OesQuickResults.aspx?code=15-1132&area=41884&year=13&source=11> (last visited June 2, 2014).

#### IV. CONCLUSION

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 145 (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act; *see e.g., 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.