



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **MAR 27 2014** OFFICE: CALIFORNIA SERVICE CENTER

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)

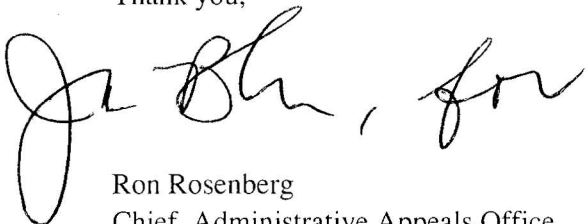
ON BEHALF OF PETITIONER:

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 (hereinafter "director") denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as a software training, development, and IT services firm. In order to employ the beneficiary in what it designates as a market research analyst position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, concluding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. On appeal, counsel asserted that the director's basis for denial was erroneous and contended that the petitioner satisfied all evidentiary requirements.

As will be discussed below, the AAO has determined that the director did not err in her decision to deny the petition on the specialty occupation issue. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

Beyond the decision of the director, the AAO finds an additional aspect which, although not addressed in the director's decision, nevertheless also precludes approval of the petition. Specifically, the AAO finds that the Labor Condition Application (LCA) filed by the petitioner in support of this petition does not correspond to it. The AAO conducts review of service center decisions on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and it was in the course of this review that the AAO identified this additional ground for denial.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's submissions on appeal.

I. Standard of Review

In the exercise of its administrative review in this matter, as in all matters that come within its 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.

Again, the AAO conducts its review of service center decisions on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d at 145. In doing so, the AAO applies the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon its review of the present matter pursuant to that standard, however, the AAO finds 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*, the AAO finds that the director's determination that the evidence of record does not establish that the proffered position is a specialty occupation was correct. Upon its 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, the AAO finds 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 the AAO 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 the AAO's supplemental finding made on appeal regarding the LCA and the evidentiary deficiencies present in the materials submitted with regard to the qualifications of the beneficiary, the evidence of record also does not lead the AAO 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.

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

Before addressing the director's determination that the proffered position is not a specialty occupation, the AAO will first address the supplemental finding it has made on appeal, which independently precludes approval of this petition, namely, our finding that the LCA submitted by the petitioner in support of this petition does not correspond to the petition.

The LCA submitted by the petitioner in support of the instant position was certified for use with a job prospect within the "Market Research Analysts and Marketing" occupational classification, SOC (O*NET/OES) Code 13-1161, and at 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 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.¹

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.² The U.S. Department of Labor (DOL) emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received as indicated by the job description.

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

¹ 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 Mar. 14, 2014).

² 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.

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.

The petitioner has classified the proffered position at a Level I wage, which 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 wage-level designation indicates further that the beneficiary will only be expected to "perform routine tasks that require limited, if any, exercise of judgment." However, the AAO finds that many of the duties described by counsel and the petitioner exceed this threshold.

For example, the record contains multiple references to the complexity and specialization of the duties proposed for the beneficiary. For example, the individual who prepared the position evaluation submitted by the petitioner stated that "this is a specialized and complex job," indicated that the position constitutes "a complex role" within the organization, asserted that "the position is specialized in nature," claimed that "the duties associated with the offered position are so complex" and that "the nature of the specific duties is so specialized and complex," and referenced the "sophisticated software" with which the beneficiary would work. He also claimed that "[t]he proposed job duties of the position are indicative of a complex role" and addressed "the level of technical responsibility and the importance of the Market Research Analyst's role to the ability of the [petitioner] to do business[.]" In similar fashion, on appeal counsel references the "the specific duties [of the proffered position] and their specialized and complex nature."

Furthermore, the petitioner claimed in its July 2, 2013 letter that the position requires "minimum experience in market research, competitive analysis and product planning, sampling techniques, [and in] creating survey designs[.]"

These statements 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.

The AAO, therefore, questions 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 submitted by the petitioner, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, the selected wage rate indicates that the beneficiary is only

required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results. Thus, the petitioner's characterizations of the proffered position and the claimed duties and responsibilities 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.

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 her at a Level II (qualified), a Level III (experienced), or a Level IV (fully competent) level. The petitioner has offered the beneficiary a wage of \$60,000 per year, which satisfied the Level I (entry level) prevailing wage for a market research analyst in the Oakland-Fremont-Hayward³ and San Jose-Sunnyvale-Santa Clara,⁴ California Metropolitan Statistical Areas at the time the LCA was certified. 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 required to raise her salary to at least \$79,976 per year. The Level III (experienced) prevailing wage was \$104,395 per year, and the Level IV (fully competent) prevailing wage was \$128,835 per year.⁵

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

³ U.S. Dep't of Labor, Foreign Labor Certification Data Center, Online Wage Library, FLC Quick Search, "Market Research Analysts and Marketing Specialists," <http://www.flcdatcenter.com/OesQuickResults.aspx?code=13-1161&area=36084&year=13&source=1> (last visited Mar. 14, 2014).

⁴ *Id.* at <http://www.flcdatcenter.com/OesQuickResults.aspx?code=13-1161&area=41940&year=13&source=1> (last visited Mar. 14, 2014).

⁵ *Id.*

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 characterized by the petitioner on the Form I-129 and allied submissions and as required under the Act, if the petition were granted for a higher-level and more complex position than addressed in the LCA as claimed elsewhere in the petition.

Additionally, 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 and USCIS regulations reveal several features of the LCA-certification process that have material implications in USCIS review of a H-1B specialty occupation petitions, including the one before us now.

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."

That the LCA-certification process does not involve a substantive review, but instead relies upon the petitioner to provide complete and accurate information, is highlighted by the following italicized-for-emphasis statement that appears at Part M, the certification section, of the standard LCA (ETA Form 9035/9035E):

The Department of Labor is not the guarantor of the accuracy, truthfulness, or adequacy of a certified LCA.

By the signature at part K (Declaration of Employer) of the ETA Form 9035/9035E, the petitioner attested, in part, "that the information and labor condition statements provided [in the LCA] are true and accurate."

As the signature at Part 7 of the Form I-129 certifies under penalty of perjury that the "this petition and the evidence submitted with it are true and correct" to the best of the petitioner's knowledge,

that signature also certified that the content of the LCA filed with it and identified by the LCA or ETA case number at item 2 of Part 5 (Basic Information about the Proposed Employment and Employer) truly and correctly matched the related aspects of the petition. However, as just discussed above, this appears to not be the case.

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

Certification by the Department of Labor [DOL] of a labor condition application in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. The director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. The director shall also determine whether the particular alien for whom H-1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.⁶

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 this petition would then fail to correspond to the level of work, responsibilities and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work, responsibilities and requirements in accordance with section 212(n)(1)(A) of the Act and the pertinent LCA regulations.

The statements regarding the claimed level of complexity, independent judgment and understanding required for the proffered position are materially inconsistent with the certification of the LCA for a Level I, entry-level position. This conflict undermines the overall credibility of the petition. The

⁶ *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").

AAO finds that, fully considered in the context of the entire record of proceedings, the petitioner failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed.

As such, a review of the 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.

III. Specialty Occupation

The AAO will now address the director's determination that the proffered position is not a specialty occupation. Based upon a complete review of the record of proceeding, the AAO agrees with the director that the evidence fails to establish that the proffered position constitutes a specialty occupation.

A. Law

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

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires [(1)] 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 requires [(2)] 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, the 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 rely simply upon a proffered position's title. The specific duties of the 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 beneficiary, and determine whether the position qualifies as a specialty occupation. *See generally* *Defensor v. Meissner*, 201 F. 3d at 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree *in the specific specialty* as the minimum for entry into the occupation, as required by the Act.

B. The Letter Submitted for Consideration as an Expert Opinion

Before reviewing the director's decision, the AAO will first discuss why it accords no probative value to the letter from [REDACTED] Sciences Program at [REDACTED]

In his June 21, 2013 letter [REDACTED] (1) describes the credentials that he asserts qualify him to opine upon the nature of the proffered position; (2) briefly lists some of the duties proposed for the beneficiary; (3) claims that the proffered position "is a specialized and complex job," indicated that the position constitutes "a complex role" within the organization, asserted that "the position is specialized in nature," claimed that "the duties associated with the offered position are so complex" and that "the nature of the specific duties is so specialized and complex," and referenced the "sophisticated software" with which the beneficiary would work; and (4) states his belief that the position requires a bachelor's or higher degree, or the equivalent, "in Technology Business or [a] closely related field such as Biotechnology." He later adds a bachelor's degree in information systems as another course of study that would prepare an individual to perform the duties of the proffered position.

As will now be discussed, the AAO finds that [REDACTED] letter does not constitute probative evidence of the proffered position satisfying any criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A).

At the outset we note a fundamental defect that we find in itself fatal to the evidentiary value of the opinions stated in the letter with regard to the educational requirements of the proffered position. That defect is the letter's failure to establish both the specific information upon which the professor bases his statements about the proffered position's education requirements as well as the letter's failure to identify the professor's information about the proffered position with sufficient particularity to establish that it substantially conforms to the relevant information presented in the record of proceeding.

At page 2 of his letter, [REDACTED] states that he "reviewed the position description provided to me," and references "[h]aving reviewed the professional education and experience in detail." At

page 3 of his letter, [REDACTED] references his "review of [the] Market Research Analyst [j]job description." At page 4, he states that he "reviewed an outline of the job duties" proposed for the beneficiary. At page 9, he states that his "opinion is based on copies of the original documents provided by the candidate." However, the letter does not include copies of the referenced material or quote them to any extent, let alone sufficiently for the AAO to discern to which, if any, of the many job and position descriptions in the record of proceeding he is referring.

The AAO does not question the accuracy of [REDACTED] narrative regarding his credentials, and we have considered all information provided therein. Likewise, we have considered his academic standing, background, and degrees. However, he does not provide any information with regard to studies, treatises, statistical surveys, authoritative industry sources, U.S. Department of Labor resources, or any other relevant and authoritative sources of which he may have specialized knowledge that would merit deference or special weight to the particular opinion that he offers in this case.⁷ Thus, we accord little to no weight to his position, degrees, academic history, or teaching duties as endowing him with specialized knowledge relevant to the particular matters upon which he here opines, namely, the educational requirements for the particular position proffered in this petition.

Moreover, it is noted that because [REDACTED] did not discuss the duties of the proffered position in substantive detail, the degree to which he analyzed those duties prior to formulating his letter is not evident.

Further, the letter is not accompanied by, and does not expressly state the full content of, whatever documentation and/or oral transmissions upon which it may have been based. For instance, Dr. [REDACTED] does not indicate whether he visited the petitioner's business premises or communicated with anyone affiliated with the petitioner as to what the performance of the general list of duties cited by the professor would actually require.⁸ Nor does Dr. [REDACTED] articulate whatever familiarity he may have obtained regarding the particular content of the work products that the petitioner would require of the beneficiary. In short, while there is no standard formula or "bright line" rule for producing a persuasive opinion regarding the educational requirements of a particular position, a person purporting to provide an expert evaluation of a particular position should establish greater knowledge of the particular position in question than [REDACTED] has done here.

⁷ [REDACTED] statement that he reviewed "employment websites" including www.monster.com, www.jobs.com, and www.careerbuilder.com is acknowledged. However, while the three positions he states he encountered while searching through those websites do appear to require a bachelor's degree, it is not clear that any of the employers who placed those job postings required the degrees to come from any particular specialty. As noted above, USCIS interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.

⁸ [REDACTED] statement that his "opinion is based on copies of the original documents provided by the candidate" indicates that he may not have spoken to anyone affiliated with the petitioner, other than the beneficiary.

Nor does [REDACTED]'s description of the position upon which he opines indicate that he considered, or was even aware of, the fact that the petitioner submitted an LCA that was certified for a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation which, as discussed above, signifies that the beneficiary is only expected to possess a basic understanding of the occupation. In any event, he does not discuss this aspect of the petition at any point in his letter. The AAO considers this a significant omission, in that it suggests an incomplete review of the position in question and a faulty factual basis for his ultimate conclusion as to the educational requirements of the position upon which he opines.

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 "Market Research Analysts and Marketing" occupational category, SOC (O*NET/OES) Code 1133-1161, and a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels. Again, the above-discussed *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.⁹

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 she will be expected to perform routine tasks requiring limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

[REDACTED]'s omission of such an important factor as the LCA wage-level significantly diminishes the evidentiary value of his assertions.

⁹ U.S. Dept'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 Mar. 14, 2014).

Finally, it is noted that [REDACTED] indicates that a bachelor's degree in business would provide an adequate preparation for performing the duties of the proffered position. However, a petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

The AAO may, in its 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, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988).

For all of these reasons, the AAO finds that [REDACTED] letter is not probative evidence towards satisfying any criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). For the sake of economy, the AAO hereby incorporates the above discussion and findings into its analysis of each of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

C. Evidence and Analysis

With the visa petition, counsel submitted evidence that the beneficiary received a bachelor's degree in Biotechnology from [REDACTED] and a master's degree in Biotechnology from [REDACTED].

Counsel also submitted (1) a document headed, "Professional Service Agreement" [PSA]; (2) a document, executed March 22, 2013, headed, "Statement of Work" [SOW]; and (3) a letter, dated April 1, 2013, from the petitioner's Chief Operating Officer [COO].

The PSA was executed January 3, 2012 by the petitioner's COO and the director of [REDACTED]. It states:

[The petitioner] "has experience and expertise in providing information systems planning analysis, design and development, and management, technical and project consulting ("Services"); and [REDACTED] desires to use such Service to meet its business needs.

It further states that [REDACTED] agrees to utilize the petitioner's workers as contractors to provide such services.

The SOW provided is an agreement for the petitioner to render services to [REDACTED] in its Mobile Advertising & Campaign Management Solution Application Development project. It states that [REDACTED] will pay the petitioner \$14,500 for "*Testing and Implementation of web*," due October 1, 2013; \$34,000 for "*Co-ordinate [sic] and work with QA, RTP and off-shoring teams*," due May 30,

2014; and \$32,000 for "Post implementation support. Documentation and Knowledge Transfer done to Internal Staff," which is due December 15, 2014. It contains no indication that [REDACTED] will use the beneficiary on that project or that the services of a market research analyst would be useful in providing the contracted services.

In his April 1, 2013 letter, the petitioner's COO provided the following description of the duties of the proffered position:

1. Collect and analyze data, prepare and translating into the report's findings,
2. Measure and assess customer and employee satisfaction.
3. Understand the industry statistics, knows about the market trends.
4. Measure the effectiveness of marketing
5. Provide management with information and proposals concerning the promotion, distribution of company products or services.

The petitioner's COO also stated:

We need to upgrade the skills of our consultants in social, mobile and cloud related technologies so that they can provide the best services in their respective fields. It is in the light of this that we are filing this petition for a Remedy Architect who has the requisite skills.

Yet further, the petitioner's COO stated:

[The beneficiary] was chosen because at the time of the interview we found that she has a thorough understanding of Remedy ITSM and AR System development and her knowledge is well utilized in writing technical design specifications and system configuration.

In that letter, the petitioner did not claim that the proffered position requires a minimum of a bachelor's degree or its equivalent.

On May 1, 2013, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence that the petitioner would employ the beneficiary in a specialty occupation. The director outlined the specific evidence to be submitted, including a more detailed description of the duties of the proffered position.

In response, counsel submitted, *inter alia*, (1) Dr [REDACTED] evaluation of the proffered position; (2) a letter, dated July 5, 2013, from the director of [REDACTED] (3) a letter, dated July 2, 2013, from the petitioner's COO; (4) a document headed, "Project Description and Itinerary"; and (5) a company profile of [REDACTED]

In his July 5, 2013 letter, the director of [REDACTED] stated:

We intend to hire [the beneficiary] from October 1st 2013, upon visa approval. This open ended purchase order is initially for a period of twelve months subject to annual renewal by mutual agreement depending on the needs of the company. It is the normal practice of the company not to issue purchase orders for more than twelve months although we have a clear intentions [sic] of renewing it for further periods depending on the needs.

The director of [redacted] provided the following description of the duties of the proffered position:

- Research and survey analysis of mobile application development.
- Assisting project team, conducting Business needs assessment.
- Preparing Business Case, to save development time and high cost of implementing the new system replacing the old one.
- Work with the Business users (Business Partner), technical lead in gathering their requirements and data transition information.
- Other incidental responsibilities not mentioned hereinabove.

He further stated:

In order to perform the role, the position requirements are that [the beneficiary] possesses at least a Bachelor's degree and/or equivalent experience plus specific experience with certain biotechnologies as described above.

The AAO observes that no biotechnologies were "described above," and that although [redacted] director stated that the proffered position requires a bachelor's degree, he did not state that the degree was required be in a specific specialty.

Although the petitioner's COO stated in his July 2, 2013 letter that the proffered position requires a bachelor's degree, he did not state that the degree was required to be in any specific specialty. He stated further that "[t]he qualifications required for this job is [sic] highly demanding which can only be met with from [sic] hiring someone who has attained higher level of qualification and understanding in a highly specialized body of knowledge or occupation in software development.

The petitioner's COO also stated:

The client letter clearly indicates that the contract is valid for one year and a half and will be renewed for one year, each time, depending on consultant performance and client business needs.¹⁰

The petitioner's COO also stated:

¹⁰ In his letter, the petitioner's COO refers to the contents of the July 5, 2013 letter from the director of [redacted] However, the COO's letter was written on July 2, 2013, three days before the [redacted] letter was written.

The position requires the following skills and role to be performed-

- Requirements gathering, analysis, documentation, designing business process.
- It also includes incident ticket analysis, checking KIs, Root cause analysis, Coordination with Teams, Daily incident meeting-hosting and attending.
- There is significant Communication with agent for further analysis and history record, maintaining problem record, creating task for system analyst and other work group.

The job duties also include the following tasks to be performed, on a day to day basis:

- Develop, test, and release mobile application for advertising and campaign management.
- Assisting project team, conducting Business Needs Assessment and preparing Business Case, to save development time and high cost of implementing the new system replacing the old one.
- Active engagement in analyzing and documenting Business requirements, documenting Functional Specifications and interpreting business needs to the technical team.
- Working with the Business users (Business Partner), technical lead in gathering their requirements and data transition information.
- Working on all phases of the "System Development Life Cycle (SDLC)", necessary procedure for requesting, developing, implementing and supporting the system development process.
- Coordinating the workflow among team members and managing project deliverables like Business Requirement Document (BRD), Functional Specification Document (FSD) and progress through regular meeting with internal stakeholders
- Assisting system analyst (SA) to simplify the complex functional requirements, and define functionalities of various processes in policy administration.
- Extensive use of HP Service Manager to format problem tickets, analysis of errors. Create Problem Record and defect record management related with AWP-MP, AQP-C, DSS, PVC, SFPP, Payment, QEC, Stuck App and Errors.
- Working on HP Service Manager to manage problem tickets, involved in formatting, analyzing the issue, contacting Business Partner to document Agents and Customers requirements, created task to system analyst and assigned to the appropriate work group.
- Responsible in contacting MP-channel & C-channel customer to understand issues by logging into their system remotely.
- Direct contact with Agent to solve their technical error as well as to understand issues by logging into their system remotely.

- Responsible in finding technical errors related with software by using Splunk, Tealeaf and JRF Data Tool.
- Researching and analyzing the root case, define problem tickets, recorded in recovery action, creating task for responsible work group and saved in history for future work around.
- Working very closely with [REDACTED] team to analyze the issues related with payment and act proactively.
- Conducting Gap Analysis to find out the expectation of New (UAX) system versus Legacy System for clients.
- Documenting end-users' needs regarding Policy View and Change, Payment and refund, Policy cancelation and New registration.
- Responsible in working with incident Coordinator and Problem Coordinator to formulate new strategy to solve incident tickets and maintain problem record to create defect log.

The "Project Description and Itinerary" provided states, *inter alia*, that the beneficiary would work on the [REDACTED] project from October 2013 to December 2016. The AAO observes that the period of requested employment as stated on the visa petition and the LCA ends September 1, 2016.

In its company profile, [REDACTED] describes itself as "an international provider of Information technology consulting services"

The director denied the petition on July 19, 2013, finding, as was noted above, that the petitioner had not demonstrated that the proffered position qualifies as a position in a specialty occupation by virtue of requiring a minimum of a bachelor's degree in a specific specialty or its equivalent. More specifically, the director found that the petitioner had satisfied none of the supplemental criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal counsel stated:

Although as a general occupation, "Market Research Analysts" could have varying degrees, the specific duties of the proffered position indicate that a biotechnology or closely related degree would be required, as the individual would need the requisite specialized knowledge to perform literature research, analyze and summarize data, and make presentations on new market and technical areas, along with analyzing the competitive environment, future marketing trends, and making appropriate recommendations specific to the industry.

Counsel cited the evaluation submitted as support for that proposition.

As a preliminary matter, the AAO observes that the record contains two competing versions of the duties the beneficiary would perform. In his April 1, 2013 letter, the petitioner's COO listed five duties, all of which are related to market research and analysis. Those duties were provided as follows:

1. Collect and analyze data, prepare and translating into the report's findings.
2. Measure and assess customer and employee satisfaction.
3. Understand the industry statistics, knows about the market trends.
4. Measure the effectiveness of marketing
5. Provide management with information and proposals concerning the promotion, distribution of company products or services.

However, all of the duty-descriptions provided subsequent to that letter related to information technology, not market research analysis. For example, in his July 5, 2013 letter, the director of Droisys stated that the beneficiary would:

- Research and survey analysis of mobile application development.
- Assisting project team, conducting Business needs assessment.
- Preparing Business Case, to save development time and high cost of implementing the new system replacing the old one.
- Work with the Business users (Business Partner), technical lead in gathering their requirements and data transition information.
- Other incidental responsibilities not mentioned hereinabove.

The duties described in the petitioner's COO's July 2, 2013 letter also clearly related to information technology:

- Requirements gathering, analysis, documentation, designing business process.
- It also includes incident ticket analysis, checking KIs, Root cause analysis, Coordination with Teams, Daily incident meeting-hosting and attending.
- There is significant Communication with agent for further analysis and history record, maintaining problem record, crating task for system analyst and other work group.
- Develop, test, and release mobile application for advertising and campaign management.
- Assisting project team, conducting Business Needs Assessment and preparing Business Case, to save development time and high cost of implementing the new system replacing the old one.
- Active engagement in analyzing and documenting Business requirements, documenting Functional Specifications and interpreting business needs to the technical team.
- Working with the Business users (Business Partner), technical lead in gathering their requirements and data transition information.
- Working on all phases of the "System Development Life Cycle (SDLC), necessary procedure for requesting, developing, implementing and supporting the system development process.
- Coordinating the workflow among team members and managing project deliverables like Business Requirement Document (BRD), Functional

- Specification Document (FSD) and progress through regular meeting with internal stakeholders
- Assisting system analyst (SA) to simplify the complex functional requirements, and define functionalities of various processes in policy administration.
 - Extensive use of HP Service Manager to format problem tickets, analysis of errors. Create Problem Record and defect record management related with AWP-MP, AQP-C, DSS, PVC, SFPP, Payment, QEC, Stuck App and Errors.
 - Working on HP Service Manager to manage problem tickets, involved in formatting, analyzing the issue, contacting Business Partner to document Agents and Customers requirements, created task to system analyst and assigned to the appropriate work group.
 - Responsible in contacting MP-channel & C-channel customer to understand issues by logging into their system remotely.
 - Direct contact with Agent to solve their technical error as well as to understand issues by logging into their system remotely.
 - Responsible in finding technical errors related with software by using Splunk, Tealeaf and JRF Data Tool.
 - Researching and analyzing the root case, define problem tickets, recorded in recovery action, creating task for responsible work group and saved in history for future work around.
 - Working very closely with [REDACTED] team to analyze the issues related with payment and act proactively.
 - Conducting Gap Analysis to find out the expectation of New (UAX) system versus Legacy System for clients.
 - Documenting end-users' needs regarding Policy View and Change, Payment and refund, Policy cancelation and New registration.
 - Responsible in working with incident Coordinator and Problem Coordinator to formulate new strategy to solve incident tickets and maintain problem record to create defect log.

Because the conflict between these various descriptions of the duties of the proffered position has never been reconciled, the substantive nature of the duties of the proffered position has not been established. 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 is a specialty occupation under 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. The director's decision must therefore be affirmed and the petition denied on this basis alone.

However, for the purpose of performing a comprehensive analysis of whether the proffered position qualifies as a specialty occupation, the AAO will nonetheless 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.

The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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)).

The AAO will first address the requirement under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1): A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹¹

The petitioner claims in the LCA that the proffered position corresponds to SOC code and title 13-1161, Market Research Analysts and Marketing Specialists from O*NET. The *Handbook* describes the occupation of "Market Research Analysts" as follows:

What Market Research Analysts Do

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

Duties

Market research analysts typically do the following:

- Monitor and forecast marketing and sales trends
- Measure the effectiveness of marketing programs and strategies

¹¹ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2014 – 2015 edition available online.

- 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

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.

Workers who design and conduct surveys are known as survey researchers.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Market Research Analysts," <http://www.bls.gov/ooh/Business-and-Financial/Market-research-analysts.htm#tab-2> (last visited Mar. 14, 2014).

As was pointed out above, the substantive nature of the duties the beneficiary would perform if the visa petition were approved has not been established and consequently the AAO is unable to find that the proffered position is a market research analyst position. However, the AAO will analyze the specialty occupation issue based on the assumption, made *arguendo*, that the proffered position is a market research analyst position, so as to reach counsel's assertions pertinent to such positions.

The *Handbook* states the following about the educational requirements of market research analyst positions:

How to Become a Market Research Analyst

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

Education

Market research analysts typically need a bachelor's degree in market research or a related field. Many have degrees in fields such as statistics, math, and computer science. Others have backgrounds in business administration, the social sciences, or communications.

Courses in statistics, research methods, and marketing are essential for these workers. Courses in communications and social sciences, such as economics, psychology, and sociology, are also important.

Some market research analyst jobs require a master's degree. Several schools offer graduate programs in marketing research, but many analysts complete degrees in other fields, such as statistics and marketing, and/or earn a Master of Business Administration (MBA). A master's degree is often required for leadership positions or positions that perform more technical research.

Other Experience

Most market research analysts can benefit from internships or work experience in business, marketing, or sales. Work experience in other positions that require analyzing data, writing reports, or surveying or collecting data can also be helpful in finding a market research position.

Licenses, Certifications, and Registrations

Certification is voluntary, but analysts may pursue certification to demonstrate a level of professional competency. The Marketing Research Association offers the Professional Researcher Certification (PRC) for market research analysts. Candidates qualify based on experience and knowledge; they must pass an exam, be a member of a professional organization, and have at least 3 years working in opinion and marketing research.

Important Qualities

Analytical skills. Market research analysts must be able to understand large amounts of data and information.

Communication skills. Market research analysts need strong communication skills when gathering information, interpreting data, and presenting results to clients.

Critical-thinking skills. Market research analysts must assess all available information to determine what marketing strategy would work best for a company.

Detail oriented. Market research analysts must be detail oriented because they often do precise data analysis.

Id. at <http://www.bls.gov/ooh/Business-and-Financial/Market-research-analysts.htm#tab-4> (last visited Mar. 14, 2014).

In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties.¹² Section 214(i)(1)(b) of the Act (emphasis added).

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

Where, as here, the *Handbook* does not support the proposition that the proffered position satisfies this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide

¹² Whether read with the statutory "the" or the regulatory "a," both readings denote a singular "specialty." Section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Still, the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. As just stated, this also includes even seemingly disparate specialties provided the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

persuasive evidence that the proffered position otherwise satisfies this criterion by a preponderance of the evidence standard, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that supports a favorable finding with regard to this criterion. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." 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)). In this case, the *Handbook* does not support the proposition that the proffered position satisfies 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), and the record of proceeding does not contain any persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion in this occupational category would be sufficient in and of itself to establish that a bachelor's or higher degree in a specific specialty or its equivalent "is normally the minimum requirement for entry into [this] particular position."

The AAO notes further that prior to the instant appeal, the petitioner had never previously claimed that the proffered position requires a minimum of a bachelor's degree or its equivalent in any specific specialty, let alone such a degree or equivalent in biotechnology or a closely-related subject. The petitioner's COO made no such claim in his April 1, 2013 letter. There is no indication of any such requirement in the PSA or SOW executed by the petitioner and [REDACTED]. The petitioner's COO's July 2, 2013 letter and Droisys's director's July 5, 2013 letter both state that the proffered position requires a bachelor's degree, but neither stated that the degree must be in any specific specialty.

As the evidence of record does not establish that the particular position here proffered is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively 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 a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other reliable and authoritative source, indicates that there is a standard, minimum entry requirement of at least a bachelor's degree in a specific specialty or its equivalent.

Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions.

In his June 21, 2013 evaluation, [REDACTED] stated that he had performed a thorough review of employment websites and described three vacancy announcements. However, he did not provide the actual announcements. He stated that each of the three vacancy announcements was for a market research analyst position and that each required a "Bachelor's Degree in [a] related field." Whether he was quoting from the vacancy announcements or paraphrasing the requirements they stated is not clear. In any event, the criterion of the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) pertains to the requirements of positions in organizations similar to the petitioner *and* in the petitioner's industry. The vacancy announcements to which counsel referred have not been shown to be for positions within the petitioner's industry *or* in organizations otherwise similar to the petitioner.

The first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) also pertains to positions "parallel" to the proffered position. The petitioner stated in the LCA that the proffered position is a Level I position, that is, an entry-level position for an employee who has only basic understanding of the occupation.¹³ However, there is no indication that the positions advertised in the vacancy announcements on which the evaluator relied were equivalent to Level I wage-level positions. As such, they are not persuasive evidence for the proposition that positions parallel to the proffered position require a minimum of a bachelor's degree in a specific specialty or its equivalent.

Finally, even if all of the vacancy announcements were for parallel positions with organizations similar to the petitioner and in the petitioner's industry and required a minimum of a bachelor's degree in a specific specialty or its equivalent, the evaluator failed to demonstrate what statistically valid inferences, if any, can be drawn from three announcements with regard to the common educational requirements for entry into parallel positions in similar organizations.¹⁴

¹³ 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.

¹⁴ 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 these job advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom

Thus, based upon a complete review of the record, 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 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.

The petitioner also has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." As was noted above, the petitioner has not established the substantive nature of the duties of the proffered position. It cannot show, therefore, that the duties the beneficiary will be responsible for or perform on a day-to-day basis entail such complexity or uniqueness as to constitute a position so complex or unique that it can be performed only by a person with at least a bachelor's degree in a specific specialty.

Moreover while the assertions of record with regard to the claimed complex and unique nature of the proffered position are acknowledged, those assertions are undermined by the fact that the petitioner submitted an LCA certified for a job prospect with a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation. 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 she will receive specific instructions on required tasks and expected results; and that her work will be reviewed for accuracy.¹⁵

Accordingly, given the *Handbook's* indication that typical positions located within the "Market Research Analysts" occupational category do not require at least a bachelor's degree in a specific

selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that the position of market research analyst for firms similar to and in the same industry as the petitioner 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.

¹⁵ 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 Mar. 14, 2014).

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.

Even assuming the proffered position to be a market research analyst position, as the petitioner fails to demonstrate how the proffered position is so complex or unique relative to other positions within the same occupational category that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The record contains no evidence that the petitioner has ever previously hired anyone to fill the proffered position, and the petitioner has not, therefore, provided any evidence for analysis under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).¹⁶ While a first-time hiring for a position is certainly not a basis for precluding a position from recognition as a specialty occupation, it is unclear how an employer that has never recruited and hired for the position would be able to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a demonstration that it normally requires at least a bachelor's degree in a specific specialty or its equivalent for the position.

Finally, the AAO will address the alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which is satisfied if the petitioner establishes that the nature of the specific duties is so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent.

Again, even assuming the proffered position to be a market research analyst position, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. In other words, whichever version of the duties of the proffered position is analyzed, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than the duties of market research analyst positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent.

Finally, the AAO finds 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 Level I wage-level, the petitioner effectively attests that the proposed duties are of relatively low complexity

¹⁶ While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in a specific specialty or its equivalent. See *Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. See § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

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 Mar. 14, 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 higher-than-here-assigned, 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, the AAO notes 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.

Here the AAO again incorporates its earlier discussion and analysis regarding the implications of the petitioner's submission of an LCA certified for the lowest assignable wage-level. 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).

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.

IV. Conclusion and Order

The evidence of record does not demonstrate that the proffered position is a specialty occupation and therefore does not overcome the director's ground for denying this petition. Consequently, the appeal will be dismissed, and the petition will be denied.

Beyond the decision of the director, the petition will also be denied because the LCA filed by the petitioner in support of this petition does not correspond to it, and it fails to establish that the petitioner will pay the beneficiary an adequate salary. Consequently, this petition could be approved even if it were determined that the petitioner had overcome the director's ground for denying this petition, which it has not.

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 at 1043, *aff'd*, 345 F.3d 683; *see also Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

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

The director's decision will be affirmed and the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the denial.¹⁷ In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act; *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.

¹⁷ Because these matters preclude approval of the petition, the AAO will not further discuss whether the evidence of record establishes that the petitioner will engage the beneficiary in an employer-employee relationship, that the LCA was certified for the correct occupational category, that the beneficiary is qualified to perform the duties of the proffered position, or any additional issues, deficiencies, or unresolved questions it has observed in the record of proceeding.