



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **MAY 15 2014**

OFFICE: CALIFORNIA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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

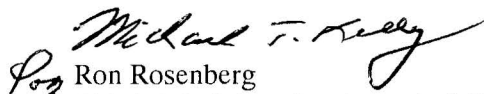
ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

  
Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center ("the 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 petitioner on the Form I-129, Petition for a Nonimmigrant Worker (Form I-129), describes itself as a "Manufacturer natural stone products" business. The petitioner states that it was established in 1996, and employs 9 persons in the United States. It seeks to employ the beneficiary in a position to which it assigned the job title "Market Research Analyst" and 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 the duties of the proposed position comprise the duties of a specialty occupation.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B, Notice of Appeal or Motion (Form I-290B), counsel's brief, and additional documentation.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director's grounds for denying this petition.<sup>1</sup> Accordingly, the appeal will be dismissed and the petition will remain denied.

## I. FACTS AND PROCEDURAL HISTORY

In an undated letter appended to the petition, the petitioner stated that "it is a leading importer and distributor of high-end decorating building materials for both residential and commercial applications." The petitioner noted that it specializes in natural stone, glass, wood and other materials and "import[s] these products from multiple countries around the world and distribute[s] them to our customers throughout the United States." The petitioner stated further that its customers range from large improvement chains to major builders, designers, architecture firms and construction companies and that it maintains a showroom and warehouse in the Chicago area. The petitioner asserted that to "maintain and grow the relationship with [its] suppliers and customers, [it is] seeking to hire a Market Research Analyst."<sup>2</sup> The petitioner stated:

The principle duty of the Market Research Analyst is to develop our customer base. The Market Research Analyst will need to develop knowledge of suppliers,

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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).

<sup>2</sup> The petitioner previously filed a petition for this same beneficiary requesting H-1B approval for the beneficiary to perform the duties of a management analyst occupation [REDACTED] The notice decision denying the petition was sent on November 17, 2012.

logistics, customers, and competitors to do this. This will allow the Market Research Analyst to determine what customers want now or may want in the future, to isolate competitor weaknesses, and to identify potential suppliers. The specific duties of the Market Research Analyst follow (with estimates of the percentage of time that the Market Research Analyst will spend on each duty.)

1. **Determine best practices.** The Market Research Analyst will analyze market data with the goal of determining present unprofitable practices and predicting potentially higher profit-yielding suppliers and customers. (10%)
2. **Research markets for expansion.** The Market Research Analyst will [sic] regional and national/international markets, demographics, and sectors, to determine the potential and expanding sales for products. (10%)
3. **Forecast future market and marketing trends.** The Market Research Analyst will analyze economic/statistical data (e.g., present and past sales data) to forecast future market and marketing trends in building suppliers, building needs, trends in building, etc. (20%)
4. **Identify customer demand.** The Market Research Analyst will compile and identify customer demands based upon the interpretations of statistical evidence gathered through surveys and market research. (20%)
5. **Research competitors.** The Market Research Analyst will gather information on competitors as to their methods of marketing and pricing. (10%)
6. **Make predictions.** The Market Research Analyst will take all [sic] gather information and conducting quantitative and qualitative research and analysis on suppliers, transportation conditions, customer demand, sales volume, etc. in order to quantify current and predicted future markets. (20%)
7. **Develop recommendations.** The Market Research Analyst will compile and analyze qualitative pricing data related to specific marketing opportunities, including pricing schedule and product related cost and possibilities of targeting different areas. (10%)

The petitioner asserted that "the complex and specialized nature of the duties of the position require an individual with at least a bachelor's degree with an emphasis in marketing or finance/accounting," and also that the usual minimum requirement for entry into the position is this type of bachelor's degree."

As the requisite Labor Condition Application (LCA) the petitioner submitted one that had been certified for use with a position within the "Market Research Analyst and Marketing Specialists" occupational classification, SOC (ONET/OES) Code 13-1161, at a Level I (entry level) wage.



The LCA identified the beneficiary's place of employment as [REDACTED] Illinois. The LCA was certified for a validity from September 12, 2013 to September 12, 2016.

Counsel for the petitioner submitted a document titled "Note Regarding the Specialty Occupation" which referenced the Department of Labor's (DOL) *Occupational Outlook Handbook's (Handbook)* chapter on market research analysts, as well as O\*NET Online's Summary Report (O\*NET) on Market Research Analysts. Counsel asserted that O\*NET indicated that at least a bachelor's degree is needed for the position of market research analyst. Counsel further noted that the *Handbook* listed "a range of analytical majors/courses that are appropriate preparation for a position as a market research analyst: statistics, business courses specializing in marketing or research methods, certain analytically-driven social science fields (sociology, psychology, and economics), and closely-related fields." Counsel asserted that this constitutes a specific area of specialization and referenced case law in support of his assertion.<sup>3</sup>

The petitioner submitted an unsigned, uncertified copy of its Internal Revenue Service (IRS) Form 1120S, U.S. Income Tax Return for an S Corporation, for 2011, its Form 941, Employer's Quarterly Tax Return, for the first quarter of 2011, and for all four quarters of 2012. The petitioner also provided a printout from its website.

Upon review of the initial record, the director issued an RFE requesting additional evidence and information from the petitioner pertaining to the proffered position.

Counsel for the petitioner filed a timely response to the RFE. In the response, counsel submitted a legal memorandum asserting that a market research analyst position is a specialty occupation. Counsel asserted, in part, that "'a narrow range of majors' is 'normally' required for the position: marketing accounting/finance." Counsel submitted website information from five top business schools which he alleged listed over 50 possible specializations within the school. Counsel also submitted the results of his search for a market research analyst on the website Monster.com. Counsel noted that the job postings showed 31 required a major in marketing, 6 required "the related majors of accounting or finance," one required a major in international business, and one required a major in operations management. Counsel asserted that his search for market research analyst revealed no job postings that listed other specializations.

Counsel asserted further that industry guidelines confirm that a bachelor's degree in a specific specialty is normally the minimum requirement for entry into the position. Counsel submitted a one-page printout from "The Council of American Survey Research Organizations (CASRO)," which stated: "[t]ypically a *bachelor's degree* is the starting point for most market and survey

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<sup>3</sup> Counsel referenced the following cases and offered the following holdings: *Matter of Caron International, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988) (indicating that a range of majors can suffice); *Matter of Michael Hertz Associates*, 19 I&N Dec. 559, 560 (Comm'r 1988) (indicating that "further specialization" suffices where a business degree is a requirement); *Unical v. INS*, 248 F. Supp. 2d 931 (C.D. Cal. 2002) (indicating that a degree in business with a marketing major constitutes "a baccalaureate or higher degree [] in a specialized area"); and *Residential Finance Corporation v. U.S. Citizenship and Immigration Services*, No. 2:12-cv-00008 (S.D. Ohio, March 12, 2012) ("The knowledge and not the title of the degree is what is important. Diplomas rarely come bearing occupation-specific majors.")



research jobs." (Emphasis added.) The CASRO document also noted that courses in mathematics, statistics, sampling theory and survey design, and computer science are extremely helpful. The record further included a printout from Campus Explorer on the subject of market research analysts. This printout provided an overview of the nature of a market research analyst's work and indicated that the minimum educational requirement for the position is a bachelor's degree. The Campus Explorer printout noted: "[f]or those seeking advanced degrees, market research analysts typically major in marketing, statistics, business administration, communications or related fields."

Counsel further contended that similar organizations require a bachelor's degree with a specific specialty in parallel positions. Counsel provided five advertisements he asserts were placed by similar organizations advertising for parallel positions that indicated: (1) a master's degree in management or an MBA in marketing is required; (2) a bachelor's degree in marketing, statistics, or mathematics is required; (3) a master's degree in finance or a related field is required; (4) a bachelor's degree in business, finance, or accounting is required; and (5) a bachelor's degree in mathematics, business, marketing, market research, or economics is required.

Counsel also noted that the petitioner had previously employed an individual in the position proffered here and that the individual held a master of business administration. The petitioner provided this individual's IRS W-2 Form and her transcript in support of this claim.

Counsel further provided his interpretation of the requirements of the seven responsibilities of the position that were initially described by the petitioner. Counsel asserted that the *Handbook*, while touching on the duties the beneficiary will be expected to perform, does not include the level of complexity that will be required. The record included a document with the heading "2013 Design Trendy in Decorative Materials" which appears to be a basic marketing analysis report with attached inventory lists. The document does not identify the author of the analysis.

Upon review of the record, the director denied the petition, determining that the *Handbook* did not establish that a market research analyst position is a specialty occupation and that the advertisements submitted did not support counsel's claim that the organizations advertising were organizations similar to the petitioner. The director also found that the petitioner had previously petitioned for this beneficiary to perform the duties of a management analyst and that the petitioner's previous employee allegedly in the proffered position had been granted H-1B classification as a management analyst, not as a market research analyst. Thus, the director questioned the petitioner's credibility regarding its characterization of the proffered position. Finally, the director determined that the petitioner had not provided sufficient evidence to demonstrate that the duties of the proffered position were complex, specialized, or unique. The director concluded that the petitioner had not established the position proffered here is a specialty occupation.

On appeal, counsel asserts that the director did not properly consider the evidence submitted to establish the duties of the proffered position are complex and unique, under the standard set out in *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010). Counsel also asserts that the director incorrectly rejected his argument that the *Handbook* reports that a market research analyst

position requires a degree in a specific specialty and improperly relied on a conclusion that a degree in business administration will not justify a finding that a particular position qualifies for classification as a specialty occupation. Counsel contends that the director's conclusion contradicts the applicable regulation at 8 C.F.R. § 214.2(h)(4)(ii) which includes the term "business specialties," and is unduly restrictive, as well as ignoring the precedent decisions from which the conclusion stems. Counsel further avers that the director incorrectly rejected evidence that the petitioner had previously hired someone with the same educational background as the beneficiary and improperly discredited the evidence without a full review of U. S. Citizenship and Immigration Services' (USCIS) records and without providing the petitioner an opportunity to respond to the alleged derogatory evidence.

Counsel asserts that the petitioner can establish: that the nature of the specific duties of the proffered position or the position itself are so unique/specialized, and complex that a bachelor's degree is necessary; that a bachelor's degree in a specific specialty is normally required for entry into the position; and that the petitioner normally requires a degree or its equivalent for the position. Counsel submits a copy of the H-1B extension petition record filed for the petitioner's previous employee which shows that the extension petition was filed for a market research analyst position and was approved as a market research analyst position.

## II. 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 the petitioner'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 in this matter 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 petitioner has not established that its claims are "more likely than not" or "probably" true. 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 claims are "more likely than not" or "probably" true.

### III. ANALYSIS

#### A. The Petitioner's Submission of an LCA Only Certified for A Level I Wage-Rate

Aside from material evidentiary deficiencies of the record of proceeding that we shall later discuss, the petitioner's assertions regarding the relative complexity, specialization and/or uniqueness of the proffered position are weakened when reviewed in connection with the Labor Condition Application (LCA) submitted with the Form I-129 petition.

As previously mentioned, the petitioner submitted an LCA in support of the instant petition that designated the proffered position under the occupational title of "Marketing Research Analyst and Marketing Specialist" - SOC (ONET/OES Code) 13-1161, at a Level 1 (entry level) wage.

We observe that wage levels should be determined only after selecting the most relevant O\*NET occupational code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable



performance in that occupation.<sup>4</sup> Prevailing wage determinations start with an entry-level wage rate (Level I) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent worker) 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.<sup>5</sup> 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.

The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels.<sup>6</sup> A Level I wage rate is described by DOL as follows:

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

The petitioner claims that the nature of the duties of the proffered position is "complex and specialized." Counsel emphasizes that the level of complexity associated with the duties the beneficiary will be expected to perform exceed the duties described in the *Handbook* and that the specific duties of the proffered position as well as the position itself include duties that are

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<sup>4</sup> 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).

<sup>5</sup> 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 jobs 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.

<sup>6</sup> 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).

unique/specialized and complex. Counsel asserts - without any substantive details - that the proffered position includes: manipulating gathered data by means of hypotheses; breaking down gathered data by geography, consumers, and sectors for specific analysis; predicting future trends based on hypotheses and data groupings and habits of consumers; researching competitors for strengths and weaknesses and for predicted trends, data analyses, and recommendations; isolating future possibilities broken down by geographic and industry sectors and by consumer group; and recommending courses of action based on gathered data, and the beneficiary's analyses, hypotheses, and predictions of future trends and business possibilities. Counsel claims that these more detailed duties increase the level of complexity beyond the *Handbook's* report on the occupation of market research analysts.

Also we observe that the petitioner itself claims that the beneficiary will spend 50 percent of her time forecasting future market and marketing trends, making predictions, and developing recommendations.

As we will further discuss later in this decision, such descriptions in terms of generalized functions without detailed information as to what their actual performance would involve in terms of substantive work and associated theoretical and practical applications of specialized knowledge, do not establish either the proffered position or its constituent duties as more complex, specialized, and/or unique than other positions, and associated duties, within the Market Research Analysts occupational group. However, the AO must also question the level of complexity and independent judgment and understanding required for the position because the LCA is certified for a Level I entry-level position. The LCA's wage level indicates the position is actually a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate is appropriate for positions where the beneficiary would only be required to have a basic understanding of the occupation; would be expected to perform routine tasks that require limited, if any, exercise of judgment; would be closely supervised and have his or her work closely monitored and reviewed for accuracy; and would receive specific instructions on required tasks and expected results.

This aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the petitioner's assertions regarding the demands and high-level duties and responsibilities of the proffered position.

It is well within the AAO's authority and responsibility to compare the content of an LCA with the evidence or record.

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

Certification by the Department of Labor of a labor condition application in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. The director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. The director shall also determine whether the particular alien for whom



H-1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of 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.

It should be noted that, for efficiency's sake, the AAO hereby incorporates the above discussion and analysis into its analyses, below, of the application of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence of record.

## B. Specialty Occupation

### 1. Specialty Occupation Law

Next, the AAO will address the issue of whether the petitioner established that the proffered position is a specialty occupation. Based upon a complete review of the record of proceeding, the AAO concurs with the director's ultimate decision and concludes that the evidence fails to establish that the position as described constitutes a specialty occupation.

To meet its burden of proof on this issue, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements. Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

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



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

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

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

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

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

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS consistently interprets the term "degree" in the criteria at 8 C.F.R.

§ 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 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.

## 2. Generality of the Descriptions of the Position and its Duties

We again quote the following excerpt from the record for its listing of what the is described as the "specific duties of the Market Research Analyst" . . . (with estimates of the percentage of time that the Market Research Analyst will spend on each duty.)

1. **Determine best practices.** The Market Research Analyst will analyze market data with the goal of determining present unprofitable practices and predicting potentially higher profit-yielding suppliers and customers. (10%)
2. **Research markets for expansion.** The Market Research Analyst will [sic] regional and national/international markets, demographics, and sectors, to determine the potential and expanding sales for products. (10%)
3. **Forecast future market and marketing trends.** The Market Research Analyst will analyze economic/statistical data (e.g., present and past sales data) to forecast future market and marketing trends in building suppliers, building needs, trends in building, etc. (20%)
4. **Identify customer demand.** The Market Research Analyst will compile and identify customer demands based upon the interpretations of statistical evidence gathered through surveys and market research. (20%)
5. **Research competitors.** The Market Research Analyst will gather information on competitors as to their methods of marketing and pricing. (10%)
6. **Make predictions.** The Market Research Analyst will take all [sic] gather information and conducting quantitative and qualitative research and analysis on suppliers, transportation conditions, customer demand, sales volume, etc. in order to quantify current and predicted future markets. (20%)
7. **Develop recommendations.** The Market Research Analyst will compile and analyze qualitative pricing data related to specific marketing opportunities, including pricing schedule and product related cost and possibilities of targeting different areas. (10%)

At the outset the AAO finds that, as reflected in the duty descriptions which we again quoted above from the record, the petitioner describes the duties of the proffered position exclusively in



terms of general and generic functions. Representative examples of these descriptions of duties as general functions include the above statements that the beneficiary: (1) "will analyze market data" (without identifying any particular methodologies that the beneficiary would employ); (2) "will analyze economic/statistical data (e.g., present and past sales data) to forecast future market and marketing trends in building suppliers, building needs, trends in building, etc." (without discussing the particular "economic/statistical data" elements that the beneficiary would derive from "present and past sales data"; (3) "will compile and identify customer demands based upon the interpretations of statistical evidence gathered through surveys and market research" (without elaborating upon who would conduct the market "surveys and market research," how sophisticated or complex such surveys and research would be, the types of analysis that would be used to produce the generally referenced "interpretations of statistical evidence," or who would apply that analysis.) Likewise, the record contains no substantive details with regard to either how the beneficiary will "compile" or "analyze" what the duty list describes as "qualitative pricing data related to specific marketing opportunities."

The evidence of record does not describe any of the listed functions in sufficient detail to either establish the substantive nature and associated complexity or specialization of the petitioner's matters that the beneficiary would have to address, or to establish whatever training, education, or education-equivalence level in any particular specialty that performance of those functions would require, let alone that the performance would require the practical and theoretical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty, as would be required to establish the proffered position as a specialty occupation.<sup>7</sup>

Also, the record's descriptions of the proposed duties and the position that they are said to comprise are not sufficiently detailed and concrete to establish either the duties or the proffered position as particularly complex, unique, and/or specialized in comparison to other Market Research Analyst positions. Rather, the AAO finds, the proffered position, and its constituent duties, are described in terms of relatively abstract and generalized functions, that, as such, do not demonstrate whatever academic and/or experience-derived level of highly specialized knowledge the beneficiary would have to theoretically and practically apply in performing the proffered position.

The petitioners failure to establish the substantive nature of the work to be performed by the beneficiary, therefore, 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

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<sup>7</sup> Counsel, in his legal memorandum in response to the director's RFE, offers his explanations of what each of the seven responsibilities means and requires in terms of additional duties; however, the petitioner does not explain in terms of its business processes what duties it will actually require of the beneficiary on a daily basis. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).



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 material deficiencies in the evidentiary record are decisive in this matter and they conclusively require that the appeal be dismissed. However, we will continue our analysis in order to apprise the petitioner of additional deficiencies in that record that would also require dismissal of the appeal.

### 3. Business Specialties and Case Law

Assuming for the sake of argument that the proffered duties as generally described by the petitioner in its initial letter would in fact be the duties to be performed by the beneficiary, the AAO will analyze them and the evidence of record to determine whether the proffered position as described would qualify as a specialty occupation.

We will first address counsel's citation to 8 C.F.R. § 214.2(h)(4)(ii) and his implication that the inclusion of "business specialties" as an example of a specialty occupation allows a general business degree to establish an occupation as a specialty occupation.

As stated above, 8 C.F.R. § 214.2(h)(4)(ii) reads as follows (*italics added*):

An occupation [(1)] which 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 [(2)] which 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.

Contrary to counsel's assertion, while 8 C.F.R. § 214.2(h)(4)(ii) lists "business specialties" as an example of a field in which the application of highly specialized knowledge may be required, the regulation does not state that an occupation in this field meets this criterion by default. Of all the fields listed as examples in the regulation, only business has the word "specialties" written after it, which means that the regulation was not intended to include business generally as an example of those fields entailing a theoretical and practical application of a body of highly specialized knowledge. The term "business specialties" does not remove the embedded requirements of the regulation that the petitioner establish that (1) the proffered duties entail the theoretical and practical application of a body of highly specialized knowledge and (2) the position requires at

least a bachelor's degree in a *specific specialty* or its equivalent for entry into the occupation in the United States. *Id.* Further, our position is consistent not only with the statutory and regulatory framework but also with *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988) and *Matter of Caron International, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988), which counsel cites.

In that regard, we note counsel's assertion that the petitioner in this matter has shown what "further specialization" and which "narrow range of majors" is required to perform the duties of the petitioner's market research analyst and generally a market research occupation. In this matter, the petitioner states that a general bachelor's degree with an emphasis in marketing or finance/accounting is required to perform the duties it describes.<sup>8</sup> However, the petitioner does not explain how or why this particular position could be performed only by an individual with such credentials. The petitioner does not identify the close correlation between specialized courses in finance and accounting and the position or otherwise expand upon the acceptance of this emphasis to elevate its general degree requirement to a specialized requirement. Moreover, the record does not include evidence nor has the petitioner explained that marketing, finance and accounting fall within a narrow range of majors. In any event, as reflected in our previous comments and findings with regard to the generalized level at which the petitioner describes the proffered position and its constituent duties, the record of proceeding does not provide sufficient evidence to establish that performance of the proffered position would require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in any specific specialty, as would be required to establish the proffered position as a specialty occupation within the governing statutory and regulatory framework.

As emphasized above, the petitioner must submit evidence that (1) the proffered duties entail the theoretical and practical application of a body of highly specialized knowledge and (2) the position requires at least a bachelor's degree in a *specific specialty* or its equivalent for entry into the occupation in the United States. *Id.* Regarding the first requirement at 8 C.F.R. § 214.2(h)(4)(ii), the record in this matter does not include a position description that describes duties and tasks that demonstrate that the proffered position requires the theoretical and practical application of highly specialized knowledge. As such, the petitioner has failed to establish that the proffered position meets the first requirement of the statutory and regulatory definition of specialty occupation. Section 214(i)(1)(A) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). While highly specialized knowledge in business specialty fields is referenced in 8 C.F.R. § 214.2(h)(4)(ii), such a reference does not mean that a petitioner, merely stating that it requires at least a bachelor's degree or higher in disparate business specialties, has demonstrated that the proffered position is a specialty occupation. The petitioner has not provided detailed information establishing how and what duties require the theoretical and practical application of a body of highly specialized knowledge in any of the business fields the petitioner lists as desirable.

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<sup>8</sup> The petitioner in this matter states: "[t]he complex and specialized nature of the duties of the position require an individual with at least a bachelor's degree with an emphasis in marketing or finance/accounting. The petitioner does not declare that the duties require a bachelor's degree in a specific discipline.



The record in this matter lacks specific information or examples demonstrating what advanced theories are necessary to perform the routine tasks initially set out in the petitioner's description. Upon review of the duties of the proffered position, there is an overriding lack of information and detail for a conclusion that the duties of the proffered position require the theoretical and practical application of a body of highly specialized knowledge which requires the attainment of a bachelor's degree or higher in a specific specialty. The record is devoid of any specific evidence that the proffered position requires a precise and specific course of study relating directly and closely to the described duties of the position. The petitioner has not submitted evidence establishing that the position proffered here requires a business degree with specific specialization or requires a degree within a narrow range of closely related majors. Rather, the petitioner has indicated that a general bachelor's degree that includes business courses in marketing, finance or accounting is sufficient to perform the duties of the proffered position.

The petitioner in this matter has not provided evidence that at least bachelor's degree or its equivalent in a specific *specialty* is a prerequisite to performing the duties of the proffered position. Neither has the petitioner demonstrated a nexus between the required coursework taken toward a degree and the proffered duties; accordingly, the petitioner has also failed to demonstrate that the proffered position is a specialty occupation under the second part of the statutory and regulation definition of specialty occupation. § 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii).

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

The AAO agrees with the aforementioned proposition that "[t]he knowledge and not the title of the degree is what is important." In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. For the aforementioned reasons, however, the petitioner has failed to meet its burden and establish that the particular position offered in this matter requires a bachelor's or higher degree in a specific specialty, or its equivalent, directly related to its duties in order to perform those duties.

As a final note, the AAO is not persuaded by counsel's comments on *Unical Aviation, Inc. v. INS*, 248 F. Supp. 2d 931 (D.C. Cal 2002). The material facts of the present proceeding are distinguishable from those in *Unical*. Specifically, the proffered position and related duties in the present proceeding are different from those in *Unical Aviation, Inc.*, where the beneficiary was to liaise with airline and Maintenance Repair Organization ("MRO") customers in China for supply of parts and services; analyze and forecast airline and MRO demands to generate plans to capture business; provide after-sales services to customers in China; and develop new products and services for the China market. Moreover, there is no indication in the record of proceeding



that the petitioner is in the same industry or is in any way similar in size or type of business as *Unical Aviation, Inc.*

Further, in *Unical Aviation* the Court partly relied upon *Augut, Inc. v. Tabor*, 719 F. Supp. 1158 (D. Mass. 1989), for the proposition that Immigration and Naturalization Service (INS, now USCIS), had not used an absolute degree requirement in applying the "profession" standard at 8 U.S.C. § 1101(a)(32) for determining the merits of an 8 U.S.C. § 1153(a)(3) third-preference visa petition. That proposition is not relevant here, because the H-1B specialty occupation statutes and regulations, not in existence when INS denied the *Augut, Inc.* third-preference petition, mandate not just a baccalaureate or higher degree, or its equivalent, but a degree "in the specific specialty." Section 214(i)(1) of the Act; *see also* 8 C.F.R. § 214.2(h)(4)(ii).

Although the petitioner's failure to establish that the proffered position meets the statutory and regulatory definition of specialty occupation obviates the need to examine this issue further, for purposes of a complete and thorough analysis, the AAO will also review the additional requirements imposed by the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A).

#### 4. The Criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)

To satisfy the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) the petitioner must demonstrate that a baccalaureate or higher degree in a specific discipline is normally the minimum requirement for entry into the particular position.

The AAO recognizes the DOL's *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.<sup>9</sup> The AAO agrees with counsel and the petitioner that the proposed duties generally align, although are not exact, with those of market research analysts.

In relevant part, the *Handbook* summarizes the duties typically performed by market research analysts as follows:

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

Market research analysts typically do the following:

- Monitor and forecast marketing and sales trends
- Measure the effectiveness of marketing programs and strategies
- Devise and evaluate methods for collecting data, such as surveys, questionnaires, and opinion polls
- Gather data about consumers, competitors, and market conditions

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<sup>9</sup> The AAO references to the *Handbook*, are references to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

- 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.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-2015 ed., "Market Research Analysts," <http://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm#tab-2> (last visited April 30, 2014).

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

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

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

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

Some market research analyst jobs require a master's degree. Several schools offer graduate programs in marketing research, but many analysts complete degrees in other fields, such as statistics and marketing, and/or earn a Master of



Business Administration (MBA). A master's degree is often required for leadership positions or positions that perform more technical research.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-2015 ed., "Market Research Analysts," <http://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm#tab-4> (last visited April 30, 2014).

Again, 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.<sup>10</sup> Section 214(i)(1)(b) of the Act (emphasis added).

Here, although the *Handbook* indicates that a bachelor's or higher degree is "typically" required, it also indicates not only that baccalaureate "degrees" in various fields are acceptable for entry into the occupation, but that so also are unquantified "backgrounds" in a wide range of areas (i.e., "in business administration, the social sciences, or communications").

We will first note that, while a "background" in business administration is not limited to bachelor's degrees but would also include associate's degrees, it would also encompass non-academic avenues such as training and/or experience in that general area – and the *Handbook* does not specify any particular amount of time as normally invested in those areas by those market research analysts who may have been hired on the basis of their "background."

Further, with regard to the fact that bachelor's degrees in business administration without further specialization (such as, for some examples, a major in accounting, management, finance) is acceptable for entry into the Market Research Analysts occupational group, we reiterate that although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007). Therefore, the *Handbook's* recognition that a general, non-specialty degree or "background" in business

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<sup>10</sup> Whether read with the statutory "the" or the regulatory "a," both readings denote a singular "specialty." Section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Still, the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. As just stated, this also includes even seemingly disparate specialties provided the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

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 satisfying the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

We acknowledge that counsel does not agree with this position. Counsel notes the *Handbook's* statement that "[m]arket research analysts typically need a bachelor's degree in market research or a related field" is followed by statements that "[m]any have *degrees* in fields such as statistics, math, and computer science" and "[o]thers have *backgrounds* in business administration, the social sciences, or communications (emphasis added)." We are not persuaded by counsel's assertions these latter statements describe the "further specialization" of coursework and list a "narrow range of majors." In this regard we first note that, especially in this context here where the preceding comments spoke in terms of "degrees," the plain reading of "*backgrounds*" in "business administration, the social sciences, or communications" does not indicate "academic majors," as counsel suggests. Rather, "backgrounds" encompasses some unquantified amount training, experience, and/or coursework short of a degree and not necessarily in pursuit of any academic major – in other words some amount of knowledge in "business administration, the social sciences, or communications," however gathered. Such a broad and undefined range of knowledge does not reasonably equate to a requirement for a body of highly specialized knowledge in any specialty. Further, neither the *Handbook* nor any other evidence of record identifies a definitive range of disciplines and associated knowledge that would characterize "the social sciences" or "communications" from which such knowledge could be gathered.

Counsel also references CASRO, an industry organization, and Campus Explorer, an educational advice website, which he asserts confirm that a market research analyst position requires further specialization beyond a general bachelor's degree and offers a narrow range of disciplines for such specialization. Counsel also reiterates his research of 50 top business schools which he alleges list 12 common business specializations and his further research of job websites with parameters of market research analyst and the 12 common business specializations and his conclusion that only five specializations were mentioned in relation to the occupation of market research analyst.<sup>11</sup> Counsel asserts that this evidence demonstrates that to perform the duties of a market research analyst, not only is a bachelor's degree required but the degree must be one of five disciplines and that the five disciplines are within a "narrow range of majors."<sup>12</sup>

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<sup>11</sup> As noted above in the section on Facts and Procedural History, counsel noted the results of his research on Monster.com revealed that the job postings showed 31 required a major in marketing, 6 required "the related majors of accounting or finance," one required a major in international business, and one required a major in operations management. Counsel claimed that his search for market research analyst with the other five seven specializations revealed no job postings.

<sup>12</sup> Counsel claimed his research revealed advertisers sought majors in marketing, accounting, finance, international business, and operations management for the position of market research analyst.



We disagree. The *Handbook*, the industry organization, educational advice website, and counsel's research, reflect at most that a bachelor's degree – but not one in any specific specialty is required to perform the duties of a market research analyst. Each of these sources describes a variety of disciplines that may be helpful in performing the duties of a market research analyst. The sources do not describe how further specialization in each of the disciplines mentioned correlates to the specific duties of a market research analyst. Moreover, there is no evidence demonstrating how the five disciplines counsel claims are within a "narrow range of majors" are related. Further, although we do not doubt counsel's veracity, we do not find his research to be as authoritative or as reliable as the Department of Labor's *Handbook's* information which is derived from more comprehensive research into each occupational area upon which it reports.

Although counsel does not repeat his assertions regarding the Occupational Information Network (O\*NET) Summary Reports, on appeal, we find that the O\*NET does not establish a market research analyst position as a specialty occupation. On April 30, 2014, the AAO accessed the pertinent section of the O\*NET OnLine Internet site relevant to 13-1161 – Market Research Analysts and Marketing Specialists. Contrary to the assertions of counsel, O\*NET OnLine does not state a requirement for a bachelor's degree. Rather, it assigns this occupation a Job Zone "Four" rating, which groups it among occupations of which "most," but not all, "require a four-year bachelor's degree."<sup>13</sup> Further, O\*NET OnLine does not indicate that four-year bachelor's degrees required by Job Zone Four occupations must be in a specific specialty directly related to the occupation. Therefore, O\*NET OnLine information is not probative of the proffered position being a specialty occupation.

Additionally, the AAO observes 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, which signifies that the beneficiary is only expected to possess a basic understanding of the occupation.

As the evidence in the record of proceeding does not establish that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position that is the subject of this petition, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

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<sup>13</sup> Moreover, the first definition of "most" in *Webster's New College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of market research analyst positions require at least a bachelor's degree in marketing or a related field, it could be said that "most" market research analysts positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." § 214(i)(1) of the Act.

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

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. The industry organization and the job advice website submitted by counsel also support the *Handbook's* report. Finally, the petitioner's reliance upon the job vacancy advertisements is misplaced.<sup>14</sup> Upon review of the five advertisements counsel cited as from similar organizations, we note the organizations are in the following industries:

- (1) Wimplus, Inc. wholesales scrap plastics;
- (2) Toppers Pizza is in the restaurant/food services industry;
- (3) Cathy Home Inc. appears to be a textile and apparel company;
- (4) OSG Tap & Die manufactures and sells cutting tools; and
- (5) Source Interlink Companies, Inc. is an integrated media, publishing, merchandising and logistics company.

These companies are not in the import and distribution of decorative building materials for residential and commercial applications industry. Accordingly, these advertisements have little evidentiary value in establishing the first prong of this criterion. Moreover, the advertisements provided establish at best that a bachelor's degree is generally required, but not at least a bachelor's degree in a *specific specialty* or its equivalent.

Accordingly, based upon a complete review of the record, the petitioner has not established that at least a bachelor's degree in a specific specialty is the norm for entry into positions that are (1) parallel to the proffered position; and (2) located in organizations similar to the petitioner. For

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<sup>14</sup> USCIS "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." *Matter of Chawathe*, 25 I&N Dec. at 376. As just discussed, the petitioner has failed to establish the relevance of the job advertisements submitted to the position proffered in this case. Even if their relevance had been established, the petitioner still fails to demonstrate what inferences, if any, can be drawn from these few job postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the same industry. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995).



the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree."

To begin with and as discussed previously, the petitioner itself does not require at least a baccalaureate degree or its equivalent in a specific specialty. In addition, the petitioner failed to credibly demonstrate exactly what the beneficiary will do on a day-to-day basis such that complexity or uniqueness can even be determined. Furthermore, the petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of market research analyst.

It is worth emphasizing that satisfaction of this criterion requires not merely that the petitioner show the proffered to be complex or unique, but that it show that the position is *so* complex or *so* unique as to require the services of a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

We refer the petitioner back to our earlier discussion of the record's presentation of the proffered position in generalized and relatively abstract terms. As we previously discussed, those descriptions do comport with what DOL's *Handbook* reports as general duties of the Market Research Analysts occupational group. However, the *Handbook* indicates that this occupational group includes diverse positions with varying levels of complexity, indicates that a position's inclusion within this group is not predictive of the specific educational credentials of its incumbent, and does not identify any range or subset of Market Research Analyst positions that would require the services of a person with at least a bachelor's degree, or the equivalent, in a specific specialty. Accordingly, to satisfy this particular criterion the petitioner must present sufficient evidence to persuade the AAO that the proffered position's level of complexity or uniqueness elevates its particular position above market research analyst positions held by persons without a bachelor's or higher degree in a specific specialty. This the petitioner has not done.

We refer the petitioner back to our earlier discussions and findings with regard to the generalized descriptions of the proffered position and its generalized duties as not being sufficiently detailed to present relative complexity, uniqueness, and/or specialization as aspects of the proffered position, let alone as aspects that would distinguish the proffered position from those in the Market Research Analysts occupational group that are held by persons without at least a bachelor's degree in a specific specialty.

Next, while counsel points to the documents at pages 77-83 of the RFE reply as establishing the requisite complexity or uniqueness, he does not articulate any persuasive argument for the proposition and, further, we find that it is not evident how the content of those documents would substantiate counsel's contention. We note, for instance, that the 7-page document on the current trends in decorative material reflect that there is competition and fluctuations in the related

markets for various items related to the petitioner's business. However, such information does not shed light on the substantive requirements of the proffered position or on whatever relative levels of complexity, uniqueness, and/or specialization may reside in the proffered position or its constituent duties. Likewise, the "2013 Stocking Over Cap" document does not manifest whatever market research analysis may have been involved in its production, and, accordingly, that document is not probative evidence of the relative complexity or uniqueness required for this position to satisfy the requirements of this alternative prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Although counsel asserts that the 13-page report on design trends with charts and multiple inventory pages and recommendations for additions to the inventory shows that the proffered position is complex and unique/specialized, as observed above, the author is not identified and the petitioner is referred to only once in the report. Moreover, upon review of the totality of the record, we the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than market research analyst can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

Additionally, we again observe 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. Paying a wage-rate that is only appropriate for a low-level, entry position relative to others within the occupation, is inconsistent with the analysis of the relative complexity and uniqueness required to satisfy this criterion. Based upon the wage rate, 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. See U.S. Dept of Labor, Empt & Training Admin., *Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs* (rev. Nov. 2009), which is accessible at the Department of Labor Internet site [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

This aspect of the record is inconsistent with and undermines the claim that the proffered position has the level of complexity or uniqueness that is required to satisfy this criterion.

Given the *Handbook's* indication that market research analysts positions do not normally require at least a bachelor's degree in a specific specialty, or the equivalent, for entry, it is questionable that a position whose LCA wage-rate level is appropriate for positions 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* require a person with such credentials.<sup>15</sup> Thus, the record lacks sufficiently detailed information to distinguish the

<sup>15</sup> 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. U.S. Dept of Labor, Foreign Labor Certification Data Center, Online Wage Library, FLC Quick Search, "Computer Systems Analysts,"



proffered position as unique from or more complex than positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent. Consequently, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Turning to the third criterion, we see that counsel asserts, in part, that the petitioner previously employed an individual to perform the duties of the position proffered here and that USCIS approved that individual's H-1B classification.

We will accept that the petitioner's has in fact had at least one previous hire for a Market Research Analyst position. At the outset, however, we must note that evidence of one such hire is not sufficient to establish the recruiting and hiring history required to satisfy this criterion. This finding is dispositive.

Further, though, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be unreasonable to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Further, it must be emphasized that each petition filing is a separate proceeding with a separate record. *See Hakimuddin v. Dep't of Homeland Sec.*, No. 4:08-cv-1261, 2009 WL 497141, at \*6 (S.D. Tex. Feb. 26, 2009); *see also Larita-Martinez v. INS* 220 F.3d 1092, 1096 (9th Cir. 2000) (stating that the "record of proceeding" in an immigration appeal includes all documents submitted in support of the appeal). In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

That all being said, we have reviewed all of the documentation that the petitioner has submitted with regard to that other petition. However, we find nothing in that material that indicates that we should reach a different conclusion than the rest of this record requires.

Additionally, we see that counsel on appeal provides copies of a Form I-129 and supporting documents for a petition extending the previous employee's H-1B classification, and that counsel asserts that the duties for that position are "substantially identical" to those of the position proffered here. However, a review of the duties of the previously approved position, while showing some overlap, show significant differences. For example, the duties for the previously approved position include collecting and analyzing information about the petitioner's manufacturers and suppliers in China, making field trips to manufacturing facilities to inspect products, analyzing data on economic and political conditions affecting the international flow of trade with the United States, designing surveys, and developing advertising brochures and commercials, sales plans and product promotions such as rebates and giveaways, and streamlining marketing strategies. These duties include elements not mentioned in the petitioner's description of duties for the position proffered here.

Counsel also indicates that the individual previously employed had an educational background that matches the beneficiary's background in support of the petitioner's contention that it normally requires a bachelor's degree in business administration to perform the duties of the position proffered here.<sup>16</sup> However, any implication that the beneficiary's credentials evidence the specialty nature of the proffered position is misplaced. The beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. That is a beneficiary's credentials do not make a non-specialty occupation position a specialty occupation.

We also observe that while a petitioner may believe and assert that a proffered position requires a bachelor's degree or even a bachelor's degree in a specific specialty, 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 the 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").

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent.

We here incorporate and adopt into our analysis of the record under this criterion our analyses and findings in both (1) the discussion above of the second alternative criterion at 8 C.F.R.

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<sup>16</sup> Again, the petitioner stated that the duties of the position required a bachelor's degree with an emphasis in marketing or finance/accounting.



§ 214.2(h)(4)(iii)(A)(2) and (2) our earlier discussion of the deficiencies of the generalized, functional terms in which the petitioner described the proffered position and its constituent duties. In short, the evidence of record has not developed relative specialization and complexity as aspects of the nature of the duties of the proffered position, let alone as aspects that elevate the nature of the proffered position's duties above the nature of the duties of other market research analyst positions whose performance does not require knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty. Put another way, we find that the proposed duties have not been presented in sufficient detail to show that they are more specialized and complex than the duties of market research analyst positions that are not usually associated with attainment of at least a bachelor's degree in a specific specialty. .

In addition, we again note the implication of the petitioner's submission of an LCA that was certified only for a Level I wage-rate, that is, for a job prospect with a wage-rate level appropriate for an entry-level position for an employee who has only basic understanding of the occupation.<sup>17</sup> We find this aspect of the petition to be materially inconsistent with a position whose duties are particularly specialized and complex relative to other positions within the pertinent occupational group.

For all of the reasons discussed above, we find that the evidence of record has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

In sum, for the reasons discussed above 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.

#### IV. CONCLUSION

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 AAOs enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *affd.* 345 F.3d 683.

The petition must be denied for the above stated reasons, with each considered as an independent and alternate 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. at 128. Here, that burden has not been met.

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

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<sup>17</sup> See U.S. Dept of Labor, Empt & 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).