



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **SEP 26 2014**

OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE:

Petitioner:

Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and certified the decision to the Administrative Appeals Office (AAO) for review. We reviewed the proceeding in its entirety and find that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will be affirmed and the petition will be denied.

I. PROCEDURAL HISTORY

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on April 1, 2013. In the Form I-129 visa petition, the petitioner describes itself as an online search portal for the Chinese community that was established in [REDACTED]. 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, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. Subsequently, counsel for the petitioner filed a combined motion to reopen and reconsider. The director dismissed the motion finding that it did not meet the applicable requirements.

Thereafter, the director reopened the case on service motion and issued a Request for Evidence (RFE). Counsel and the petitioner responded to the RFE. Then the director denied the petition and certified the decision to our office for review. In response to the director's certification, the petitioner submitted a brief as permitted by 8 C.F.R. § 103.4(a)(2). The petitioner asserts that the director's basis for denial of the petition was erroneous and contends that it satisfied all evidentiary requirements.

The record of proceeding contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's RFE dated April 29, 2013 (first RFE); (3) previous counsel's response to the RFE; (4) the notice of decision dated July 5, 2013; (5) the Form I-290B for a combined motion and supporting materials; (6) the notice of decision dated September 24, 2013; (7) the director's RFE dated February 26, 2014 (second RFE); (8) counsel and the petitioner's response to the RFE; (9) the Notice of Certification dated June 23, 2014; and (10) the petitioner's brief to the AAO. We reviewed the record in its entirety before issuing our decision.

For the reasons that will be discussed below, we agree with the director's decision that the record of proceeding does not establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.¹ Accordingly, the director's decision will not be disturbed. The decision certified to us will be affirmed, and the petition will be denied.

¹ The AAO conducts its review of service center decisions on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

II. STANDARD OF REVIEW

In response to the certification, the petitioner asserts that "the standard of review in H-1B cases is preponderance of evidence, which means that if the facts and evidence prove that it is 'more likely than not' that the position qualifies as a specialty occupation then the application should be approved." The petitioner further contends that "[b]ased upon a preponderance of evidence that has been presented in the initial H-1B filing and is now provided . . . the position it is offering to the beneficiary through the subject H-1B petition qualifies as a specialty occupation."

In light of the petitioner's references to the requirement that U.S. Citizenship and Immigration Services (USCIS) apply the "preponderance of the evidence" standard, we affirm that, in the exercise of our appellate review in this matter, as in all matters that come within our purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). In pertinent part, that decision states the following:

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

* * *

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination 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.

The "preponderance of the evidence" standard does not relieve the petitioner from satisfying the basic evidentiary requirements set by regulation. The standard of proof should not be confused with the burden of proof. Specifically, the petitioner bears the burden of establishing eligibility for the

benefit sought. A petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). As will be discussed, in the instant case, that burden has not been met.

III. SPECIALTY OCCUPATION

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

A. Proffered Position

In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services as a market research analyst on a part-time basis (25 hours) for an hourly wage of \$26.70.² In a support letter dated March 26, 2013, the petitioner provided the following description of the proffered position:

In this position, under board member's director supervision, the incumbent will create a strategic marketing plan based on research, analysis and experience to identify new market sectors and increase market opportunities in the areas we cover. The incumbent will be responsible for directing the collection, analysis, interpretation and presentation of social media, search engine optimization, search engine management, Internet analytics and public opinion data for existing and potential clients. The position also requires the incumbent to design, execute, and manage innovative and high quality marketing research and campaigns to help the business growth.

² The petitioner has provided inconsistent information regarding the beneficiary's hours. In response to the second RFE, the petitioner indicated that the duties for the proffered position are "broken down by percentage of time spent on each task in a **40 hour week** (emphasis added)." Further, in response to the certification, the petitioner provided a chart that lists a breakdown of the beneficiary's duties, which indicate that the beneficiary works 30 hours per week. In addition, when USCIS recently conducted site verification visits, the beneficiary informed USCIS that she works fulltime, eight hours a day, but the petitioner stated that she works thirty to forty hours a week. The petitioner did not explain the discrepancies.

Moreover, the beneficiary told USCIS that she currently works as a project manager for the petitioner and that her title will change to market research analyst if the instant petition is approved. However, as the record indicates that the beneficiary's F-1 student optional practical training (OPT) employment authorization expired on January 8, 2013 and as there is no other evidence of the beneficiary's authorization to work for the petitioner as a project manager, it is unclear why, if she is already being employed without authorization, she would work as a project manager but wait for an approval of H-1B status before working as a market research analyst. This raises the question of whether the petitioner truly intends to employ the beneficiary as a market research analyst.

Specifically, the incumbent will perform the following job duties:

Analysis and Reporting (39%)

- Collect and perform analysis of multiple and diverse datasets by using statistical techniques and software (10%)
- Develop and implement market & consumer surveys (2%)
- Convert complex data and findings into understandable tables, graphs, and written reports for clients (5%)
- Develop recommendations based on findings (2%)
- Perform ROI analysis to evaluate efficiency and effectiveness of different marketing campaigns (5%)
- Analyze the effect of different online and offline channels on each other and develop and implement innovative strategies for improvement (7%)
- Analyze user behavior, conversion data and multi-channel attribution (3%)
- Deliver regular reporting and analysis to clients and present findings (5%)

Campaign Strategy (31%)

- Identify client objectives and advise on suitable strategies (2%)
- Conceptualize and initiate tests (keyword bids, ad copy, and landing pages) in order to continually improve key metrics (click, search, convert) across online campaigns (5%)
- Make recommendations on keyword selection and content, to improve organic search (8%)
- Conduct data analysis to improve SEM channel performance using Google AdWords (5%)
- Design and execute media placement and social media strategy (5%)
- Manage and Monitor online reputation; discover, response and handle online crisis for clients (4%)
- Manage relationships with search engine and social media marketing partners (2%)

The Market Research Analyst will also support the development and execution of internal marketing effort for [the petitioner], [REDACTED] conference, and other business events.

Marketing Research and Strategy (30%)

- Conduct market analysis to identify user needs and opportunities (5%)
- Develop and execute an acquisition strategy to drive traffic to websites (5%)

- Plan, manage and execute online marketing best practices including: paid search, SEO, affiliate marketing, social media etc. that generate high ROI (5%)
- Develop an effective email program, growing the mailing list and executing advanced email marketing tactics (5%)
- Create marketing content and material for [the petitioner], [REDACTED] and other business events (5%)
- Monitor and manage online reputation for [the petitioner], [REDACTED] and other business events (3%)
- Stay informed of industry trends and best marketing and communication practices (2%)³

* * *

The position requires at least a Bachelor's degree in Business Administration, Communication, Marketing or related field.⁴

B. Law

³ In contrast, during the USCIS site verification visit, the beneficiary told USCIS that she performs the following duties:

- Marketing Promotion
 - Email marketing, website update, social media update
- Analy[z]e & Report
 - Analy[z]e the company website, event promotion
 - Collect data from client, potential competitor
 - Report on the data collected
- Event Marketing
 - Promote company event [REDACTED]
 - Manage media and partner relationship
- Client Service
 - Maintain current client with marketing consulting service
 - Attend event to look for potential client
- Other Marketing / Ana[lysis] Duties Assigned

⁴ The petitioner submitted a copy of the beneficiary's diploma and academic transcript for her Master of Arts in Mass Communication from the [REDACTED]. The petitioner also provided the beneficiary's foreign credentials, which indicate that she received a diploma in English Language and Literature. As will be discussed in greater detail, *infra*, however, the qualifications of a beneficiary are not relevant to the determination of whether a proffered position qualifies as a specialty occupation. In other words, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of at least a bachelor's degree in a specific specialty or its equivalent as a minimum for entry into the occupation. *See* section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1).

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

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

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

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

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

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

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

section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the particular position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F.3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of a baccalaureate or higher degree in the specific specialty or its equivalent as the minimum for entry into the occupation, as required by the Act.

C. Analysis

(1) The duties of the proffered position.

When determining whether a position is a specialty occupation, we must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. To ascertain the intent of a petitioner, USCIS looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by

[d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

For H-1B approval, the petitioner must demonstrate a legitimate need for an employee exists and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. It is incumbent upon the petitioner to demonstrate it has sufficient work to require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent, to perform duties at a level that requires the theoretical and practical application of a body of highly specialized knowledge for the requested validity dates. 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)). USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

In the instant case, the petitioner describes itself on the Form I-129 as "an online search portal for Chinese community." In its support letter, the petitioner states that "it covers the most rich local information and significant trends"; it is a "platform for business owners and consumers to exchange information"; and that it "helps domestic and overseas businesses to plan marketing and media strategies." The petitioner submitted documentary evidence such as an "Online Marketing Service Agreement, Terms and Conditions" and a "Website Host Service Brochure," which indicate that the petitioner's services include online marketing (e.g., yellow page listings, classifieds, newsletters, online stores, and seminar/event promotions) and website services (e.g., design, hosting, improvements, and search engine optimization).

In response to the second RFE, the petitioner claims that it "aims to become the first full service integrated online marketing consulting firm in Silicon Valley [that] targets US-China business." The petitioner states that it provides "in-depth market research and customized digital marketing solutions package" which includes but is not limited to "market research and data report, comparative industry analysis, website management (database management, search engine optimization and search engine management, etc.), media placement, construction of business models, product market analysis, marketing survey design, customer data collection, and [the] like."

Further, throughout the record, the petitioner repeatedly emphasizes hosting an annual two to three day conference called [REDACTED]

[REDACTED] since 2011.⁵ [REDACTED] is described as an annual "gathering of business professionals from China and the United States" and "a leading venue for establishing business partnerships between the two countries." The petitioner refers to a number of speakers at the forum such as the former

⁵ It is noted that the promotional brochures provided indicate that the petitioner was an organizer in 2011, a presenter and supporting media in 2012, an organizer in 2013, and an organizer and media partner in 2014. These brochures name other entities (e.g., [REDACTED]), and not the petitioner, as the hosts of these conferences.

president [REDACTED] former vice president, [REDACTED] Speaker Pro Tempore [REDACTED] of the California State Assembly, Congresswoman [REDACTED] and Congressman [REDACTED] and more. However, the record does not establish how this two to three day forum held once per year as well as any associated business activities would relate to the beneficiary's day-to-day duties to be performed throughout the rest of the year. In addition, when the beneficiary was asked about her role in [REDACTED] she told USCIS that she has "no role" in this conference.

Overall, we find that the description of the duties of the proffered position fails to adequately convey the substantive work that the beneficiary will perform within the petitioner's business operations. Specifically, the description of the beneficiary's duties lacks the specificity and detail necessary to support the petitioner's assertion that the proffered position qualifies as a specialty occupation. The abstract level of information provided about the proffered position and its constituent duties is exemplified by the petitioner's assertion that the beneficiary will "[c]ollect and perform analysis of multiple and diverse datasets by using statistical techniques and software" (10%), "[c]onvert complex data and findings into understandable tables, graphs, and written reports for clients" (5%), "[d]eliver regular reporting and analysis to clients and present findings" (5%), and "[c]onduct market research analysis to identify user needs and opportunities" (5%). The petitioner's statements – as so generally described – do not illuminate the substantive application of knowledge involved or any particular educational attainment associated with such application. Further, they fail to provide any particular details regarding the demands, level of responsibilities, and requirements necessary for the performance of these duties.

The petitioner further claims that the beneficiary will "[a]nalyze the effect of different online and offline channels on each other and develop and implement innovative strategies for improvement" (7%), "[m]ake recommendations on keyword selection and content, to improve organic search" (8%), and "[m]anage and [m]onitor online reputation; discover, respon[d,] and handle online crisis for clients" (4%). However, these statements do not provide any information as to the complexity of the job duties, the amount of supervision required, and the level of judgment and understanding required to perform the duties. Furthermore, the phrases could cover a range of issues, and without additional information, do not provide any insights into the beneficiary's day-to-day work.

In addition, based on the information provided by the petitioner and the beneficiary in response to the USCIS site verification visit, it appears the beneficiary is currently performing the duties of a project manager, not a market research analyst. Employment authorization aside, this raises such additional questions as (1) why is the beneficiary currently performing the duties of a project manager if the petitioner has a legitimate and ongoing need at this time for the services of a market research analyst and (2) if the beneficiary would change her position to perform the duties of a market research analyst, as described by the petitioner, who will perform or relieve her from performing the project manager duties. Based on the lack of detail and corroborating evidence as well as the unresolved discrepancies and inconsistencies in the record, we find that the petitioner did not sufficiently describe the specific duties and responsibilities to be performed by a beneficiary in the context of the petitioner's business operations to demonstrate a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. That said, it is not evident that the proposed duties, even as

described, and the position that they comprise merit recognition of the proffered position as a specialty occupation.

Here, the petitioner did not communicate (1) the actual work that the beneficiary would perform, (2) the complexity, uniqueness and/or specialization of the tasks, and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. Without statements of work describing the specific duties the petitioner requires the beneficiary to perform, USCIS is unable to discern the nature of the position and whether the position requires the theoretical and practical application of a body of highly specialized knowledge and attainment of at least a bachelor's degree in a specific specialty or its equivalent. Without a meaningful job description within the context of non-speculative employment, the record thereby lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires a specialty occupation's level of knowledge in a specific specialty.

The record'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. Thus, the petitioner has failed to satisfy any of the criteria under the applicable provisions at 8 C.F.R. § 214.2(h)(4)(iii)(A).

However, assuming *arguendo* (1) the petitioner has a legitimate need for a market research analyst and (2) it had sufficiently described and documented the duties of the proffered position, we will discuss them and the evidence of record with regard to whether the proffered position as described by the petitioner would qualify as a specialty occupation. To that end, we turn to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

- (2) The petitioner did not establish that a bachelor's degree in a specific specialty is normally the minimum requirement for entry into the particular position proffered in this matter.

We will first review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position.

We recognize the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁶ In the Labor Condition Application (LCA) filed in support of the instant H-1B

⁶ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://>

petition, the petitioner indicates that the proffered position corresponds to the occupational category "Market Research Analysts and Marketing" – SOC (ONET/OES Code) 13-1161, at a Level I (entry level) wage.

We reviewed the chapter of the *Handbook* entitled "Market Research Analysts," including the sections regarding the typical duties and requirements for this occupational category. However, the *Handbook* does not indicate that "Market Research Analysts" comprise an occupational group for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry.

The subchapter of the *Handbook* entitled "How to Become a Market Research Analyst" states the following about this occupational category:

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.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Market Research Analysts, on the Internet at <http://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm#tab-4> (last visited September 25, 2014).

When reviewing the *Handbook*, we again note that the petitioner designated the proffered position under this occupational category at a Level I on the LCA.⁷ This designation is indicative of a

www.stats.bls.gov/oco/. Our references to the *Handbook* are to the 2014 – 2015 edition available online. We hereby incorporate into the record of proceeding the chapter of the *Handbook* regarding "Market Research Analysts."

⁷ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is described 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

comparatively low, entry-level position relative to others within the occupation and signifies that the beneficiary is only expected to possess a basic understanding of the occupation and will perform routine tasks that require limited, if any, exercise of judgment. In accordance with the relevant DOL explanatory information on wage levels, the beneficiary will be closely supervised and her work closely monitored and reviewed for accuracy. Furthermore, she will receive specific instructions on required tasks and expected results. DOL guidance indicates that a Level I designation is appropriate for a research fellow, a worker in training, or an internship. This designation suggests that the beneficiary will not serve in a high-level or leadership position relative to others within the same occupational category.

The *Handbook* does not state that a baccalaureate or higher degree in a specific specialty, or its equivalent is normally the minimum requirement for entry into the occupation. This passage of the *Handbook* reports that market research analysts have degrees and backgrounds in a wide-variety of disparate fields. While the *Handbook* states that employees typically need a bachelor's degree in market research or a related field, it continues by indicating that many market research analysts have degrees in fields such as statistics, math, or computer science. According to the *Handbook*, other market research analysts have a background in fields such as business administration, social sciences, or communications.

In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum requirement of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in the specific specialty (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).⁸

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.

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.

⁸ 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, we do not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry

In addition to recognizing degrees in disparate fields, e.g., the social sciences, math, and computer science as acceptable for entry into this field, the *Handbook* also states that "others have a background in business administration." As noted *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. 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 administration, without further specification, does not establish the position as a specialty occupation. Cf. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558, 560 (Comm'r 1988). 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 normally the minimum requirement for entry into this occupation. Accordingly, as the *Handbook* does not indicate that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation, it does not support the particular position proffered here as qualifying as a specialty occupation.

Further, we find that the petitioner has provided inconsistent information regarding the requirements for the position. In its support letter dated March 26, 2013, the petitioner indicated that the proffered position requires "at least a Bachelor's degree in Business Administration, Communication, Marketing or related field." However, in response to the first RFE, the petitioner submitted a document entitled "Job Duties Description," which stated the following regarding the eligibility requirements:

Degree Required: Baccalaureate or Higher Degree

Degree Field: Mass Communications, Public Relations, Marketing, or Management related.

Subsequently, in response to the certification, the petitioner emphasized that it "will consider only candidates with Business Administration or Communications Degree for the position of Market Research Analyst." The petitioner did not explain the variance in the claimed requirements for the position. 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).

Moreover, the requirements as specified by the petitioner do not establish that the proffered position requires at least a bachelor's degree in a specific specialty. As discussed, since there must be a close correlation between the required "body of highly specialized knowledge" and the position, a minimum entry requirement of a degree in disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its

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.

equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position.

Here, the petitioner claims that the duties of the proffered position can be performed by an individual with a bachelor's degree in Business Administration, Marketing, Communications, Public Relations and related fields. The fact that a person may be employed in a position designated by an employer as that of a market research analyst and may apply some related principles in the course of his or her job is not in itself sufficient to establish the position as one that qualifies as a specialty occupation. Thus, it is incumbent on the petitioner to provide sufficient evidence to establish that the particular position that it proffers would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. When any person makes an application for a "visa or any other document required for entry, or makes an application for admission [. . .] the burden of proof shall be upon such person to establish that he is eligible" for such relief. Section 291 of the Act, 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I. & N. Dec. 190.

As previously stated, USCIS does not simply rely on a position's title to determine whether a particular position qualifies as a specialty occupation. Rather, USCIS considers the duties of a proffered position, the nature of the petitioning entity's business operations, and all other relevant factors to make its determination. Here, the petitioner accepts degrees in disparate fields such as Marketing, Communications, Public Relations and related fields, as well as in a generalized field such as business administration.

For a position to be a specialty occupation, there must be a close correlation between the required specialized studies and the position and, thus, the mere requirement of a degree, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 560 ("The mere requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility."). Accordingly, a claim by the petitioner that the duties of the position can be performed by an individual with only a general-purpose bachelor's degree, such as business administration, without more is tantamount to an admission that the proffered position is not in fact a specialty occupation. Although a general-purpose bachelor's degree 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 147.⁹

⁹ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. *See, e.g., Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; *cf. Matter of Michael Hertz Assocs.*, 19 I & N Dec. at 560 (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: otherwise, an employer could ensure the granting of a specialty occupation visa petition by the simple

Further, in response to the certification, the petitioner refers to the Occupational Information Network (O*NET) Summary Report to assert that the proffered position "is a Job Zone 4 with an SVP range of 7.0 < 8.0, requiring a bachelor's degree." However, contrary to the petitioner's assertion, the O*NET Summary Report does not establish that the proffered position qualifies as a specialty occupation normally requiring at least a bachelor's degree in a specific specialty, or its equivalent. In the subsection entitled "Education," O*NET states that "[m]ost of these occupations require a four-year bachelor's degree, but some do not." Further, the term "most" is not indicative that a particular position within the wide spectrum of marketing research analyst jobs normally requires at least a bachelor's degree.¹⁰ Moreover, O*NET does not state that a degree must be in a *specific specialty*. Thus, a designation of Job Zone Four does not demonstrate that at least a bachelor's degree in a *specific specialty* is normally the minimum requirement for entry, and does not, therefore, demonstrate that a position so designated qualifies as a specialty occupation as defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).

In addition, the assignment of an SVP rating of 7 or 8 is also not indicative of a specialty occupation. This becomes more apparent upon reading Section II of the *Dictionary of Occupational Title (DOT)*'s Appendix C, Components of the Definition Trailer, which addresses the SVP rating system.¹¹ The section reads:

II. SPECIFIC VOCATIONAL PREPARATION (SVP)

Specific Vocational Preparation is defined as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation.

This training may be acquired in a school, work, military, institutional, or vocational environment. It does not include the orientation time required of a fully qualified

expedient of creating a generic (and essentially artificial) degree requirement.

Id.

¹⁰ For instance, the first definition of "most" in *Webster's New Collegiate College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of the positions require at least a bachelor's degree in a specific specialty, it could be said that "most" of the 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 (which as noted above is designated as a Level I entry position in the LCA). 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." Section 214(i)(1) of the Act.

¹¹ Section II of the *DOT*'s Appendix C, Components of the Definition Trailer, can be found on the Internet at the website http://www.occupationalinfo.org/appendxc_1.html#II.

worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs.

Specific vocational training includes training given in any of the following circumstances:

- a. Vocational education (high school; commercial or shop training; technical school; art school; and that part of college training which is organized around a specific vocational objective);
- b. Apprenticeship training (for apprenticeable jobs only);
- c. In-plant training (organized classroom study provided by an employer);
- d. On-the-job training (serving as learner or trainee on the job under the instruction of a qualified worker);
- e. Essential experience in other jobs (serving in less responsible jobs which lead to the higher grade job or serving in other jobs which qualify).

The following is an explanation of the various levels of specific vocational preparation:

Level	Time
1	Short demonstration only
2	Anything beyond short demonstration up to and including 1 month
3	Over 1 month up to and including 3 months
4	Over 3 months up to and including 6 months
5	Over 6 months up to and including 1 year
6	Over 1 year up to and including 2 years
7	Over 2 years up to and including 4 years
8	Over 4 years up to and including 10 years
9	Over 10 years

Note: The levels of this scale are mutually exclusive and do not overlap.

Thus, an SVP rating of 7 to 8 does not indicate that at least a four-year bachelor's degree is required, or more importantly, that such a degree must be in a specific specialty directly related to the duties and responsibilities of that occupation.

In response to the first RFE, previous counsel for the petitioner indicated that "statistics on [O*NET]...shows that for Market Research Analyst Position '71% of them are holding Bachelors' degree, 2[1]% of them are holding Master's degree, 4% are holding Doctoral or professional degree, which has [sic] demonstrate[s] that [a] Bachelor['s] degree is normally the minimum requirement

for this position." Again, however, the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) is one that requires a degree in a specific specialty, or its equivalent, that is directly related to the proposed position. Here, these self-reporting percentages do not indicate that these degrees must be ones in a specific specialty directly related to the occupation. As such, the information provided on O*NET is not sufficient to support a conclusion that the proffered position normally requires a minimum of a bachelor's or higher degree in a specific specialty or its equivalent for entry.

Moreover, in response to both the second RFE and the certification, the petitioner and counsel also discuss two decisions, specifically, *Tapis Int'l v. INS*, 94 F. Supp. 2d 172 (D. Mass. 2000) and *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985 (S.D. Ohio 2012). In response to the second RFE, counsel asserted that *Tapis Int'l v. INS* rejected "agency interpretation because it would preclude any position from satisfying the 'specialty occupation' requirements where a specific degree is not available in that field."

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

Further, the petitioner and counsel also cite to *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 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." We agree that "[t]he knowledge and not the title of the degree is what is important." However, for the aforementioned reasons, the petitioner did not establish that the particular position offered in this matter requires a bachelor's or higher degree in a specific specialty, or its equivalent, directly related to its duties in order to perform those duties.

In any event, the petitioner did not provide evidence to establish that the facts of the instant petition are analogous to those in *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*¹² or *Tapis Int'l v. INS*. We also note that, in contrast to the broad precedential authority of the case law

¹² It is noted that the district judge's decision in that case appears to have been based largely on the many factual errors made by the service center in its decision denying the petition. We further note that the service center director's decision was not appealed. Based on the district court's findings and description of the record, if that matter had first been appealed through the available administrative process, we may very well have remanded the matter to the service center for a new decision for many of the same reasons articulated by the district court if these errors could not have been remedied in our *de novo* review of the matter.

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

For the foregoing reasons, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook* (or other objective, authoritative source) supports a finding that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position proffered in this matter. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding by the petitioner do not indicate that this position is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

(3) The petitioner did not establish that the degree requirement is common to the industry.

Next, we will review the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common for positions that are identifiable as being (1) in the petitioner's industry, (2) parallel to the proffered position, and also (3) located in organizations that are similar to the petitioner.

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

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook* (or other objective, authoritative source), reports a standard, industry-wide requirement for at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference our previous discussion on that matter.

For the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, documentation submitted by a petitioner would be outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the advertising organization share the same general characteristics, such factors may include information regarding the nature or type of organization and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

In this matter, the petitioner stated in the Form I-129 that it is an online search portal for Chinese community established in 2007, with two employees and four contractors.¹³ The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 541850 – "Outdoor Advertising."¹⁴ The U.S. Department of Commerce, Census Bureau website describes this NAICS code as follows:

This industry comprises establishments primarily engaged in creating and designing public display advertising campaign materials, such as printed, painted, or electronic displays; and/or placing such displays on indoor or outdoor billboards and panels, or on or within transit vehicles or facilities, shopping malls, retail (in-store) displays, and other display structures or sites.

See U.S. Dep't of Commerce, U.S. Census Bureau, 2012 NAICS Definition, 541850 – Outdoor Advertising on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited September 25, 2014).

Upon review, the petitioner fails to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common for positions that are identifiable as being (1) in the petitioner's industry, (2) parallel to the proffered position, and (3) located in organizations that are similar to the petitioner.¹⁵

For example, in support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, counsel submitted copies of job advertisements. However, we find that the petitioner's reliance on these job postings is misplaced, as the advertising organizations do not appear to be similar to the petitioner. More specifically, the advertisements include:

- Egress Solutions (software product management and marketing consulting);

¹³ The petitioner provided documents which contain inconsistent information about its number of employees. For example, the petitioner's 2011 tax return indicates that it did not pay any salaries or wages. Further, the 2013 1Q wage report indicates that the petitioner had only one employee. Moreover, the petitioner's organizational chart indicates that the petitioner has a total of 11 employees including 3 web developers in Beijing. Whereas, during the recent USCIS site verification visit, the petitioner informed USCIS that it only has one employee on its payroll and that any remaining workers are contractors.

¹⁴ NAICS is used to classify business establishments according to type of economic activity, and each establishment is classified to an industry according to the primary business activity taking place there. See U.S. Dep't of Commerce, U.S. Census Bureau, NAICS, on the Internet at <http://www.census.gov/eos/www/naics/> (last visited September 25, 2014).

¹⁵ Moreover, the petitioner did not provide any independent evidence of how representative the job postings are of the particular advertising employers' recruiting history for the type of job advertised. As the advertisements are only solicitations for hire, they are not evidence of the actual hiring practices of these employers.

- Chambers Designs Group (product development, branding, positioning, and design);
- [REDACTED] (technology and product innovation);
- Market Strategies International (banking-financial services, insurance);
- [REDACTED] (food retail);
- Applied Marketing Science (market research, consulting and expert insight services);
- [REDACTED] (survey-based market research operating in over 80 countries);
- [REDACTED] (leading independent provider of digital video brand advertising solutions); and
- [REDACTED] (leading market research and consulting organization);

Further, the record also contains advertisements from staffing companies such as [REDACTED], as well as from [REDACTED] for which little or no information regarding the employers is provided. The petitioner did not state which aspects or traits (if any) it shares with the advertising organizations. Without further information, the advertisements appear to be for organizations that are not similar to the petitioner and the petitioner has not provided any probative evidence to suggest otherwise. The petitioner failed to supplement the record of proceeding to establish that the advertising organizations are similar to it.

Moreover, the petitioner has not established that the advertisements are for parallel positions. Some of the examples of requirements for the advertised positions include:

- [REDACTED] a minimum of 2 to 5 years in the custom market research industry and at least 2 years of experience in the high technology, software, or Internet industry;
- [REDACTED] 3-8 years of experience in market research, customer insight research, or related social science field;
- [REDACTED] 3-10 years related experience;
- [REDACTED] 5+ years of experience in market research;
- [REDACTED] 5-7 years market research experience, including supervisory experience.

As previously discussed, the petitioner designated the proffered position on the LCA through the wage level as a Level I (entry level) position relative to others within the same occupation. Based upon the information provided in the job postings, the advertised positions appear to be for more senior positions than the proffered position. More importantly, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.

In addition, contrary to the purpose for which the advertisements were submitted, some job postings do not indicate that a bachelor's degree is required. For example:

- [REDACTED] a high school diploma with 2 years of experience; and
- [REDACTED] BS is preferred. However, a "preference" does not indicate that a bachelor's degree is required for the position.

Further, some postings do not indicate that a bachelor's degree in a directly related specific specialty is required. For instance:

- [REDACTED] a bachelor's degree, but no specific specialty or its equivalent is identified as being required;
- [REDACTED] a bachelor's degree in business, marketing, applied mathematics, statistics, or related field;
- [REDACTED] a bachelor's degree in Psychology (Cognitive or Experimental), Marketing, Market Research or Human-Computer Interaction; and
- [REDACTED] a bachelor's degree in business or related discipline.

As discussed, the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but one in a specific specialty that is directly related to the specialty occupation claimed in the petition. Further, requiring a general-purpose bachelor's degree, such as business or business administration, 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.

As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, as the evidence does not establish that similar organizations in the same industry routinely require at least a bachelor's degree in a specific specialty, or its equivalent, for parallel positions, not every deficit of every job posting has been addressed.¹⁶

In support of the assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, counsel also submitted letters from [REDACTED] Marketing Director at [REDACTED] Sales & Regional Manager at [REDACTED]. However, contrary to the purpose for which the letters were submitted, they do not establish that the proffered position qualifies as a specialty occupation.

¹⁶ According to the *Handbook's* detailed statistics on market research analysts, there were approximately 415,700 persons employed in these positions in 2012. *Handbook*, 2014-15 ed., available at <http://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm#tab-6> (last visited September 25, 2014). 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 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).

For example, we find that the petitioner did not establish that the letters are from similar organizations. Specifically, [REDACTED] is described as the "most influential Chinese-language newspaper in North America," which has a marketing department. Similarly, [REDACTED] is described as a part of the [REDACTED] an ethnic TV/Media content aggregator, which also provides business platforms to its customers. In addition, while the letters make various claims regarding the marketing activities of these entities, they are not substantiated by documentary evidence to support that the organizations or their operations are similar to those of the petitioner.

Further, the letters from [REDACTED] contain inconsistencies that undermine the credibility of their experience and expertise. For example, [REDACTED] states in the letter that she has "been working as Marketing Manager in [REDACTED] in charge of sales and marketing in the company." However, she signed the letter as a "Marketing Director." Further, the letter from [REDACTED] describes [REDACTED] experience as an expert, but there is no evidence to establish that [REDACTED] are the same individual. 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. 592.

[REDACTED] also claims that the petitioner "is seeking for a Market Research Analyst to lead the online marketing services." Ms [REDACTED] further states that "[f]or a relatively small-sized company such as [the petitioner], it is essential to have a particularly specialized Market Research Analyst to manage its internal and external marketing responsibilities, to ensure the organic growth of the company." Similarly, [REDACTED] claims that the proffered position "designs, executes and manages innovative and high quality marketing strategies through gathering, analyzing and converting complex data for their clients." [REDACTED] states that this position "is not as simpl[e] as some other office routine ones, but involves strong background of both US and China's culture."

As discussed, however, the petitioner classified the proffered position as a Level I position on the LCA. There is no indication that the petitioner or its counsel advised [REDACTED] that the petitioner characterized the proffered position to DOL as an entry-level position, for a beginning level employee who has only a basic understanding of the occupation (as indicated by the wage-level selected by the petitioner on the LCA). The wage-rate indicates that the beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment (relative to other positions in the same occupation); 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. It appears that [REDACTED] would have found this information relevant for their opinion letters. Moreover, without this information, the petitioner has not demonstrated that [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately analyze similar or parallel positions.

In addition, [REDACTED] claim that "all of our past and current staff [have] at least a Bachelor's degree in Marketing, Communications, or Journalism." [REDACTED] also asserts that "all of our Market Research Analysts have at least a Bachelor's degree in Marketing, Communications, or related

field." However, they did not provide documentary evidence to support their claims. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

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

Thus, based upon a complete review of the record, the petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common for positions that are identifiable as being (1) in the petitioner's industry, (2) parallel to the proffered position, and (3) located in organizations that are similar to the petitioner. For 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).

- (4) The petitioner did not establish that the proffered position is so complex or unique that it can only be performed by an individual with at least a bachelor's degree in a specific specialty or its equivalent.

We will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner shows that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

In the instant case, the petitioner and counsel claim that the proffered position involves complex and/or unique duties. In support of the petition, the petitioner provided information regarding the proffered position and evidence regarding its business operations, which include: (1) program brochures for [REDACTED] (2) financial documents such as tax returns and wage reports; (3) its business license; (4) articles of incorporation; and (5) a business plan. However, upon review of the record, we find that the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of market research analyst.

As previously mentioned, we examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence. The evidence submitted, however, fails to establish that the petitioner's proffered position qualifies for the requested classification under the applicable statutory and regulatory provisions. It is not the volume of documentation that establishes eligibility for the benefit sought, but rather the relevance, probative value, and credibility of the documentation – both individually and within the context of the totality of the evidence. *Matter of Chawathe*, 25 I&N Dec. 375-376.

Notably, the petitioner repeatedly emphasizes that it has sponsored [REDACTED] since 2011. However, the petitioner failed to establish how this two to three day annual conference relates to the

beneficiary's day-to-day responsibilities and how such an infrequent event establishes that the proffered position is so complex or unique that it can be performed only by an individual with a baccalaureate (or higher degree) in a specific specialty, or its equivalent. As mentioned, the petitioner provided the profiles of small and medium-sized businesses that have attended the forum and with which it has consulted for offline solutions to expand its market in China. The petitioner claimed that the beneficiary "made the list [of these businesses], designed [a] survey to collect data, and analyzed those companies' potential[] in [the] Chinese market." However, the document only contains a brief description of the companies and does not provide information about the survey that the beneficiary designed or her analysis of the potential of each company. Further, there is no evidence that the beneficiary was involved in preparation of the list since it does not contain the beneficiary's name or any other information connecting her to the documents.

Overall, the record lacks sufficient probative evidence to distinguish the proffered position as more complex or unique from other market research analyst positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent. The job descriptions in the record do not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. Moreover, the petitioner failed to provide documentary evidence to establish that the duties performed by the beneficiary involve any particular level of complexity or uniqueness relative to other market research analysts. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the position. While a few related courses may be beneficial, or in some cases even required, to perform certain duties of the position, the record failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position.

The evidence of record does not establish that this position is significantly different from other positions such that it refutes the *Handbook's* information that there is a spectrum of preferred degrees acceptable for such positions, including a general business administration degree. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than other market research analyst positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Once again, the petitioner designated the proffered position at a Level I (entry level) wage. The wage-level of the proffered position indicates that, relative to others within the occupation, 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. Without further evidence, it is not credible that the petitioner's proffered position is so complex or unique relative to other market research analysts, as such a position would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing

wage. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."¹⁷

The petitioner indicates that the beneficiary's academic credentials and experience qualify her to serve in the proffered position. In the support letter, the petitioner states that the beneficiary "is amply qualified for the position." The petitioner indicates that the beneficiary's "work experience in search engine marketing and viral marketing will be a strong asset to the company." The petitioner further states that "her solid background in the media industry will provide an input to help the company's growth."

However, the test to establish a position as a specialty occupation is not the credentials and skills of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent). The petitioner does not explain or clarify at any time in the record which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. Upon review of the record of proceeding, we find that the petitioner has failed to establish the proffered position as satisfying the second prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

- (5) The petitioner did not establish that it normally requires at least a bachelor's degree in a specific specialty or its equivalent for the position.

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. When reviewing this criterion, we usually review the petitioner's past recruiting and hiring practices, as well as any other information provided by the petitioner in support of the petition.

To satisfy this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

While a petitioner may assert that a proffered position requires a specific degree, that opinion alone without corroborating evidence will not establish that the position qualifies 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 petitioner 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 388. In

¹⁷ For additional information regarding the 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.

other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if 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").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. See generally *Defensor v. Meissner*, 201 F.3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. According to the Court in *Defensor*, "To interpret the regulations any other way would lead to an absurd result." *Id.* at 388. If USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. See *id.*

The petitioner stated in the Form I-129 petition that it has two employees and four contractors and that it was established in 2007 (approximately 5 to 6 years prior to the submission of the H-1B petition). In response to the second RFE, the petitioner submitted its advertisements for "marketing/sales," "project manager/marketing assistant/event coordinator/sales assistant" positions. However, the postings do not indicate a bachelor's degree in a specific specialty is required. For example, the posting for "marketing/sales" position states "completion or current enrollment in Bachelor/Master degree, a related field preferred." Further, for "project manager/marketing assistant/event coordinator/sales assistant" position, the advertisement indicates "BA or BS in related field preferred." As mentioned, preference for a bachelor's degree is not equivalent to a requirement of a bachelor's degree. Further, we reiterate that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a *specific specialty* or its equivalent that is directly related to the specialty occupation claimed in the petition. Moreover, the petitioner did not establish that the duties and responsibilities of the advertised positions are similar to the proffered position. Therefore, the posting does not establish that the petitioner normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position and, in fact, indicates the opposite.

The petitioner also submitted a copy of a diploma and the Wage and Tax Register forms for one of its former employees, [REDACTED]. The petitioner claimed in its response to the second RFE that [REDACTED] worked as a market research analyst until April 2013 and that the beneficiary was promoted to

replace [REDACTED] position. Notably, the wage form indicates that [REDACTED] received \$11,666.68 in taxable wages and worked 344 hours. This translates to approximately \$34 per hour, which is higher than the beneficiary's proffered wage of \$26.70 per hour. Further, the petitioner did not provide [REDACTED] job description to establish that the duties and responsibilities are the same or are related to the proffered position. The petitioner also did not provide any information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required, or the amount of supervision received. Therefore, the petitioner failed to establish that [REDACTED] was employed in a position parallel to the proffered position.

Upon review of the record, the petitioner has not provided sufficient evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

(6) The petitioner did not establish that the nature of the duties is so specialized and complex.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent.

The petitioner provided information regarding the proffered position and its business operations. While the evidence provides some insights into the petitioner's business activities, the documents do not establish that the nature of the specific duties of the proffered position is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

In the instant case, we note that relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. We incorporate our earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a Level I position (out of four assignable wage-levels) relative to others within the same occupational category, and hence one not likely distinguishable by relatively specialized and complex duties. Without further evidence, the petitioner has not established that the proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a substantially higher prevailing wage. As previously noted, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems" and requires a significantly higher wage.

The petitioner has submitted inadequate probative evidence to satisfy this criterion of the regulations. Thus, the petitioner has not established that the nature of the specific duties of the position is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. We, therefore, conclude that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The petition will be dismissed and the petition denied for this reason.

IV. THE BENEFICIARY'S QUALIFICATIONS

The director also found that the beneficiary would not be qualified to perform the duties of the proffered position if the job had been determined to be a specialty occupation. However, a beneficiary's qualifications to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the proffered position does not require a baccalaureate or higher degree in a specific specialty or its equivalent. Therefore, we need not and will not address the beneficiary's qualifications further.

V. CONCLUSION

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. at 128. Here, that burden has not been met.

ORDER: The director's decision is affirmed. The petition is denied.