



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF A-C- INC.

DATE: JUNE 20, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a consumer electronics company, seeks to temporarily employ the Beneficiary as a "marketing specialist" under the H-1B nonimmigrant classification for specialty occupations. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director of the California Service Center denied the petition, concluding that the Petitioner did not establish, as required, that: (1) the proffered position is a specialty occupation; and (2) the labor condition application (LCA) corresponds to and supports the H-1B petition.

On appeal, the Petitioner submits additional evidence and contends that the petition should be approved.

Upon *de novo* review, we will dismiss the appeal.

### I. LEGAL FRAMEWORK

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) largely restates this statutory definition, but adds a non-exhaustive list of fields of endeavor. In addition, the regulations provide that the proffered position must meet one of the following criteria to qualify as a specialty occupation:

- (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.

8 C.F.R. § 214.2(h)(4)(iii)(A). We have consistently interpreted the term “degree” to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proposed 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”); *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000).

## II. PROFFERED POSITION

The Petitioner stated in the H-1B petition that the Beneficiary will serve as a “marketing specialist.” The Petitioner stated the following with regard to the proffered position in its response to the Director’s request for additional evidence (RFE) (note: errors in the original text have not been changed):

The position of Marketing Specialist is a complex position and requires a degree specific to the industry. This position is extremely important for fast growing startup companies such as [the Petitioner]. This position is responsible for performing on-going product and market research analysis; gathering market intelligence and customer feedback; identifying potential and existing opportunities and threats; providing market intelligence support for new product development; providing data analytics support including customer feedback for marketing for existing products; defining and executing marketing plan including social media, paid advertising, content marketing and Search Engine Optimization (SEO); managing paid advertising campaigns, identify opportunities; and defining budget and budget plan and oversee creatives creation.

Below is a breakdown of the specific job duties including the percentage of time spent on each duty. This position is full-time and therefore requires 40 hours of work per work.

Data Research: This component requires performing ongoing market research on competitor sales and methods and marketing distribution, gathering data on customer demographics, preferences and buying habits to identify markets. This is critical in fashion wearable technology because it is so new and new competitors arise on a regular basis. Understanding the strengths and weaknesses of our competitors allow us to market more effectively. This duty includes fathering market intelligence and customer feedback. The knowledge required to perform this duty is gained though obtaining a Bachelor Degree in a business related field. These duties comprise approximately 40% of the position.

Analyzing Data: This component requires analyzing data to identify correlations and contributing variables and clustered customer data to provide insight and recommendations for business implementations such as targeting advertisings on outbound marketing channels using analytics software such as SAS. Analysis of the emerging and ever changing market is critical. We much understand new technology that can be utilized before our competitors. The knowledge required to perform this duty is gained through obtaining a Bachelor degree in a business related field. These duties comprise approximately 30% of the position.

Preparing Reports: This component requires preparing reports of findings, illustrating data graphically and translating complex findings to report to management. Delivering the research and analysis through reports is critical to our team's ability to react to market changes. The knowledge required to perform this duty is gained through obtaining a Bachelor degree in a business related field. These duties comprise approximately 30% of the position.<sup>1</sup>

The Petitioner stated that the proffered position requires a bachelor's degree in business or a related field.

### III. ANALYSIS

Upon review of the record in its totality and for the reasons set out below, we determine that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation.<sup>2</sup>

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<sup>1</sup> The Petitioner expands upon these duties significantly on appeal. However, the Petitioner must establish that the position offered to the Beneficiary when the petition was filed merits classification for the benefit sought. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to U.S. Citizenship and Immigration Services (USCIS) requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). On appeal, the Petitioner cannot offer a new position to the Beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, the associated job responsibilities, or the requirements of the position.

<sup>2</sup> Although some aspects of the regulatory criteria may overlap, we will address each of the criteria individually.

Specifically, the record does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.<sup>3</sup>

Before addressing the specialty-occupation criteria contained at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1)-(4), we will briefly discuss an issue which precludes a finding that the proffered position is a specialty occupation.

The Petitioner did not demonstrate that the educational requirements for the position qualify as a specialty occupation. As noted, the Petitioner stated that a bachelor's degree would adequately prepare an individual to perform the duties of the proffered position. However, a requirement for a bachelor's degree in business is inadequate to establish that a position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 (Comm'r 1988). To prove that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As explained above, we interpret 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. We have consistently stated 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. *Royal Siam Corp.*, 484 F.3d at 147.

The Petitioner's statement therefore indicates that the proffered position is not in fact a specialty occupation, and the Director's decision must therefore be affirmed and the appeal dismissed on this basis alone. While this issue precludes approval of the petition, for the purpose of performing a more comprehensive analysis, we will nonetheless review the evidence of record in light of the four specialty-occupation criteria contained at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1)-(4).

#### A. First Criterion

We turn next 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. To inform this inquiry, we recognize the U.S. Department of Labor's

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<sup>3</sup> The Petitioner submitted documentation to support the H-1B petition, including evidence regarding the proffered position and its business operations. While we may not discuss every document submitted, we have reviewed and considered each one.

(DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>4</sup>

On the LCA<sup>5</sup> submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category “Market Research Analysts and Marketing Specialists” corresponding to the Standard Occupational Classification code 13-1161.<sup>6</sup> The *Handbook* states the following with regard to the educational requirements of positions located within this occupational category:

Most market research analysts need at least a bachelor’s degree. Top research positions may 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.

#### **Education**

Courses in statistics, research methods, and marketing are essential for these workers. Courses in communications and social sciences, such as economics or consumer behavior, 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

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<sup>4</sup> All of our references are to the 2016-2017 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/ooh/>. We do not, however, maintain that the *Handbook* is the exclusive source of relevant information. That is, the occupational category designated by the Petitioner is considered as an aspect in establishing the general tasks and responsibilities of a proffered position, and USCIS regularly reviews the *Handbook* on the duties and educational requirements of the wide variety of occupations that it addresses. To satisfy the first criterion, however, the burden of proof remains on the Petitioner to submit sufficient evidence to support a finding that its particular position would normally have a minimum, specialty degree requirement, or its equivalent, for entry.

<sup>5</sup> The Petitioner is required to submit a certified LCA to demonstrate that it will pay an H-1B worker the higher of either the prevailing wage for the occupational classification in the “area of employment” or the actual wage paid by the employer to other employees with similar experience and qualifications who are performing the same services. *See Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542, 545-546 (AAO 2015).

<sup>6</sup> The Petitioner classified the proffered position at a Level II wage. We will consider this selection in our analysis of the position. The “Prevailing Wage Determination Policy Guidance” issued by the DOL provides a description of the wage levels. DOL’s wage-level guidance specifies that a Level II designation is reserved for positions for involving only moderately complex tasks requiring limited judgment. U.S. Dep’t of Labor, Emp’t & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://flcdatcenter.com/download/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://flcdatcenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf). A prevailing wage determination starts with an entry level wage and progresses to a higher wage level after considering the experience, education, and skill requirements of the Petitioner’s job opportunity. *Id.*

other fields, such as statistics and marketing, and/or earn a master's degree in business administration (MBA). A master's degree is often required for leadership positions or positions that perform more technical research.

### **Licenses, Certifications, and Registrations**

Certification is voluntary, but analysts may pursue certification to demonstrate a level of professional competency. The Marketing Research Association offers the Professional Researcher Certification (PRC) for market research analysts. Candidates qualify based on experience and knowledge; they must pass an exam, be a member of a professional organization, and have at least 3 years working in opinion and marketing research. Individuals must complete 20 hours of industry-related continuing education courses every 2 years to renew their certification.

Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Outlook Handbook*, Market Research Analysts (2016-17 ed.).

The *Handbook* reports that individuals working in positions located within this occupational category have degrees and backgrounds in a wide variety of disparate fields. That is, while the *Handbook* states that employees typically need a bachelor's degree in market research or a related field, it continues by specifying that many market research analysts have degrees in fields such as statistics, math, or computer science. According to the *Handbook*, others have backgrounds in fields such as business administration, the social sciences, or communications. This passage of the *Handbook* identifies various courses as essential to this occupation, including statistics, research methods, and marketing. It further elucidates that courses in communications and social sciences (such as economics, psychology, and sociology) are also important. Therefore, although the *Handbook* indicates that market research analysts typically need a degree, it also indicates that degrees and backgrounds in various fields are acceptable for jobs located within this occupational category – including computer science and the social sciences, as well as statistics and communications.

In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the “degree in the specific specialty (or its equivalent)” requirement of section 214(i)(1)(B) of the Act. In such a case, the required “body of highly specialized knowledge” would essentially be the same. Since there must be a close correlation between the required “body of highly specialized knowledge” and the position, however, a minimum entry requirement of a degree in 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.<sup>7</sup> Section 214(i)(1)(B) of the Act (emphasis added).

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<sup>7</sup> Whether read with the statutory “the” or the regulatory “a,” both readings denote a singular “specialty.” Section

The *Handbook* also states that “others have a background in business administration.” As discussed, 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.*, 484 F.3d at 147. Therefore, the *Handbook*'s recognition that a general, non-specialty “background” in business administration is sufficient for positions located within this occupational category strongly suggests that a bachelor's degree *in a specific specialty* is not normally the minimum entry requirement for this occupation.

The narrative of the *Handbook* further reports that some employees obtain professional certification to demonstrate a level of professional competency. It continues by outlining the requirements for market research analysts to achieve the PRC, and states that candidates qualify based upon their experience and knowledge. According to the *Handbook*, the credential is granted by the Marketing Research Association – now known as the Insights Association<sup>8</sup> – to those who pass an exam and have at least three years of experience working in market research.<sup>9</sup>

We reviewed the Insights Association's website, which confirms the *Handbook*'s statement regarding the requirements for professional certification (i.e., passage of an exam and three years of relevant industry experience), and further specifies that the “education” necessary to apply for professional certification is “12 industry-related education hours within the two preceding years.” It also emphasizes that the credentialing program differentiates the individual who takes it and provides a “‘badge’ of competence in the given areas and an assurance that the individual is current in knowledge and experience.” The narrative continues by stating that the credential “provides a vehicle for developing a pool of well-trained, competent marketing researchers, thereby improving both perceived and substantive standards.” The website includes information regarding “How to Enter the Industry” which lists a variety of possible degrees, such as business administration, liberal arts, computer science and communications, and a variety of “helpful skills,” including “attention to detail,” and “basic computer skills.” It does not indicate that a market research analyst position has any specific minimum academic requirement for entry, nor does it state that it requires any particular level of education to be identified as qualified and possessing a level of expertise or competence. Instead, IA highlights the importance of professional experience and industry-related professional courses (through conferences, seminars, and webinars).

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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 requirement, degrees in more than one closely related specialty. 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.

<sup>8</sup> The Marketing Research Association merged with the Council of American Survey Research Organizations in 2017 to become the Insights Association (IA). See <http://www.insightsassociation.org/about> (last visited June 20, 2017). The Insights Association is therefore the successor to the Marketing Research Association.

<sup>9</sup> The Insights Association website states that it “strives to effectively represent, advance, and grow the research profession and industry.” For additional information, see <http://www.insightsassociation.org/about> (last visited June 20, 2017).

Thus, the *Handbook* and the Insights Association website therefore do not support the claim that the occupational category "Market Research Analysts" is one for which normally the minimum requirement for entry is a baccalaureate degree (or higher) in a specific specialty, or its equivalent.

The information the Petitioner submits from O\*NET Online (O\*NET) does not establish the proffered position as a specialty occupation, either. First, O\*NET assigns these positions a "Job Zone Four" rating, which groups it among occupations for which "most . . . require a four-year bachelor's degree, but some do not." It is therefore not clear that a bachelor's degree is even required, which is consistent with the *Handbook*. Further, as indicated above a requirement for a bachelor's degree alone is not sufficient. Instead, we have consistently interpreted the term "degree" to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proposed position. See *Royal Siam Corp.*, 484 F.3d at 147; *Defensor*, 201 F.3d at 387. O\*NET does not indicate that when a four-year bachelor's degree is required, that it must be in a specific specialty directly related to the occupation, or the equivalent. For both reasons, this information does not establish the proffered position as a specialty occupation.

The information from the California Employment Development Department (EDD) is also insufficient for similar reasons. While the EDD indicates that these positions require a bachelor's degree, it does not state the degree must be in any particular field of study. Again, we interpret the term "degree" to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proposed position.

Likewise, the printout from *U.S. News & World Report* states that "[b]ecoming a market research analyst requires at least a bachelor's degree, but you could choose *from a range of majors*" (emphasis added). Bachelor's degrees in "business administration" and "one of the social sciences" are then listed as being among the range of degrees that would provide adequate preparation.

Nor does the position evaluation the Petitioner submits meet its burden. According to Professor [REDACTED] a bachelor's degree in business administration would adequately prepare an individual to perform the duties of the proffered position. That conclusion is consistent with the *Handbook*. Once again, however, the issue here is that a requirement for a bachelor's degree in a business administration is inadequate to establish that the position qualifies as a specialty occupation. For this reason alone, Professor [REDACTED] evaluation does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A).

However, even if we set that foundational deficiency aside we would still find that Professor [REDACTED] evaluation did not satisfy the first criterion. Professor [REDACTED] does not discuss the duties of the proffered position or the Petitioner's business operation in any meaningful detail. Nor does he reference the Petitioner's Level II wage-level designation, and we question whether he was aware that the proffered position possesses the Level II wage characteristics outlined above. Considered collectively, we find that these shortcomings indicate an incomplete review of the proffered position.

We may, in our discretion, use opinion statements submitted by the Petitioner as advisory. *Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988). 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. *Id.* Consistent with *Caron Int'l*, we find that this evaluation does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and, for the sake of efficiency, hereby incorporate this finding into our analysis of the remaining specialty-occupation criteria.

For all of these reasons, we find that the Petitioner has not established that the proffered position is located within an occupational category for which the *Handbook*, or any other relevant, authoritative source, indicates that the normal minimum entry requirement is at least a bachelor's degree *in a specific specialty*, or the equivalent. Consequently, the evidence of record does not support a finding that the particular position proffered here, a position located within the "Market Research Analysts and Marketing Specialists" occupational category which only requires the Beneficiary to "perform moderately complex tasks that require limited judgment," would normally have such a minimum specialty degree requirement, or the equivalent. The Petitioner therefore has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

## B. Second Criterion

The second criterion presents two alternative prongs: "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[.]" 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) (emphasis added). The first prong casts its gaze upon the common industry practice, while the alternative prong narrows its focus to the Petitioner's specific position.

### 1. First Prong

To satisfy this first prong of the second criterion, the Petitioner must establish that the "degree requirement" (i.e., a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent) is common to the industry in parallel positions among similar organizations.

We generally consider the following sources of evidence to determine if there is such a common degree requirement: 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 establish 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) (considering these "factors" to inform the commonality of a degree requirement)).

As previously discussed, the Petitioner has not established that its proffered position is one for which the *Handbook*, or another authoritative source, reports a requirement for at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter. Also, there are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement. Furthermore, the Petitioner did not submit

any letters or affidavits from similar firms or individuals in the Petitioner's industry to establish that such firms "routinely employ and recruit only degreed individuals."

The record contains 11 job vacancy announcements for our consideration under this prong. To be relevant for this consideration, the job vacancy announcements must advertise "parallel positions," and the announcements must have been placed by organizations that conduct business in the Petitioner's "industry" and are also otherwise "similar" to the Petitioner. Upon review, we find that these job vacancy announcements do not satisfy that threshold.

The Petitioner has not established that the advertisements are for "parallel positions." As noted, the Petitioner attested to DOL that the proffered position is a Level II position involving moderately complex tasks that require limited judgment. However, some advertised positions require the ability to work independently, and one posting states that a successful applicant may be required to supervise peers. We observe further that one of the advertised positions contains the word "senior" in its title. These factors indicate that the advertised positions involve more than moderately complex tasks that require limited judgment, and that they are not "parallel positions" to the one proffered here. Further, the Petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.

Nor did the Petitioner submit sufficient evidence to establish that these advertising companies (1) conduct business in the Petitioner's industry and (2) are also "similar" to the Petitioner. The Petitioner is a wearable consumer electronics startup company with five employees. However, the Petitioner submitted job vacancy announcements placed by *inter alia*, the world's largest social network, a financial services company, a location tracking app, a peer-to-peer sharing app, and a "service to streamline the sales and registration of automobile aftermarket and insurance products." Notably, several advertisers do not provide sufficient information about their businesses, and we are unable to ascertain the nature of their businesses to conduct a legitimate comparison of the advertisers to the Petitioner. The Petitioner did submit an advertisement placed by a company which claims to be "creating a revolution in wearable technology." However, the record does not contain documentary evidence to establish the similarity of this company to the Petitioner in terms of size, scale and scope of operations, or any other essential nature in order to demonstrate that it is also "similar" to the Petitioner for purposes of the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

For all of these reasons, the Petitioner has not established that these job vacancy announcements are relevant. Even if that threshold had been met, we would still find that they did not satisfy this prong of the second criterion, as they do not indicate that a bachelor's degree *in a specific specialty*, or the equivalent, is common to the industry in parallel positions among similar organizations.<sup>10</sup> To the

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<sup>10</sup> In addition, the Petitioner does not demonstrate what statistically valid inferences, if any, could be drawn from the job postings with regard to the common educational requirements for entry into parallel positions in similar organizations. See generally *Earl Babbie, The Practice of Social Research* 186-228 (7th ed. 1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-96 (explaining that "[r]andom selection is the

contrary, several advertisers indicate that a degree in any field of study would suffice, and several others state that they would find acceptable a bachelor's degree in business, with no further specialization.

Thus, the Petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

## 2. Second Prong

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.

Neither the *Handbook* nor O\*NET indicate that a bachelor's degree in a specific specialty, or the equivalent, is normally required for positions located within the occupational category designated by the Petitioner. The Petitioner's implications that the knowledge and associated entry requirements associated with the proffered position exceed those of other positions located within the occupational category are acknowledged. For example, the Petitioner emphasizes the complex nature of the position and its constituent duties throughout the petition, and stated in its RFE response that the proffered position "is critical for the success and image" of the company. On appeal, the Petitioner emphasizes that the Beneficiary will be required to "be capable of working independently," and the Beneficiary's resume contains phrases such as "took ownership" and "lead" to describe her work for the Petitioner. However, the Petitioner's Level II wage designation undermines these claims.<sup>11</sup> When the Petitioner assigned the proffered position a Level II wage, it attested to DOL that the Beneficiary would perform moderately complex tasks that require limited judgment. In other words, if typical positions located within the occupational category do not require a bachelor's degree in a

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

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

<sup>11</sup> The Petitioner's designation of this position as a Level II position undermines its claim that the position is particularly complex, specialized, or unique compared to other positions *within the same occupation*. Nevertheless, a Level II wage-designation does not preclude a proffered position from classification as a specialty occupation, just as a Level IV wage-designation does not definitively establish such a classification. In certain occupations (e.g., doctors or lawyers), a Level II position would still require a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor's degree in a specific specialty, or its equivalent. That is, a position's wage-level designation may be a relevant factor but is not itself conclusive evidence that a proffered position meets the requirements of section 214(i)(1) of the Act.

specific specialty, or the equivalent, then it is unclear how a position with these Level II characteristics would, regardless of the Petitioner's assertions.

The Petitioner claims that the Beneficiary is well-qualified for the position, and references her qualifications repeatedly. However, the test to establish a position as a specialty occupation is not the education or experience of a proposed beneficiary, but whether the position itself requires at least a bachelor's degree in a specific specialty, or its equivalent. The Petitioner did not sufficiently develop relative complexity or uniqueness as an aspect of the duties of the position, and it did not identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. Accordingly, the Petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

### C. Third Criterion

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. 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 instead by performance requirements of the position. *See Defensor*, 201 F.3d at 387-88. If we were solely limited to reviewing the 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 created a token degree requirement. *Id.* Evidence provided in support of this criterion may include, but is not limited to, documentation regarding the Petitioner's past recruitment and hiring practices, as well as information regarding employees who previously held the position.

In its RFE response, the Petitioner conceded that this is a newly-created position, and that it therefore has no information to submit regarding its past hiring practices for the position. However, on appeal, the Petitioner states that it recently filed a product marketing position, which it characterizes as similar to the one proffered here, and submits a copy of an advertisement it posted announcing the job vacancy as well as information regarding the credentials of the individual it ultimately hired to fill the position. However, we find this evidence insufficient to satisfy the third criterion, as it is not apparent that this position is the same or similar to the proffered position. For example, the advertisement states that the position involves "little supervision" and requires the ability to work independently. Further, the position will be "responsible for managing all aspects of content creation and social media" and "lead [the Petitioner] in a wide range of areas." This contrasts with the proffered position which, by virtue of the Level II wage designation, involves moderately complex tasks requiring limited judgment. The Petitioner does not reconcile this discrepancy – if the proffered duties are only moderately complex and require the exercise of only limited judgment, then it is unclear how the position is similar to the new position that requires the ability to work independently and lead a wide range of areas. In any event, it undermines the claim that this announcement advertises the same position as the one proffered here.

Setting that issue aside, we observe that the Petitioner's advertisement specifically states that it would accept a bachelor's degree in business administration. Again, a requirement for a bachelor's degree in business, or business administration, is not a requirement for a degree in a specific specialty, or the equivalent.

Without more, 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. Therefore, it has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

#### D. Fourth Criterion

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.

We acknowledge the Petitioner's assertions regarding the specialization and complexity of the position's duties. However, as discussed above, those claims are undermined by the Petitioner's Level II wage designation. Again, in classifying the proffered position at a Level II wage, the Petitioner effectively attested to DOL that the Beneficiary would perform moderately complex tasks that require limited judgment.<sup>12</sup> Further, given the findings of the *Handbook* and O\*NET that a bachelor's degree in a specific specialty, or the equivalent, is not required to perform the duties of typical positions located within this occupational category, it seems unlikely that a position involving only moderately complex tasks that require limited judgment would have such a requirement. The Petitioner has not demonstrated in the record that its proffered position is one with duties sufficiently specialized and complex to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

#### E. The Case Law Cited by the Petitioner

We acknowledge the case law cited by the Petitioner. However, the facts in most those decisions are not analogous to the instant petition, as they involved immigrant visa petitions and whether the beneficiaries of those petitions were members of the professions as defined in section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), and as that term was previously interpreted. The issue before us is whether the Petitioner's proffered position qualifies as a nonimmigrant H-1B specialty occupation – not whether it is a profession.<sup>13</sup> The matters cited by the Petitioner are irrelevant.<sup>14</sup>

<sup>12</sup> Again, the Petitioner's designation of this position as a Level II position undermines its claim that the position is particularly complex, specialized, or unique compared to other positions *within the same occupation*.

<sup>13</sup> The primary and fundamental difference between qualifying as a profession and qualifying as a specialty occupation is that specialty occupations require the U.S. bachelor's or higher degree to be in a specific specialty, or its equivalent. Thus, while an occupation may be specifically identified as qualifying as a profession as defined in section 101(a)(32) of the Act, that occupation would not necessarily qualify as a specialty occupation unless it met the definition of that term at section 214(i)(1) of the Act.

<sup>14</sup> We observe further that this letter misstated the name of the Petitioner as [REDACTED] and stated that the Petitioner

#### IV. THE LCA

The Director also found that the Petitioner did not submit an LCA that corresponds to and supports the H-1B petition. However, because the proffered position is not a specialty occupation, which is dispositive of the Petitioner's appeal, we will not address it further.

#### V. CONCLUSION

The Petitioner has not established eligibility for the benefit sought.

**ORDER:** The appeal is dismissed.

Cite as *Matter of A-C- Inc.*, ID# 380783 (AAO June 20, 2017)

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was applying for approval of an E-3 visa petition on behalf of the Beneficiary. These errors lead us to question whether the letter was actually intended to be used in support of another beneficiary's visa petition.