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



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



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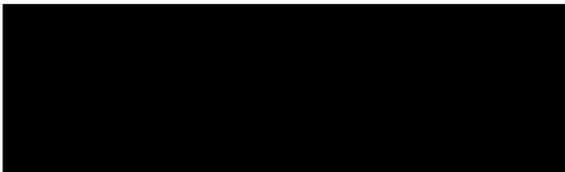
Date: **APR 29 2011** Office: CALIFORNIA SERVICE CENTER FILE: WAC 09 149 50035

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Michael T. Kelly
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a construction company and seeks to employ the beneficiary, on a part-time basis, in a position that it designates as a market research analyst. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant 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 position was not a specialty occupation.

On appeal, counsel for the petitioner contends that the director's findings were erroneous, and submits a brief in support of his contentions.

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

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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

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

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

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

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must 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, 8 U.S.C. § 1184(i)(1), 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 illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. 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, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. Cf. *Defensor v. Meissner*,

201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

In an April 6, 2009 letter, the petitioner explained that it offered construction, remodeling and architectural services. Based on its business needs, the petitioner claimed that it required the services of a part-time market research analyst, and claimed that the market research analyst would perform the following duties:

- 1) Become knowledgeable with our company's products and services, as well as the marketing philosophy that is currently employed in selling them.
- 2) Become familiar with the market to which our company's products and services are sold, the composition of our customer base, and the attributes of our competitors.
- 3) Research actual and potential markets and their conditions at the local, regional, and national levels and determine the potential sales of our company's products and services in them.
- 4) Gather information on competitors, prices, sales and methods of marketing and distribution, and determine which alternative may be beneficial to our company.
- 5) Develop customer segmentation and statistical models that ascertain customer behaviors and buying preferences.
- 6) Conduct analyses of current and potential marketing and strategic initiatives to identify key insights and opportunities, including: measuring our company's return on investment from marketing activities; efficacy of marketing and sales efforts; market data trends and leading indicators that influence strategic and tactical decisions in our company's market.
- 7) Work alongside other employees to develop marketing policies, sales activities, and direct advertising campaigns[.]
- 8) Implement and manage marketing policies, sales activities, and direct advertising campaigns and collect data to ensure that policies, activities, and campaigns are meeting market and company expectations.
- 9) Service existing clients' needs in order to ensure long-term patronage.

The petitioner further contended that performance of the duties of the position required the attainment of a bachelor's degree in business administration or other related degree, and contended that the beneficiary was qualified for the position sought based on his A.A. degree in Business Administration.

In a June 15, 2009 RFE, the director requested additional information. Specifically, the director requested more detailed evidence demonstrating that the proffered position was a specialty occupation, including but not limited to a more detailed description of the proffered position and information pertaining to the petitioner's business, its hiring practices, and its organizational chart.

In response, the petitioner addressed the director's queries in a letter and submitted a substantial amount of documentary evidence as requested by the director. In a letter dated July 14, 2009, the petitioner provided the following updated description of the duties of the proffered position:

- [The beneficiary] will review, collect, screen, and monitor market data, information and variables from real estate and construction publications, data, listings, and bulletins released by various institutions and businesses such as local builders for new construction data, real estate brokers for listings of properties and foreclosures, lending institutions for terms of constructions [sic] loans, and suppliers for pricing of construction materials. He will be gathering statistical data on competitors and examining prices, sales, and methods of marketing and distribution; devise methods and procedures for obtaining the data to assess consumer preferences through internet, telephone, or mail responses. He will conduct some field surveys as personal interviews of potential customers, even going door-to-door in the targeted neighborhood to solicit marketing feedbacks, holding individual or group discussions with potential customer, or setting up company booths in real estate construction expositions and trade shows to market. (30%)
- [The beneficiary] will then evaluate and analyze local real estate and construction market conditions and developments, including marketing promotion methods, market demands for our services, properties price changes, construction financing terms and conditions, and other variables, so as to recommend to company management for take [sic] specific actions to undertake the targeted projects (e.g. whether tear down an old property for new construction would turn out profit margins). In this way he will also help our company to market its products (e.g. new constructed properties) and services (e.g. construction, remodeling and designing services) to the most likely customers. (20%)
- During the process, [the beneficiary] will communicate, collaborate and coordinate with accountants, architects, real estate appraisers and brokers to estimate and determine costs and expenses breakdowns needed to finance company construction and business operations. He will also source and find the most cost-effective construction materials and sub-contracting services for our construction projects. He will forecast the market trends and conditions, customer tastes and preferences to predict and pinpoint targeted market sectors (e.g. properties near good schools or easy transportation with potentials to appreciate in value). He will assist manager in preparation of annual budget, business plan and marketing schemes by offering specific recommendations and proposals based on his market research efforts. (10%)
- [The beneficiary] will also work with company manager and accountants to examine and review past and current budget, investment and marketing plans to evaluate proposals in terms of company's priorities and financial resources. Through company regular meetings and other communications, he will offer his inputs in preparing and submitting preliminary marketing and budget plans or recommendations to management for comment and approval. He will also assist managers in analyzing the proposed plan and devise possible alternatives if the projected results are unsatisfactory (e.g. hold and rent the completed new construction when its sale would turn into a loss.) In this regard, [the beneficiary] will also work with other managers in periodically monitoring and adjusting

company business and budget plans by reviewing marketing, financial and accounting reports and records to assess company actual performance.

- [The beneficiary] will be constantly browsing, screening and monitoring government regulatory developments, incentives and restrictions as well as the above data from various sources to determine how to better comply with the codes and regulations, how to take advantage of government incentives (e.g. federal rescue funding in real estate distress area), etc.. In the process, he will build up the relevant computer database for constant reference by the company marketing team and management[.] (10%)
- Based on the above analyses, [the beneficiary] will prepare feasibility studies (in collaboration with company-hired business and financial professionals), memos, briefings, or reports of findings on our services and properties promotion and market conditions and developments associated with specific issue for review and approval by managers as well as reference guide for the management. He will also regularly advise and brief the company manager on such developments, and participate in negotiating contracts and orders with customers by project managers. (10%)
- [The beneficiary] will also carry out our company public relations campaigns by attending or sponsoring local community meetings and events (e.g. hold fundraising efforts for benefiting the communities) as well as offering free remodeling or repairing services, for example, for local senior citizens and the [disabled]. He will also join with company manager in public hearings on certain new developments. He will also represent our company in attending various construction and remodeling related trade shows. Using his wide business connections in China, [the beneficiary] will also promote local real estate development projects to potential Chinese individual or institution investors so as to attract their investment in the local market. (5%)
- He will also maintain and categorize the business research reference library and business documents, including periodicals, reference publications, reference internet downloads, plat maps, property brochure and listing files, contracts, orders, and research files, and he will perform other related job duties as assigned by the manager from time to time. (5%)

The petitioner also provided copies of job postings for what it claimed were parallel positions in similar organizations in support of the contention that the petitioner's degree requirement was common in the industry, as well as a letter from the beneficiary's prior employer in support of his prior human resources experience.

On August 24, 2009, the director denied the petition, determining that the petitioner had failed to establish that the proffered position was a specialty occupation. The director found that the proffered position was most akin to the occupation of a market research analyst, and set forth two bases for the denial: (1) the duties of the proffered position were not those of a market research analyst; and (2) the industry in which the beneficiary would be employed did not typically require the services of a market research analyst.

On appeal, counsel contends that the director's findings were erroneous. Counsel presents arguments in support of the contention that the proffered position is that of a market research analyst based on the specific duties of the proffered position and their complexity.

Counsel's assertions are not persuasive. The AAO observes that the critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

To make its determination as to whether the employment described above qualifies as a specialty occupation, the AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. Factors considered by the AAO when determining this criterion include whether the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports that the industry requires a degree in a specific specialty.

The petitioner claims that the proffered position is that of a market research analyst. To determine whether the duties of the proffered position support the petitioner's characterization of its proposed employment, the AAO turns to the 2010-2011 online edition of the *Handbook* for its discussion of market research analysts. As stated by the *Handbook*, the occupation of market research analyst is described as follows:

Market and survey researchers gather information about what people think. Market research analysts help companies understand what types of products people want, determine who will buy them and at what price. Gathering statistical data on competitors and examining prices, sales, and methods of marketing and distribution, they analyze data on past sales to predict future sales.

Market research analysts devise methods and procedures for obtaining the data they need by designing surveys to assess consumer preferences. While a majority of surveys are conducted through the Internet and telephone, other methods may include focus group discussions, mail responses, or setting up booths in public places, such as shopping malls, for example. Trained interviewers usually conduct the surveys under a market research analyst's direction.

Market opinion research has contributed greatly to a higher standard of living as most products and services consumers purchase are available with the aid of market research. By making recommendations to their client or employer, market research analysts provide companies with vital information to help them make decisions on the promotion, distribution, and design of products or services. For example, child proof closures on medicine bottles exist because research helped define the most workable design; and the growing variety of ready to cook meals, such as microwaveable soups and prepackaged meat products, exist because of increasing public demand for fast and convenient meals. The information also may be used to determine whether the company should add new lines of merchandise, open new branches, or otherwise diversify the company's operations. Market research analysts also

help develop advertising brochures and commercials, sales plans, and product promotions such as rebates and giveaways based on their knowledge of the consumer being targeted.

The director found that, based on the description of the occupation of market research analyst, such analysts compile and analyze market data, but do not act upon that data. Noting that the beneficiary's duties within the structure of the petitioner's construction company require such actions, the director concluded that, in essence, the proffered position was more akin to that of a marketing manager. The AAO agrees with this finding, and will discuss this issue in further detail below.

It should be noted, however, that the AAO finds that, even if the proffered position were deemed that of a market research analyst, as claimed by counsel on appeal, market-research-analyst positions do not comprise an occupational group which categorically includes only positions that normally require a baccalaureate or higher degree, or its equivalent, in a specific specialty. Thus, the proffered position's inclusion within the market-research-analyst occupation would not be sufficient in itself to establish the position as a specialty occupation by application of the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). In this regard, the *Handbook's* section pertaining to the educational requirements for market and survey researchers states:

While a bachelor's degree is often sufficient for entry-level market and survey research jobs, higher degrees are usually required for advancement and more technical positions. Strong quantitative skills and keeping current with the latest methods of developing, conducting, and analyzing surveys and other data also are important for advancement.

Education and training. A bachelor's degree is the minimum educational requirement for many market and survey research jobs. However, a master's degree is usually required for more technical positions.

The *Handbook* does not indicate that a bachelor's degree or higher in a specific specialty or its equivalent is the normal minimum requirement for entry into the position. While the *Handbook* indicates that a bachelor's degree is the most significant source of postsecondary education for persons employed in market and survey research jobs, no specific specialty is identified as the area in which the degree must be obtained. Therefore, even if the proffered position were deemed to be that of a market research analyst, based on the duties as described in the record of proceeding, including gathering information on competitors, the proffered position would not be considered a specialty occupation.¹

¹ It should be noted that the AAO concurs with counsel that the petitioner's organizational complexity is not a decisive factor in this particular proceeding. Accordingly, the AAO withdraws this basis for denying the petition. The AAO also withdraws the director's finding as a basis for denial the type of industry in which the beneficiary would be employed, as the *Handbook* states that market research analysts "are employed throughout the economy." Nevertheless, as discussed above, the AAO finds that the petitioner has not established that the proffered position is a specialty occupation. Accordingly, the director's decision to deny the petition shall not be disturbed.

That being said, upon review of the totality of the duties described in the record of proceeding, the AAO finds that, while the proffered position encompasses some of the duties of a market research analyst, the proffered position is most akin to that of a marketing manager as described in the *Handbook's* section pertaining to advertising, marketing, promotions, public relations, and sales managers.

The *Handbook* describes the occupational category of marketing manager as follows:

Marketing managers. Marketing managers work with advertising and promotion managers to promote the firm's or organization's products and services. With the help of lower level managers, including *product development managers* and *market research managers*, marketing managers estimate the demand for products and services offered by the firm and its competitors and identify potential markets for the firm's products. Marketing managers also develop pricing strategies to help firms maximize profits and market share while ensuring that the firms' customers are satisfied. In collaboration with sales, product development, and other managers, they monitor trends that indicate the need for new products and services and they oversee product development.

As discussed above, the duties of the proffered position, which is identified as that of a market research analyst in a construction company, are most akin to the occupation of marketing manager. For example, while the petitioner claims that the beneficiary will spend 30% of his time gathering statistical data via field surveys and group discussions, which are generally considered tasks associated with the position of a market research analyst, the main purpose of the beneficiary's research is to maximize potential markets and increase profits for the petitioner. While market research analysts typically gather statistical data for firms or companies and present their findings to those companies, the beneficiary is tasked with duties such as forecasting market trends, developing pricing strategies, and working with company managers and accountants to provide direct input into also business and budget plans for the petitioner.

The *Handbook* states as follows with regard to the educational requirements of this occupation:

A wide range of educational backgrounds is suitable for entry into advertising, marketing, promotions, public relations, and sales manager jobs, but many employers prefer college graduates with experience in related occupations.

Education and training. For marketing, sales, and promotions management positions, employers often prefer a bachelor's or master's degree in business administration with an emphasis on marketing. Courses in business law, management, economics, accounting, finance, mathematics, and statistics are advantageous. In addition, the completion of an internship while the candidate is in school is highly recommended. In highly technical industries, such as computer and electronics manufacturing, a bachelor's degree in engineering or science, combined with a master's degree in business administration, is preferred.

The *Handbook* clearly indicates that educational requirements vary for the position of a marketing manager. While it appears that a bachelor's degree in business administration is often preferred for entry into the field, the *Handbook* does not indicate that a baccalaureate or higher degree, or its equivalent, in a specific specialty is the normal minimum requirement for entry into the proffered position. Upon review of the duties of the proffered position, the AAO cannot conclude that the proffered position requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree in a specific specialty.

In this matter, the petitioner and counsel contend that the beneficiary possesses the U.S. equivalent of a bachelor's degree in business administration, and they rely on this equivalency as a means for supporting the contention that the proffered position is a specialty occupation. However, a requirement for a generic four-year degree does not qualify a job as a specialty occupation. When a job, like that of a marketing manager, can be performed by a range of degrees or a degree of generalized title, without further specification, the position does not qualify as a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). To establish 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. USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(A)(1) to require a degree in a specific specialty that is directly related to the proffered 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. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988).

For the reasons discussed above, the petitioner has failed to establish that a baccalaureate or higher degree, or its equivalent, in a specific specialty is the normal minimum requirement for entry into the position of a market research analyst/marketing manager as described in the record of proceeding. Accordingly, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

At the time of filing, the petitioner stated that it commenced business operations as a construction company in 1994, and claimed to have seven to eight employees along with numerous independent contractors. It further claimed to have a relatively low gross annual income of \$219,220.00, and declined to disclose its net annual income. The petitioner has submitted no documentary evidence, such as its most recent income tax return or payroll records, to corroborate its claimed gross income or staffing levels. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner contends that it is facing increased competition due to the recent economic downturn, and contends that it requires the services of the beneficiary to employ more advanced market research techniques to avoid losses and attain profitability. The petitioner claims that it will employ the beneficiary on a part-time basis at a rate of \$28 per hour, and claims that the beneficiary will work 25 to 40 hours per week. In the event that the beneficiary worked the maximum of 40 hours per week, his annual compensation would be approximately \$52,240. Given that the petitioner claimed on Form I-129 to employ seven persons, and

further claimed in its letter of support that it employed eight persons plus independent contractors, it is unclear how the petitioner could financially support the beneficiary in the proffered position at the proffered salary. Although counsel claims on appeal that the petitioner, unlike many of its competitors, "is still able to continue normal business operations with a staff of seven employees and other subcontractors," there is no evidence in the record to support this contention. Absent financial documentation, the AAO cannot conclude that the petitioner, with a gross annual income of \$219,220.00, can feasibly pay the beneficiary approximately \$50,000 per year along with seven to eight additional salaries and independent contractor compensation. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner. Factors often considered by USCIS when determining the industry standard include: 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)).

In this matter, the petitioner submits one job posting from *www.monster.com* for the position of "Research Analyst I" at Grubbs & Ellis, a real estate/property management company located in Los Angeles, California. According to this posting, Grubbs & Ellis is "one of the world's leading full-service commercial real estate organizations, providing a complete range of transaction, management and consulting services." This company, while engaged in the real estate industry, provides different services than that of the petitioner's construction company, and is clearly much larger in size and scope than that of the petitioner. Moreover, the advertised position of research analyst, while encompassing some market research duties, differs from that of the proffered position in this matter. Finally, despite requiring a bachelor's degree for entry into the position, the job posting's degree requirement is not specific, and indicates that the employer will accept a variety of degrees in fields such as economics, real estate, urban planning, or business administration). This job posting, therefore, is not evidence that a degree requirement in a specific discipline is common to the industry in parallel positions among similar organizations.

In the alternative, the petitioner may submit evidence to establish that the duties of the position are so complex or unique that only an individual with a degree in a specific specialty can perform the duties associated with the position. The AAO observes that the petitioner has indicated that the beneficiary's educational background and experience in the industry will assist him in carrying out the duties of the proffered position; however, 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 obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner does not explain or clarify which of the duties, if any, of the proffered position are so complex or unique as to be distinguishable from those of similar but non-degreed employment.

For the reasons discussed above, the petitioner has failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor is there evidence in the record to satisfy the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position. The petitioner acknowledges that it now seeks to hire a market research analyst due to the economic downturn, which implies that it has not previously employed anyone in the proffered position. The petitioner likewise has not provided any evidence or claim that it has previously employed degreed individuals in the proffered position. The record, therefore, does not document that the duties of the proffered position require a baccalaureate or higher level of education to perform them. The AAO notes that while a petitioner may believe that a proffered position requires a degree, that opinion cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. *See Defensor v. Meissner*, 201 F. 3d at 384. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner 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. The duties of the position described encompass routine marketing duties. While the petitioner emphasizes the beneficiary's educational background and experience, and claims that the duties of the proffered position are sufficiently complex, the record does not contain explanations or clarifying data sufficient to elevate the position to one that is so specialized and complex that the knowledge to perform its duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

The AAO notes that the duties as described in the record of proceeding are broad and numerous and appear to span a variety of marketing functions. However, the AAO finds that, to the extent that they are described, the duties do not convey either the need for the beneficiary to apply a particular body of highly specialized knowledge in a specific specialty, or a usual association between such knowledge and the attainment of a particular educational level in a specific specialty. As the petitioner has not established that the proffered position's specific duties require the application of specialized and complex knowledge usually associated with the attainment of a baccalaureate degree or higher degree in a specific discipline, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Based on the record of proceeding, the AAO determines that the petitioner has not established that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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