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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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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: **MAR 22 2011**
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:

[Redacted]

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,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a surgical device and utensil manufacturer and designer that currently employs nine persons. It seeks to employ the beneficiary as a market research analyst 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 because he determined the position was not a specialty occupation.

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

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

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

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

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

An occupation which requires 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 the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

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

The petitioner seeks the beneficiary’s services as a market research analyst. Evidence of the beneficiary’s duties includes: the Form I-129; the petitioner’s April 9, 2010 letter of support; counsel’s April 13, 2010 letter of support; and the petitioner’s May 27, 2010 response to the director’s request for evidence.

In the petitioner’s April 9, 2010 letter of support, it stated that the beneficiary:

Will review local, regional, national and international markets for the competitors['] prices, the best media options [and] the best media options for advertisement. He will develop pricing strategy and maximize the company’s share of the market and profits while ensuring customer satisfaction. He will analyze data gathered, develop information, and consider available solutions for [the petitioner’s] market development. He will provide technical assistance related to management policies and practices to improve program operations. [The beneficiary] will organize and document findings of studies and develop recommendations

for the implementation of new systems, procedures, or organizational changes to the entity's structure and operations.

Additionally, according to a document appended to the initial petition entitled "Duties of Specialty Occupation Market Research Analyst," the duties of the proffered position also include:

- Application of baccalaureate or higher level of highly specialized knowledge in research methodology, including the development, conduct, and analysis of surveys and market studies, in order to research market conditions on a local, regional, national, and international level, with an international emphasis on the European market. Estimated percentage of time allotted for those duties: 20%.
- Application of baccalaureate or higher level of highly specialized knowledge in research methodology, including the development, conduct, and analysis of surveys, in order to design formats for data gathering through surveys, opinion polls, and questionnaires. Estimated percentage of time allotted for those duties: 20%
- Application of baccalaureate or higher level of highly specialized knowledge in research methodology, statistics, and mathematics, in order to examine and analyze statistical data to forecast future marketing trends. Additionally, the employee must gather data on competitors and analyze prices, sales, and methods of findings. Estimated percentage of time allotted for these duties: 15%.
- Application of baccalaureate or higher level of highly specialized knowledge in research methodology, consumer behavior, and market analysis, in order to determine optimal advertisement media. Estimated percentage of time allotted for these duties: 10%.
- Application of baccalaureate or higher level of highly specialized knowledge in research methodology, consumer behavior and market analysis, in order to develop pricing strategy and maximize share of market and profits. Estimated percentage of time allotted for these duties: 10%.
- Application of baccalaureate or higher level of highly specialized knowledge in business administration, in order to provide technical assistance related to management policies and practices to improve operations. Estimated percentage of time allotted for these duties: 10%.
- Application of baccalaureate or higher level of highly specialized knowledge in market creation, in order to expand the company's offer on the international market, with special emphasis on France and other member countries of the EU. Estimated percentage of time allotted for these duties: 15%.

Regarding the beneficiary's qualifications for the position, the petitioner indicated that the beneficiary possessed the U.S. equivalent of a master's degree in Business Administration with a concentration in marketing.

The director found this initial evidence insufficient to establish eligibility and consequently issued an RFE on April 28, 2010. In her request, the director asked the petitioner to submit a more detailed description of the duties of the proffered position, as well as additional evidence establishing that the proffered position satisfied the supplemental criteria for a specialty occupation set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A). The director also requested information pertaining to the nature of the petitioner's business.

In a response dated May 27, 2010, the petitioner addressed the director's queries. The petitioner provided an updated description of the duties of the proffered position, an organizational chart and tax records for the petitioner's organization, a list providing position titles and educational backgrounds for its current employees, four Internet job postings for similarly-titled positions, and two expert opinion letters.

The petitioner provided the following updated description of duties of the proffered position in a May 21, 2010 attachment entitled "Job Description Market Research Analyst Position":

- Research market conditions on a local, regional, national and international level, with an international emphasis on the European market. This shall include: the determination for each geographic market and with respect to each product, of the optimal means of obtaining market data (survey, opinion polls, etc.); determination of the goals and parameters of the market research; examination of competing products; determination of current product demand; identification of factors likely to affect product demand; development of systems for continuous, on-going data gathering and market evaluation. The competent performance of these duties will require the application of baccalaureate or higher level of highly specialized, theoretical knowledge in marketing (including Market Research and consumer behavior), advanced marketing, business mathematics and statistics, economics, international business administration, and commercial strategy, which is generally associated with the attainment of a Bachelor's or higher degree in Business Administration or Marketing. Estimated percentage of time allotted for those duties: 20%
- Draft formats for data gathering through surveys, opinion polls, and questionnaires. This shall include: the determination of appropriate parameters; determination of relevant statistical factors; the introduction of control factors; testing the reliability and the validity of the data gathering mechanism; testing for appropriate correlations. The competent performance of these duties will require the application of baccalaureate or higher level of highly specialized, theoretical knowledge in business mathematics and statistics, marketing (including market research and consumer behavior), advanced marketing, commercial communication, commercial strategy, and information and communications technologies, which is generally associated

with the attainment of a Bachelor's or higher degree in Business Administration or Marketing. Estimated percentage of time allotted for those duties: 20%

- Examine and analyze statistical data received from market research operations in order to: determine current market demand; identify factors affecting product demand; determine potential markets; analyze markets for competing products; identify market trends; quantify customer satisfaction, market share, competitiveness; forecast future consumer trends; translate findings into exploitable graphs and reports. The competent performance of these duties will require the application of baccalaureate or higher level of highly specialized, theoretical knowledge in Business mathematics and statistics, information and communications technologies, marketing (including consumer behavior), advanced marketing, and commercial strategy, which is generally associated with the attainment of a Bachelor's or higher degree in Business Administration or Marketing. Estimated percentage of time allotted for those duties: 15%
- Determination of optimal advertisement media for each product, and with respect to each geographic market. The competent performance of these duties will require the application of baccalaureate or higher level of highly specialized, theoretical knowledge in marketing, advanced marketing, commercial communications / advertising, and commercial strategy, which is generally associated with the attainment of a Bachelor's or higher degree in Business Administration or Marketing. Estimated percentage of time allotted for those duties: 10%
- Develop pricing strategy in order to help maximize market share and profits. This shall include the design, implementation and analysis of price surveys; researching of available industry data and statistics; recommendations relating to promotions and price testing; forecasting of future price evolution. The competent performance of these duties will require the application of baccalaureate or higher level of highly specialized, theoretical knowledge in business administration, business law, international business, finance, and management, which is generally associated with the attainment of a Bachelor's or higher degree in Business Administration or Marketing. Estimated percentage of time allotted for those duties: 10%
- Expand the company's offer on the international market, with special emphasis on France and other member countries of EU. This will involve the design, creation, implementation, and drafting of all necessary market research operations; determination of marketing, price and growth strategies; determination of appropriate advertisement media, etc. The competent performance of these duties will require the application of baccalaureate or higher level of highly specialized, theoretical knowledge in business mathematics and statistics, marketing (including market research and consumer behavior), advanced marketing, commercial communication, commercial strategy, and information and communications technologies, which is generally associated with the attainment of a Bachelor's or higher degree in Business

Administration or Marketing. Estimated percentage of time allotted for those duties:
15%

On June 10, 2010, the director denied the petition. The director found that the evidence of record pertaining to the proffered position was insufficient to classify the proffered position as that of a market research analyst. Instead, the director noted that, based on a review of the duties and the nature of the petitioner's business, the proffered position was more akin to that of a marketing manager. In conclusion, the director cited to the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, noting that the profession of marketing manager was not a specialty occupation.

On appeal, counsel contends that the director's denial was erroneous, and contends that the proffered position is in fact a market research analyst position. In support of his contentions, counsel alleges that the director disregarded material evidence, noting that the director did not consider the opinion letters submitted by [REDACTED] and [REDACTED] in response to the RFE.

For the reasons set forth below, the AAO concurs with the director's findings that the proffered position is not a specialty occupation.

As a preliminary matter, the AAO will address counsel's contention that the director disregarded material evidence by failing to consider the letters of [REDACTED] and [REDACTED]. Although the director failed to mention these letters in the decision, there is no evidence in the record to support counsel's contention that the director failed to consider these letters in rendering his decision. Regardless, upon review of the record, the AAO concurs with the director's ultimate conclusions and finds that the director's omission is harmless because the AAO conducts a *de novo* review, evaluating the sufficiency of the evidence in the record according to its probative value and credibility. The AAO maintains plenary power to review each appeal on a *de novo* basis, which has long been recognized by the federal courts. *See Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

To make its determination whether the employment described above qualifies as a specialty occupation, the AAO turns next to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors considered by the AAO when determining these criteria include: whether the *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, reports 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)).

In his denial, the director, relying on the 2010-2011 edition of the DOL *Handbook*, concluded both that the duties of the proffered position were not those of a market research analyst and that the record failed to establish that the petitioner's business was of the type or complexity and scope to require a market research analyst. As discussed below, the AAO concurs in the director's finding that the proffered position is not that

of a market research analyst. However, the AAO disagrees with the director's statement that the petitioner does not engage in the type of business for which a market research analyst would typically be required on a regular full-or part-time basis. In that the *Handbook* indicates that the work of market research analysts is concerned with the potential sales of a product or service and that they provide a company's management with information needed to make decisions on the promotion, distribution, as well as the design and pricing of products or services, market research is applicable to a broad range of industries and businesses seeking to improve their market share and profits. The fact that the petitioner is a retail business engaged in the sale and distribution of medical devices does not preclude it from engaging in the type of market research activities described by the *Handbook* as a means of increasing its business opportunities and earnings. However, the petitioner's potential need to conduct market research does not establish the proffered position as a specialty occupation.

In reaching its own conclusions regarding the nature of the proffered position, the AAO has reviewed the discussion of market or marketing research analysts as described by the *Handbook*. It has taken particular note of the following section of that discussion:

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 AAO finds that it is market research analysts' work in the design, development and supervision of original market research that sets this occupation apart from what might otherwise be characterized as marketing or sales manager positions, employment that also requires the incumbents to perform marketing research as they seek to identify and expand business opportunities for their employers. Although the

petitioner indicated that the beneficiary would be heavily involved in research related to expanding its business, i.e., the analysis of its sales and marketing records, the compilation of research on its competitors, the compilation of market data and the survey of customer buying habits, these market research responsibilities do not make the beneficiary a market research analyst. The issue is not whether the proffered position requires the beneficiary to do market research, which it does, but whether it is that of a market research analyst. As the petitioner does not indicate that the proffered position would also require the beneficiary to design and conduct the type of original market research performed by market research analysts, it cannot be found based on the evidence submitted that the proffered position is that of a market research analyst.¹

As such, the AAO finds the proffered position's duties to be more closely related to the work of marketing managers, who also use marketing research and financial analysis to develop business strategies. As discussed within the occupation of advertising, marketing, promotions, public relations and sales managers in the *Handbook*:

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

¹ It should be noted, however, that even if the proffered position were that of a market research analyst, the occupation of market research analyst is not a specialty occupation. According to the *Handbook*, the educational requirements for market and survey researchers are described as follows:

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.

While the *Handbook* indicates that a bachelor's degree is typically required for entry into this particular field, a degree *in a specific specialty* is not required. For example, the *Handbook* further states:

In addition to completing courses in business, marketing, and consumer behavior, prospective market and survey researchers should take social science courses, including economics, psychology and sociology. Because of the importance of quantitative skills to market and survey researchers, courses in mathematics, statistics, sampling theory and survey design, and computer science are extremely helpful. Market and survey researchers often earn advanced degrees in business administration, marketing, statistics, communications, or other closely related disciplines.

Therefore, while most market research analyst positions may require a bachelor's degree or other advanced degree, no specific degree requirement is mandated for entry into such a position. Consequently, even if the AAO considered the proffered position to be that of a market research analyst, the position would not qualify as a specialty occupation based on the statistics-based information in the *Handbook*.

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.

The petitioner indicates that the beneficiary will, among other duties, develop pricing strategies, monitor trends, and identify potential markets, all of which are the duties of a marketing manager. Furthermore, it is noted that the petitioner's organizational chart identifies no marketing staff members other than the beneficiary who will act on market research and estimate the demand for potential products. Therefore, the AAO finds that the duties of the proffered position, which will require the beneficiary to take an active role in implementing marketing strategies, are that of a marketing manager.

Having found the duties of the proffered position to be those of a marketing manager, the AAO now turns to the *Handbook* for its discussion of the educational requirements imposed on individuals who seek employment within this profession:

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.

* * *

Most advertising, marketing, promotions, public relations, and sales management positions are filled through promotions of experienced staff or related professional personnel. For example, many managers are former sales representatives; purchasing agents; buyers; or product, advertising, promotions, or public relations specialists. In small firms, in which the number of positions is limited, advancement to a management position usually comes slowly. In large firms, promotion may occur more quickly.

As the *Handbook* indicates no specific degree requirement for employment as a marketing manager, the AAO concludes that the performance of the proffered position's duties does not require the beneficiary to hold a baccalaureate or higher degree in a related field. Accordingly, the AAO finds that the petitioner has failed to establish its proffered position as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In reaching this conclusion, the AAO has also reviewed the two evaluation letters which the petitioner has submitted to establish its claimed degree requirement as an industry standard. The first opinion comes from an expert opinion letter from [REDACTED] who bases his opinion on his academic experience in the fields of marketing and business administration; the second from [REDACTED] who states that he has 13 years of experience in the field. In that both experts reviewed the duties of the proffered position and characterized it as a market research analyst, the AAO has evaluated whether these might also serve to establish the proffered position as a specialty occupation under the first criterion. They cannot.

While relevant to these proceedings, the opinions are unsupported by independent evidence substantiating the authors' expertise to evaluate the duties of the proffered position. While both individuals state their opinions are based on their extensive experience, simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *See 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)). Although [REDACTED] opinion is accompanied by his Curriculum Vitae demonstrating his background in the field, this document is not probative in determining whether the proffered position is that of a market research analyst. Moreover, [REDACTED] opines that "medical device manufacturing companies with approximately 9 employees that are seeking to hire a Market Research Analyst, require almost invariably, that candidates hold at least a Bachelor's or higher degree in Business Administration or Marketing. . . ." This statement, however, is not supported by any independent documentary evidence from companies matching this profile which would establish such a hiring standard in the industry. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Furthermore, it should be noted that both [REDACTED] and [REDACTED] state that the duties of the proffered position can only be performed by an individual with a bachelor's degree or higher in Business Administration, Marketing, or a related field. However, the field of business administration is a very broad category that covers numerous and various disciplines. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business 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).

Again, to prove that a job requires the theoretical and practical application of a body of 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. As explained above, 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. USCIS has 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. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

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. To establish its degree requirement as an industry norm, the petitioner has submitted 4 Internet job advertisements for employment related to market research analysis as well as the two previously discussed expert opinions. None of this evidence, however, establishes the petitioner's degree requirement as the norm within its industry.

Of the four job announcements submitted by the petitioner in response to the director's request for evidence, none appear to come from businesses that are similar to the petitioner, a medical and surgical instruments manufacturer. The first two postings are for pharmaceutical/biotechnology companies. The third posting appears to be posted by a pharmaceutical job placement service for a company in an unidentified industry, and the last identifies the posting opening in a company called [REDACTED] which also appears to be a pharmaceutical company. Accordingly, they fail to satisfy the second criterion's condition that a petitioner establish its degree requirement is common in parallel positions among similar organizations, since no postings specific to the industry of surgical equipment manufacturing has been submitted. Moreover, the two expert opinions, which conclude that a baccalaureate degree in business administration, marketing, or a related field is required for employment as a market research analyst, will also be discounted. As already noted, the requirement of a degree in business administration does not establish the position as a specialty occupation. *See Matter of Michael Hertz Associates*, 19 I&N Dec. 558. The two expert opinions are also unsupported by independent evidence to establish their authors' authority to judge the educational requirements imposed by the petitioner's industry. *See 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)). In addition, as the record does not establish the proffered position as a market research analyst, their conclusions regarding the degree requirements imposed by this profession also lack relevance for these proceedings.

Furthermore, the AAO also concludes that the record does not establish that the proposed position is a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires a demonstration that the position is so complex or unique that it can only be performed by an individual with a degree. The record does also not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; and 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.

To determine a petitioner's ability to meet the third criterion, USCIS often reviews the position's employment history, including the names and dates of employment of those employees with degrees who previously held the position, as well as the petitioner's hiring practices with regard to similar positions. In response to the director's RFE, the petitioner asserted that it requires all non-administrative personnel to hold a bachelor's degree or higher in a relevant field of study, and claimed that all employees with whom the candidate for the proffered position would interact hold such degrees. While the documentation submitted by the petitioner

suggests that it routinely hires degreed individuals for non-administrative positions, it is insufficient to prove that the petitioner normally requires at least a bachelor's degree in a specific specialty for the proffered position of market research analyst/marketing manager. Other than the beneficiary who is currently being offered the proffered position, there is no documentation to demonstrate that the petitioner previously and/or routinely hires specialty degreed individuals for the proffered position. Therefore, the petitioner has failed to establish that the petitioner's normal hiring practice is to require the minimum of a baccalaureate degree in a specific specialty for the proffered position.²

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its position's 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 petitioner has asserted that the duties of its proffered position – the identification of industry trends and consumer behavior based on complex market data and the development of marketing strategies to target consumers – would require the beneficiary to conduct research, statistical analyses, budgeting and forecasting. Such knowledge, it contends, comes only from a baccalaureate degree in business administration, marketing, or a closely related field. The AAO does not agree.

Upon review of the duties of the proffered position, the AAO has concluded that the position is more closely aligned to that of a marketing manager. It does not find these duties, as described by the petitioner, to reflect a higher degree of knowledge and skill than would normally be required of marketing managers whose business responsibilities require them to survey and analyze industry trends and consumer behavior. Nor do they represent an amalgam of jobs that would require the beneficiary to possess skills and qualifications beyond those of a marketing manager. The AAO, therefore, concludes that the proffered position has not been established as a specialty occupation under the requirements 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 the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the AAO shall not disturb the director's denial of the petition.

² It is further noted that, to satisfy this criterion, the record must establish 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. To interpret the regulations any other way would lead to absurd results: 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.* at 388.

Beyond the decision of the director, the AAO notes that, had the proffered position in this matter been deemed a specialty occupation, the beneficiary, by virtue of his generalized degree in business administration, would not be qualified to perform the duties of a specialty occupation.

Ordinarily, a beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. However, for purposes of issuing a thorough decision on all relevant facts in this matter, the petitioner is advised that a degree in business administration alone is insufficient to qualify the beneficiary to perform the services of a specialty occupation, unless the academic courses pursued and knowledge gained is a realistic prerequisite to a particular occupation in the field. The beneficiary's coursework must indicate that he or she obtained knowledge of the particular occupation in which he or she will be employed. *Matter of Ling*, 13 I&N Dec. 35 (Reg. Comm. 1968). In this matter, the beneficiary's academic transcript from the Institut Supérieur de Gestion (ISG) Business School of Paris, translated from French into English, lists a total of twenty-one courses. However, a review of the course listings indicates that only three of the courses are related to marketing. Based on the above provision, it cannot be determined that the beneficiary obtained specific knowledge of the field of marketing.

It is noted that the academic evaluation from [REDACTED], prepared by the same [REDACTED] who also submitted an expert opinion letter in response to the RFE, states that the beneficiary's area of concentration while pursuing this coursework was business engineering and international negotiation, which included coursework in marketing. There is no indication, however, that that coursework pursued by the beneficiary provided him with specific knowledge of the field of marketing and the professions of market research analyst or marketing manager. For this additional reason, the petition may not be approved.

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.