



U.S. Citizenship
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Date: **JUN 01 2012** Office: VERMONT SERVICE CENTER

FILE: 

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 service center director revoked the approval of the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The approval of the petition will be revoked.

The petitioner filed this nonimmigrant petition seeking to continue to employ the beneficiary in the position of market analyst as an H-1B 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 petitioner claims to be a company with two employees that sells cell phones.

The director revoked the approval of the petition based on the petitioner's failure to establish that the proffered position qualifies for classification as a specialty occupation, and that it meets the regulatory definition of an intending United States employer. Section 101(a)(15)(H)(i)(b) of the Act; 8 C.F.R. § 214.2(h)(4)(ii).

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's notice of intent to revoke; (3) the notice of decision; and (4) Form I-290B and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In the petition filed on May 19, 2009, the petitioner indicated that it wished to continue to employ the beneficiary as a market analyst. In addition, the petitioner indicated that it had two employees and that it was established in 2002. The petition was approved on August 11, 2009.

On January 5, 2010, the director issued a notice of intent to revoke the approval of the petition. To overcome the intent to revoke, the director requested the petitioner to submit (1) a detailed statement setting forth the beneficiary's proposed duties and responsibilities, including the educational requirements of the proposed position and how the beneficiary's education relates to the position itself; (2) evidence showing that a baccalaureate degree in a specific field of study is a standard minimum requirement for the job offered in the company; (3) evidence showing that the industry requires a minimum of a baccalaureate degree and companies of comparable size require a baccalaureate degree for their manager positions; (4) evidence of other business locations and detailed descriptions of the duties the beneficiary performs at these locations; (5) evidence which will establish the ownership and control of the petitioning company such as copies of stock ledgers, stock certificates, articles of incorporation, joint-venture agreements, etc., which delineate the ownership and control of the U.S. petitioner; and (6) a copy of the petitioner's 2008 federal income tax return.

The petitioner did not respond to the director's notice of intent to revoke.

On March 12, 2010, the director revoked the approval of the petition.

On appeal, counsel for the petitioner submits a brief. In addition, counsel contends that the proffered position is a specialty occupation. Counsel provides the following list of marketing related managerial occupations that he claims have been recognized as specialty occupations:

Occupation

Case Name

Market Analyst	
Market Analyst	
Marketing Analyst	
Marketing Director	
Marketing and Management Director	
Marketing Manager	

Counsel also breaks down the day-to-day responsibilities of the proffered position, as follows:¹

<u>DESCRIPTION</u>	<u>TIME %</u>
Researching market conditions in local, regional, or national area to determine potential sales of services[;]	25%
[a]nalyzing past trends, sales records, and pricing to determine values and yield[;]	20%
[t]est various marketing promotions to gauge customer responsiveness[;] [c]ollecting and analyzing data on client preferences and habits[;]	20%
[p]reparing cost estimate reports to determine accurate and competitive pricing of services[;] [p]roducing and analyzing monthly budgets and marketing reports[;]	10%
[r]eviewing market trends and competition in the data recovery industry[;] [r]etail industry and market attractiveness analysis, portfolio matrix assessment and resources and capabilities evaluation[;] [and] [i]nteract with strategic management group in order to gather market	25%

¹ It is noted that this additional, expanded description of the proffered position's job duties may not be considered evidence as it was provided by counsel, not the petitioner. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Nevertheless, the original job description provided by the petitioner is sufficient to find that the proffered position should be classified as a market research analyst position.

intelligence and discuss future growth initiatives[.]

In addition, counsel submits 22 job vacancy announcements. Further, counsel indicates that the proffered position requires a bachelor's degree in marketing or a closely related field, or its equivalent. Counsel also indicates that the petitioner has always employed individuals with a bachelor's degree in business or a related degree for the proffered position. In addition, counsel claims that the U.S. Citizenship and Immigration Services (USCIS) has erroneously concluded that the beneficiary is the owner of the company and submits copies of the petitioner's Certificate of Incorporation, a stock certificate, a list of employees, 2008 income tax return, and an unsigned pay check for the beneficiary.

It must be noted for the record that the regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. *See* 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1), (8), and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted it in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed.

Even if the petitioner had submitted the evidence in response to the director's notice of intent to revoke dated January 5, 2010, the AAO finds that this evidence is insufficient to establish the proffered position as a specialty occupation.

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

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

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

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering,

mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this 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), 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.

As a preliminary matter, it must be noted that the petitioner's claimed entry requirement of at least a bachelor's degree in "marketing, business or a related field" for the proffered position is inadequate to establish that the proposed 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 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. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (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 discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree, such as a degree in business, 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).²

In this matter, the petitioner claims that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree, i.e., a bachelor's degree in business. This assertion is tantamount to an admission that the proffered position is not in fact a specialty occupation. The director's decision must therefore be affirmed and the approval of the petition revoked on this basis alone.

² Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. *See, e.g., Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; *cf. Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: otherwise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

Id.

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO first turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty 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 in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (hereinafter the *Handbook*), on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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)).

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.³ The *Handbook* describes the occupation of market research analyst as follows:

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

Duties

Market research analysts typically do the following:

- Monitor and forecast marketing and sales trends
- Measure the effectiveness of marketing programs and strategies
- Devise and evaluate methods for collecting data, such as surveys, questionnaires, or opinion polls
- Gather data about consumers, competitors, and market conditions
- Analyze data using statistical software
- Convert complex data and findings into understandable tables, graphs, and written reports
- Prepare reports and present results to clients or management

Market research analysts perform research and gather data to help a company market its products or services. They gather data on consumer demographics, preferences, needs, and buying habits. They collect data and information using

³ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2012 – 2013 edition available online.

a variety of methods, such as interviews, questionnaires, focus groups, market analysis surveys, public opinion polls, and literature reviews.

Analysts help determine a company's position in the marketplace by researching their competitors and analyzing their prices, sales, and marketing methods. Using this information, they may determine potential markets, product demand, and pricing. Their knowledge of the targeted consumer enables them to develop advertising brochures and commercials, sales plans, and product promotions.

Market research analysts evaluate data using statistical techniques and software. They must interpret what the data means for their client, and they may forecast future trends. They often make charts, graphs, or other visual aids to present the results of their research.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Market Research Analysts, <http://www.bls.gov/ooh/Business-and-Financial/Market-research-analysts.htm#tab-2> (last visited May 22, 2012).⁴

A review of the *Handbook's* education and training requirements for this occupation, however, indicates that it does not require a bachelor's degree in a specific specialty or its equivalent for entry into the position:

Market research analysts need a bachelor's degree in market research or a related field. Many have degrees in fields such as statistics, math, or computer science. Others have a background in business administration, one of the social sciences, or communications. Courses in statistics, research methods, and marketing are essential for these workers; courses in communications and social sciences—such as economics, psychology, and sociology—are also important.

Handbook, 2012-13 ed., Market Research Analysts, <http://www.bls.gov/ooh/Business-and-Financial/Market-research-analysts.htm#tab-4> (last visited May 22, 2012).

In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as business management and engineering, would not meet the statutory requirement that the

⁴ Since the issuance of the director's decision, an updated version of the *Handbook* has become available.

degree be "in *the* specific specialty."⁵ Section 214(i)(1)(b) (emphasis added).

Here, although the *Handbook* indicates that a bachelor's or higher degree is required, it also indicates that baccalaureate degrees in various fields are acceptable for entry into the occupation. In addition to recognizing degrees in disparate fields, i.e., social science and computer science as acceptable for entry into this field, the *Handbook* also states that "others have a background in business administration." As noted above, 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 at 147. Therefore, the *Handbook's* recognition that a general, non-specialty "background" in business administration is sufficient for entry into the occupation strongly suggests that a bachelor's degree *in a specific specialty* is not a normal, minimum entry requirement for this occupation. Accordingly, as the *Handbook* indicates that working as a market research analyst does not normally require at least a bachelor's degree in a specific specialty or its equivalent for entry into the occupation, it does not support the proffered position as being a specialty occupation. The petitioner, therefore, has failed to establish eligibility under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Further, while counsel's references to *Tapis International v. INS* and *Unical Aviation, Inc. v. INS* are noted, both decisions are inapposite to this matter. First, *Tapis International v. INS* regards a showroom manager position and not a market analyst position as claimed by counsel. In addition, *Unical Aviation, Inc. v. INS* concerns a fact specific outcome for a petitioner that was able to demonstrate in part that it normally requires the duties of the proffered position to be performed by an individual with at least a bachelor's degree in a business specialty.

Second, even if these two cases were analogous to the facts in this matter, they are both district court decisions. In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court even in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Moreover, the AAO notes that counsel also refers to four unpublished AAO decisions in support of its claim that certain marketing related occupations have been recognized as specialty occupations on appeal. However, all four cases predate the creation of the H-1B specialty occupation classification at section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b). As such, these cases deal with whether the beneficiaries are members of

⁵ Whether read with the statutory "the" or the regulatory "a," both readings denote a singular "specialty." Section 214(i)(1)(b) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Still, the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty.

the professions as defined in section 101(a)(32) of the Act. Again, the issue before the AAO is whether the petitioner's proffered position qualifies as a nonimmigrant H-1B specialty occupation as that term is defined at section 214(i)(1) of the Act and not whether it is a profession under 101(a)(32) of the Act.⁶ Thus, the unpublished AAO decisions cited by counsel are irrelevant to the instant petition.

Even if these unpublished decisions were relevant, they would not be binding on the AAO. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. It is also noted that counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the decisions referenced.

As the evidence of record does not establish that the particular position here proffered is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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.

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

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement of at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions. Finally, for the reasons discussed in greater detail below, the petitioner's reliance upon the job vacancy advertisements is misplaced.

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner submitted copies of 22

⁶ The AAO notes that the primary, 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, or its equivalent, to be *in a specific specialty*.

advertisements. The advertisements provided, however, establish at best that a bachelor's degree is generally required, but not at least a bachelor's degree or the equivalent in a *specific specialty*. In addition, even if all of the job postings indicated that a bachelor's or higher degree in a specific specialty or its equivalent were required, the petitioner fails to establish that the submitted advertisements are relevant in that the posted job announcements are not for parallel positions in similar organizations in the same industry. For instance, all the advertisements are for positions in different industries and dissimilar organizations and, thus, they cannot be found to be parallel positions. As a result, the petitioner has not established that similar companies in the same industry routinely require at least a bachelor's degree in a specific specialty or its equivalent for parallel positions.⁷

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." Specifically, the petitioner failed to demonstrate how the proffered position of market analyst is so complex or unique relative to other market research analyst positions that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States.

Although counsel claimed that the petitioner has always hired individuals with a bachelor's degree in business or a related degree for the proffered position, counsel did not submit documentary evidence to support this claim. 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). Even if such evidence had been submitted, a general degree, such as a degree in business, is not considered to be a degree in a specific specialty, as noted *supra*. As the record has not established a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8

⁷ Although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from just 22 job advertisements with regard to determining the common educational requirements for entry into parallel positions in similar cell phone retail companies. See generally Earl Babbie, *The Practice of Social Research* 186-228 (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 195-196 (explaining that "[r]andom selection is the 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 announcements supported the finding that the position of market analyst for a 2-person cell phone retail company required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the statistics-based findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

C.F.R. § 214.2(h)(4)(iii)(A).⁸

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent. Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. In other words, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than market research analyst positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent.⁹

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

Next, the AAO will quickly address the issue of whether or not the petitioner qualifies as an H-1B employer or agent. The United States Supreme Court determined that where federal law fails to clearly define the term "employee," courts should conclude that the term was "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

"In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the

⁸ While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. See *Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. See § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

⁹ It must be noted that the petitioner has designated the proffered position as a Level I position on the submitted Labor Condition Application (LCA), indicating that it is an entry-level position for an employee who has only basic understanding of the occupation. See Employment and Training Administration (ETA), *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009). Therefore, it is simply not credible that the position is one with specialized and complex duties, as such a higher-level position would be classified as a Level IV position, requiring a significantly higher prevailing wage.

manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."

Darden, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); see also *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. at 440 (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

As such, while social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. Without full disclosure of all of the relevant factors, the director would be unable to properly assess whether the requisite employer-employee relationship exists and will continue to exist between the petitioner and the beneficiary.

The AAO notes that counsel submitted a copy of the petitioner's Certificate of Incorporation, a stock certificate, a list of employees, 2008 income tax return, and an unsigned pay check for the beneficiary on appeal. Again, the regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. See 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. § 103.2(b)(1), (8), and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764; see also *Matter of Obaigbena*, 19 I&N Dec. 533. If the petitioner had wanted the submitted evidence to be considered, it should have submitted it in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

Even if the petitioner would have submitted the evidence in response to the director's notice of

intent to revoke dated January 5, 2010, the AAO finds that the evidence is insufficient to establish that the petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii).

The AAO notes that the stock certificate, numbered 00, indicates that [REDACTED] owns 1,000 shares out of the authorized 1,000,000 at \$1.00 par value. However, according to the Certificate of Incorporation, the shares have no par value. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In addition, as general evidence of a petitioner's claimed ownership, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *Cf. Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362, 364-365 (Comm'r 1986). Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

In addition, counsel submitted an unsigned pay check for the beneficiary. The pay check does not indicate the pay period begin date. In addition, there are discrepancies on the pay check. For instance, the check is for \$2,700. However, the bottom portion of the pay check indicates \$6,015.44. Further, the bottom of the check indicates that the beneficiary made \$6,692.54 for two hours of work, which indicates that he gets paid \$3,346.27 per hour. Therefore, the beneficiary's salary is \$6,960,241.60, which is substantially more than the \$37,850 salary indicated on the initial petition. Again, the petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92. 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. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582.¹⁰

In this matter, the petitioner has not resolved inconsistencies in the record by competent objective evidence and has thereby failed to demonstrate that the petitioner will have an employer-employee relationship with the beneficiary. Therefore, the director's decision is affirmed, and the approval of the petition must be revoked for this additional reason.

¹⁰ Regardless of this pay discrepancy, this pay check of the beneficiary further indicates that the beneficiary was not working in a full-time capacity in accordance with the terms and conditions of the approved petition.

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications except to note that, according to the American Association of Collegiate Registrars and Admission Officers, a master of commerce from India is comparable to a U.S. bachelor's degree and not a master of business administration as indicated in the credential evaluation submitted by the petitioner with the initial petition.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. § 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The approval of the petition is revoked.