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

(b)(6)

Date: APR 0 1 2013 Office: CALIFORNIA 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:

SELF-REPRESENTED

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 in accordance with the instructions on 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,

For Michael T. Kelley

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner states that it is a for-profit men's clothing distributor and manufacturer with six employees and a gross annual income of approximately $207,365. It seeks to employ the beneficiary in what it designates 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 on October 18, 2011, finding that the petitioner had not established that the proffered position qualifies as a specialty.

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

The Labor Condition Application (LCA) submitted by the petitioner to support the petition was certified for the SOC (O*NET/OES) Code 19-3021, the associated occupational classification of Market Research Analyst, and a Level I prevailing wage rate.

The issue before the AAO is whether the petitioner established that the proffered position qualifies as a specialty occupation within the meaning of the controlling statutory and regulatory provisions.

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)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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), 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. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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

In its support letter, the petitioner stated that it needed a market research analyst to expand its existing client base as well as consolidate a new marketing campaign. As a market research analyst, the petitioner explained that the incumbent would spend approximately 60% of the time on research and analysis activities; 30% of the time on implementation; and 10% of the time on monitoring activities. More specifically, the petitioner presented the market research analyst duties as quoted below (verbatim):

> **General breakdown of position duties:**
>
> The analysis of data as regards current client base as well as past and potential future client base. This analysis will include the in depth investigation and analysis of the type of client; the type of consultations and services.
>
> The primary responsibility of this position includes the management of primary market research studies and analysis of secondary market research information to support service development, and marketing strategies for existing products, services, marketing and business development requests, market trending analysis for strategy and portfolio management. The Market Research Analyst will handle projects and information requiring a high degree of confidentiality and integrity.
>
> **ESSENTIAL FUNCTIONS:**

> Performs Primary and Secondary marketing research utilizing multiple databases to analyze relevant markets as defined by Men's Wear Industry. Performs analyses in the areas of service revenue, average prices, payer types, client demographics, procedural volumes, market size, market share, penetration, marketing practices and trends, and prepares market rend forecasts. Gathers data on competitors and analyzes their prices, sales, and methods of operation. Monitors the marketplace for trend or competitor activity relevant to our industry and reports findings on a periodic basis.
>
> Will oversee reviewing of proposals and coordinating project time line, cope and budget with external market research vendors. Will be in charge of the development of qualitative interview or focus group discussion guides and quantitative surveys for primary market research projects. Analyzes primary market research data and prepares summary reports.

The petitioner stated that the minimum education for entry into the position is a bachelor's degree in marketing. To further supplement the petition, the petitioner submitted a copy of the 2010-2011 U.S. Department of Labor's *Occupational Outlook Handbook* (hereinafter referred to as the *Handbook*) chapter regarding the occupational classification Market and Survey Researchers, in support of the assertion that a bachelor's degree in a specific specialty is normally required for a market research analyst, as would be the case if the proffered position's inclusion in the Market Research Analysts occupational classification were in itself sufficient to establish the position as a specialty occupation. Additionally, the petitioner submitted evidence from the U.S. Department of Labor's Occupational Information Network (O*NET) section on Market Research Analysts, as well as a job vacancy posting for a Director of Online Marketing stating a requirement for a bachelor's degree in marketing or a related field. This evidence, according to the petitioner, definitively shows that the job classification of market research analyst is one in which a bachelor's degree is the minimum level of education for entry into the occupation.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 25, 2011. Within the RFE, the director outlined the specialty occupation regulatory criteria and requested specific documentation to establish that the proffered position qualifies for classification as a specialty occupation.

On June 6, 2011, the petitioner submitted a response to the director's RFE containing additional evidence. The petitioner provided an expanded job description for the proffered position, as well as a different job title of Market Research Analyst/Sales Representative/Social Media Director, along with more particularized job duties, presented below:

- Provide Market Research on trends associated with men's wear sales and marketability[:]

- Research and make recommendations for new operation system(s) to transition company from manual entry system (Microsoft Excel & Filemaker)[;]

- Measure and assess customer satisfaction based on buying trends[;]

- Deliver monthly market research results for sales trends based on findings from Facebook, Twitter and Constant Contact[;]

- Provide analysis on monthly sales reports associated with research trends by season, region (Eastern US, Midwest US, Western US, INT'L, Europe (Western Europe), INT'L Europe (Eastern Europe, Russia), INT'L Asia, INT'L Australia and New Zealand and INT'L South America (Mexico)[;]

- Measure the effectiveness of marketing, advertising, and other programs and strategies and lead weekly discussion on current trends and forecast 1-2 quarters in advance on changes needing implementation[;]

- Oversee and administer all social media outlets including Facebook, Twitter, Tumblr, YouTube, Constant Contact & discover new/emerging social sites[;]

- Conduct research on consumer opinion and consumer behavior[;]

- Oversee and implement administration of company operation software system (AIMS)
  - Update inventory on operational software
  - Provide detailed sales reports by client by quarterly trends

- Administer weekly consumer and B to B corporate communications via email communications/advertising regarding new products[;]

- Administer all social media communications to the public/consumers via Twitter and Facebook[;]

- Monitor industry statistics and follow trends in trade[;]

- Forecast and track marketing and sales trends[;]

- Oversee clients in Midwest region of the US, England UK, Taiwan, Australia, New Zealand & Philippines as sales representative[;]

- Forecast and track marketing and sales trends[;] and
- Travel to domestic trade shows twice yearly.

This new title and the additional position duties seem to be contextually logical within the nature of the petitioner's business and its stated intent to grow the business. The initial description limited the beneficiary's role to market research analyst duties, while the second iteration of the job is dramatically multifunctional and vertically senior because the proffered position entails directing the social media and international sales representation.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The AAO notes that the petitioner's RFE response has added some duties not obviously associated with market research analysis (such as administering social media connections, and oversight and administration of the petitioner's software system). The AAO accords no material weight to these additional duties as they are not developed with sufficient specificity to establish that they would affect the job's occupational classification or the requirements for the position.

The director denied the petition on October 18, 2011, finding that the petitioner did not meet its burden of demonstrating that the proffered position meets the specialty occupation statutory and regulatory scheme. The director determined that the duties of the proffered position reflect the duties performed by occupational category of Market Research Analysts, as described in the *Handbook* under the title "Marketing and Survey Researcher."[1]

On appeal, the petitioner contends that the proffered position qualifies for classification as a specialty occupation, and that it meets all evidentiary criteria. In particular, the petitioner maintains that the director erred in finding that: the position does not qualify as a specialty occupation; the particular position is not so complex or unique that it can be performed only by an individual with a degree; and that the nature of the specific duties are not so specialized and complex that knowledge required to perform the duties is usually associated with a baccalaureate or higher degree.

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[1] The director's decision referred to the 2010-2011 edition of the *Handbook*. All of the AAO's references are to the 2012-2013 edition of the *Handbook*, which may be accessed at the Internet site http://www.bls.gov/oco/.

For the purpose of performing a comprehensive analysis of whether the proffered position qualifies as a specialty occupation, the AAO turns next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*): A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position that is the subject of the petition.

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. The AAO finds that the duties as presented by the petitioner appear to comport with the duties of the Market Research Analysts occupational classification as described in the *Handbook*. The *Handbook* describes this occupational classification 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 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.
>
> Workers who design and conduct surveys are known as survey researchers. For more information, see the profile on survey researchers.
>
> Some market research analysts may become professors or teachers. For more information, see the profile on postsecondary teachers. As an instructor in a junior or community college, a market research analyst may need only a master's degree, but a Ph.D. is usually required to teach in a college or university.

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 February 26, 2013).

A review of the *Handbook's* information on the education and training requirements for this occupation, however, indicates that employers do not normally require a bachelor's degree in a specific specialty or its equivalent for entry into Market Research Analyst positions. Accordingly, the *Handbook* indicates that the proffered position's inclusion within the Market Research Analysts occupational category is not in itself sufficient to establish that the position is one for which a baccalaureate or higher degree in a specific specialty, or the equivalent, is normally the minimum requirement for entry. The pertinent section of the *Handbook's* Market Research Analysts chapter states:

> Market research analysts need strong math and analytical skills. Most market research analysts need at least a bachelor's degree, and top research positions often require a master's degree.[2]
>
> **Education**

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[2] The first definition of "most" in *Webster's New Collegiate College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of market research analyst positions require at least a bachelor's degree in business administration or a closely related field, it could be said that "most" market research analyst positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." § 214(i)(1) of the Act.

> Market research analysts typically need a bachelor's degree in market research or a related field. Many have degrees in fields such as statistics, math, 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.
>
> Many market research analyst jobs require a master's degree. Several schools offer graduate programs in marketing research, but many analysts complete degrees in other fields, such as statistics, marketing, or a Master of Business Administration (MBA). A master's degree is often required for leadership positions or positions that perform more technical research.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, "Market Research Analysts," http://www.bls.gov/ooh/Business-and-Financial/Market-research-analysts.htm#tab-4 (last visited February 26, 2013).

Here, although the *Handbook* indicates that a bachelor's or higher degree is typically required, it also indicates that baccalaureate degrees in various fields that have a distinctly different focus and academic concentration from each other are acceptable for entry into the occupation. This particular range of acceptable degrees is so broad, the AAO finds, that is not indicative of a specialty occupation position. In addition to recognizing degrees in disparate fields, i.e., market research and computer science, as acceptable for entry into this field, the *Handbook* also states that "others have a background in business administration." 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, the *Handbook* does not support the proffered position as satisfying this first of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner posits several alternative arguments, with some supporting evidence, from federal government publications and decisions issued by the Board of Alien Labor Certification Appeals. These federal materials, according to the petitioner, unequivocally show that the job classification of market research analyst is one in which a bachelor's degree is the minimum level of education for entry into the occupation. The AAO will consider each argument in turn.

First, the AAO will examine whether the Occupation Information Network (O*NET) supports the petitioner's proposition that a baccalaureate or higher degree or its equivalent is normally the

minimum requirement for entry into the particular position. Contrary to the assertions of the petitioner, O*NET does not state a requirement for a bachelor's degree. Rather, it assigns the Market Research Analysts occupation a Job Zone "Four" rating, which groups it with occupations for which "most," but not all, "require a four-year bachelor's degree." Further, O*NET does not indicate that, where required, four-year bachelor's degrees for Job Zone Four occupations must be in a specific specialty closely related to the requirements of that occupation. See the U.S. Department of Labor's Occupational Information Network (O*NET) section on Market Research Analysts and Marketing Specialists on the Internet at http://www.onetonline.org/link/summary/13-1161.00 (last accessed on February 26, 2013). Therefore, O*NET is not probative of the proffered position being a specialty occupation or satisfying the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

Next, the AAO will discuss whether the beneficiary's prior visa petition approvals for market research analyst positions supports an assertion that these prior approvals demonstrate eligibility for the benefit sought. Within the record of proceedings, the petitioner provided two Form I-797C Approval Notice copies reflecting that USCIS had approved prior H-1B petitions filed by other petitioners on behalf of the beneficiary. In addition, the petitioner provided the H-1B letters of support, both of which showed that the prior positions were market research analyst positions, and further demonstrated that one of the positions was for a clothing manufacturer. As will now be discussed, the AAO accords no probative value to these documents.

As a preliminary point, the AAO finds that the record of proceeding before the AAO on appeal does not include the records of proceeding upon which the aforementioned approvals were based. Consequently, the AAO cannot determine that the substantive evidence presented in the earlier petitions and in the present one are substantially the same. Further, the AAO cannot conclude that the decisions to approve the beneficiary's prior petitions for different petitioners were in fact correct on the bases of the Approval Notices and letters of support.

The director's decision does not indicate whether she reviewed the prior approvals of the other nonimmigrant petitions. However, if the previous nonimmigrant petitions were approved based on the same assertions and evidence as contained in the current record, the approvals would constitute material error on the part of the director. More importantly, the AAO disagrees with the petitioner's contention that these prior approvals indicate that the Market Research Analyst occupational classification is deemed a specialty occupation, and therefore mandates approval of the instant petition. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of a prior approval that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved

nonimmigrant petitions on behalf of the same beneficiary for whom the present petition was filed, and for substantially the same job as is the subject of this appeal, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Additionally, as the Approval Notices and letters of support submitted by the petitioner do not constitute precedent decisions, these documents have no binding weight upon any USCIS officers in the adjudication of other non-immigrant petitions coming before them. It must be emphasized that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). For all of the reasons articulated above, the beneficiary's prior visa petition approvals are not persuasive, and they do not demonstrate that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position that is the subject of the petition as required by the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

Now the AAO will now address *Unico American Corp. v. Watson*, Case No. CV 89-6958 (C.D. Cal. Mar. 19, 1991), a federal district court case, unpublished by the court, which the petitioner cites for the proposition that the USCIS should give deference to an employer's view and evidence that the stated educational requirements are sufficient to show what an employer normally requires for the position. Reliance on this case is misplaced for two reasons. First, in *Unico American Corp.* the petitioner endeavored to classify the beneficiary as an H-1 temporary worker of distinguished merit and ability pursuant to 8 U.S.C. § 1101(a)(15)(H)(1). That section of the law is not relevant here, because the H-1B specialty-occupation statutes and regulations replaced the H-1 distinguished merit and ability program with a distinctly different statutory and regulatory framework and with new standards and qualifying criteria, including the requirement that the petitioner establish that the performance requirements of the proffered position require a baccalaureate or higher degree, or its equivalent, "in the specific specialty." Section 214(i)(1) of the Act; *see also* 8 C.F.R. §214.2(h)(4)(ii). Second, the AAO also notes that, 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 in matters arising even within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. Further, the AAO finds that the petitioner has not presented evidence and persuasive argument to establish that the facts of the instant petition are analogous to those in the unpublished decision.

For the foregoing reasons, the AAO finds that the decision in *Unico American Corp* is neither persuasive nor instructive with regard to the application of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the facts before the AAO in this appeal.

The final line of reasoning advanced by the petitioner on appeal is that the petitioner's "business necessity" demands a bachelor's degree as a minimum requirement for the proffered position, and as such, it has shown that it meets the regulatory criterion that a baccalaureate or higher degree is normally the minimum requirement for entry into the particular position. To support this contention, the petitioner cites to two Board of Alien Labor Certification (BALCA) cases that evaluate the term of art "business necessity," which is an employer's job requirement in excess of normal job duties, defined at 20 C.F.R. § 656.17(h)(1). The AAO finds that the petitioner has failed to establish the relevance of the BALCA decisions and the DOL regulations that they address.

The petitioner has not established that the BALCA decisions and related DOL regulations logically tie into USCIS application of its regulations governing the adjudication of H-1B nonimmigrant visa petitions.

Likewise, the AAO finds that the petitioner did not identify and explain the necessity of any specific baccalaureate-level knowledge of marketing principles, business analytical concepts, marketing and business modalities, or other highly specialized components of knowledge that would require the theoretical and practical application of at least a bachelor's degree level of knowledge in a specific specialty. In other words, the petitioner did not provide an adequate factual foundation for its degree-requirement claim.

Similarly, as a corollary, the AAO also finds that the petitioner does not distinguish the proposed duties, or the proffered position that they comprise, as more unique, specialized, and/or complex than market research positions which may share those same generalized functions and yet not require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty, which requirement is essential for a specialty occupation as defined at section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).

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 will consider whether the petitioner has satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common 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.

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.

The petitioner did submit three job-advertisements in support of the contention that a bachelor's or higher degree in the specific specialty is required for entry into the occupation within the petitioner's industry. Preliminarily, the AAO observes that the director correctly determined that the petitioner submitted job-advertisements that do not limit the field of study to a particular field that is appropriate to the proffered position, and as such, they are insufficient to show that the degree requirement is common to the industry in parallel positions among similar organizations. Also, the petitioner has the burden of demonstrating that its organization is similar to the organizations advertising parallel positions when attempting to establish that a degree requirement is common to the industry in parallel positions among similar organizations.

The AAO agrees with the director's assessment that not one of the job-advertisements showed, nor did the petitioner assert, that the job ads were for parallel positions, i.e. positions as a market research analyst, as specified in the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

For instance, the first advertisement is for the Director of Online Marketing for a company that describes itself as the sixth largest retail establishment of women's and men's clothing in the United States. Furthermore, the position entails management of a team of online marketing professionals, and as such, the AAO finds that the job cannot be considered parallel to that of the proffered position. Moreover, while the second advertisement is for a position in the same industry, the position is limited to online marketing, and the advertisement does not state a minimum degree requirement and, therefore, it cannot be found to be a parallel position in a similar organization. Lastly, the third advertisement is for a merchandise planner/business analyst with an emphasis on financial planning and, thus, it also cannot be found to be a parallel position. As a result, the petitioner has not established that similar organizations in the same industry routinely require at least a bachelor's degree in a specific specialty or its equivalent for parallel positions.[3] Accordingly, the job-advertisements submitted into the record have no probative value.

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[3] Further, according to the *Handbook*'s detailed statistics on market research analysts, there were approximately 282,700 persons employed as market research analysts in 2010. *Handbook*, 2012-13 ed., available at http://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm#tab-6 (last accessed January 31, 2013). Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from just four job postings with regard to the common educational requirements for entry into parallel positions in similar organizations in

In sum, for the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Next, the AAO will consider whether the petitioner has satisfied 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."

On appeal, the petitioner contends that, as they were described in the record of proceeding that was before the director at the time of her decision, the proposed duties established the position as so complex or unique as to satisfy this second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The AAO disagrees, as it finds that the petitioner has failed to provide evidence establishing relative degrees of complexity or uniqueness as distinguishing attributes of the proffered position, let alone establishing such a level of complexity or uniqueness that the position can be performed only by a person with at least a bachelor's degree or the equivalent in a specific specialty. To the contrary, the petitioner has not shown in what respects, if any, the proffered position and its constituent duties as described in the record exceed in complexity or uniqueness market research analyst positions that can be performed by persons that do not hold at least a bachelor's degree, or the equivalent, in a specific specialty.

A review of the record indicates that the petitioner has failed to show that the duties the beneficiary will be responsible for or perform on a day-to-day basis constitute a position so complex or unique that it can be performed only by a person with at least a bachelor's degree in a specific specialty or its equivalent. The AAO finds that no such relative complexity or uniqueness is inherent in the job and duty descriptions provided in the record, which are described in generalized, functional terms that do not convey substantive specifics of what performance of the proffered position would involve in terms of actual work and associated applications of knowledge in a specific specialty. Also, the petitioner did not demonstrate how the proffered position is so complex or unique that it can only be performed by a person who can apply a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. For instance, the petitioner did not submit information relevant to a detailed course of study

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the petitioner's industry. *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 had established that the three companies that issued them recruit and require for the position of market research analyst only persons with at least a bachelor's degree, or the equivalent, in a specific specialty, it cannot be found that such a limited number of job postings that appear to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not normally require at least a baccalaureate degree in a specific specialty.

leading to at least a bachelor's degree in a specific specialty and did not establish how completion of such a curriculum would be necessary to perform the duties it claims are so complex and unique. While one or two courses in marketing may be beneficial in performing certain duties of a market research analyst position, the petitioner has failed to demonstrate how completion of an established curriculum of such courses culminating in a baccalaureate degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here proffered.

Therefore, the evidence of record does not establish that this position is significantly different from Market Research Analyst positions that the *Handbook's* information indicates are performed by persons who have not attained at least a bachelor's degree in a specific specialty, but may have a less-than-bachelor's degree level background in courses with some application to market research analysis. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than market research analyst that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent. Consequently, as the petitioner fails to demonstrate how the proffered position of market research analyst is so complex or unique relative to other market research analyst positions that do not require a person who has attained at least a baccalaureate degree in a specific specialty or its equivalent, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The petitioner provided samples of work as documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty. The AAO observes that much of the documentation is advertising campaigns, promotional material, website text and raw data of contacts made with clients. Although this information may be of specific use to the proffered position, the petitioner does not persuasively explain how this information is reflective or indicative of the relative level of complexity or uniqueness required to satisfy this criterion. While this lack of probative evidence related to this criterion is itself decisive and precludes a finding that the petitioner has satisfied this criterion, the AAO further notes that the LCA's wage level is not indicative of the relative level of complexity or uniqueness required to satisfy this criterion.

Of particular significance to this decision, the AAO notes that the petitioner has submitted in support of the petition an LCA that was certified as a Level I wage-rate position, a designation for an entry-level position for an employee who has only a basic understanding of the occupation. *See* Employment and Training Administration (ETA), *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009).

That *Prevailing Wage Determination Policy Guidance* instructs that LCA wage levels should be determined only after selecting the most relevant O*NET occupational code classification. Then, a prevailing-wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational

requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation. Prevailing wage determinations start with an entry level wage (i.e. Level I) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent worker) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received as indicated by the job description.

The *Prevailing Wage Determination Policy Guidance* issued by DOL provides a description of the wage levels. A Level I wage rate is described by DOL as follows:

> **Level I** (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf

Consequently, as the petitioner fails to demonstrate that the proffered position is more complex or unique than other market research analyst positions that can be performed by persons without at least a baccalaureate degree in a specific specialty, or its equivalent, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Next, the AAO evaluates the record of proceeding to see whether the petitioner has established that it normally requires a degree or its equivalent for the position, pursuant to the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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. *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 or its equivalent as the minimum for entry into the occupation as required by section 214(i)(1) of the Act. To interpret the regulation 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 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.

In any event, the record of proceeding contains no substantive evidence on point, particularly as the petitioner states that this is the first instance of hiring a market research analyst.

Therefore, the record of proceeding does not establish the prior history of recruiting and hiring required to satisfy the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).[4]

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.

Relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position's duties. In other words, the proposed duties have not been described with sufficient specificity to show that their nature is more specialized and complex than those of market research analyst positions whose duties are not of a nature so specialized and complex that their performance requires knowledge usually associated with at least a bachelor's degree or the equivalent in a specific specialty.

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[4] Further, it is what the evidence of record establishes with regard to the actual performance requirements of the proffered position that is determinative in the application of this criterion. 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 generally Defensor v. Meissner,* 201 F.3d at 387. Moreover, regardless of a petitioner's specifying a particular degree or degree-equivalency requirement, if the evidence in the record of proceeding 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").

The petitioner asserts on appeal that it meets this criterion, and that it provided a detailed description of the petitioner's business and a detailed description of the duties of the proffered position. While the AAO acknowledges that the record of proceeding contains information as to the business, the proposed duties, and the proffered position, the petitioner did not provide evidence establishing a particular body of knowledge, usually associated with attainment of at least a bachelor's degree in a specific specialty, that performance of the duties would require.

Additionally, the AAO incorporates its earlier discussion regarding the wage-level designation on the LCA, which is appropriate for duties whose nature is less complex and specialized than required to satisfy this criterion.

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 petition denied for this reason.

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 the beneficiary's qualifications has not become relevant to the disposition of this appeal.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed, and the petition will be denied.

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