



U.S. Citizenship  
and Immigration  
Services

(b)(6)

Date: **APR 01 2013** Office: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:  
[REDACTED]

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

If you believe the 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,

*Michael T. Kelly*  
Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition filed on April 30, 2012. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner describes itself as a marketing, financial research and financial consulting business with two employees. It seeks to employ the beneficiary in what it designates as a full-time market research analyst position and to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition because the petitioner failed to establish that the proffered position qualifies for classification as a specialty occupation.

The Labor Condition Application (LCA) submitted by the petitioner to support the petition was certified for the SOC (O\*NET/OES) Code 13-1161, the associated Occupational Classification of Market Research Analyst, and a Level II prevailing wage rate.

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

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

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

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

The 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 dated April 19, 2012, the petitioner stated that it needed a full-time market research analyst and described the following duties of the proffered position:

In this position, she will provide consulting services and conduct market research for clients by gathering statistical data on competitors, analyzing prices, needs for services and methods of their distribution. In the performance of her duties, [the beneficiary] will analyze the statistical and financial data supplied by the company's clients and develop profiles and competitive assessments of clients' businesses, with a goal of increasing their competitiveness, profitability and market share. She will also evaluate data on delivery of clients' services and sales. She will also make recommendation[s] on more effective delivery of clients' services and pricing[,] as well as diversification of clients' operations. [The beneficiary] will also work with the company's clients on implementation of these recommendations.

The petitioner stated that the minimum education for entry into the position is a bachelor's degree in economics or a related field, or its equivalent.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on May 2, 2012. Within the RFE, the director requested specific documentation to establish that the proffered position qualifies for classification as a specialty occupation.

On May 16, 2012, counsel for the petitioner submitted a letter in response to the director's RFE, together with additional evidence. Specifically, counsel cites *Unical Aviation, Inc. v. INS*, 248 F. Supp. 2d 931 (D.C. Cal 2002), a case where the federal district court reversed the AAO, for the proposition that the Service recognizes market research analysts as a professional position that

requires, at a minimum, a bachelor's degree. The court's rationale for reversing the AAO had two bases. First, the court reversed the AAO because it found that the proffered position of senior market analyst was comparable to the *Occupational Outlook Handbook* (hereinafter "*Handbook*") classification of market research analyst which the former Immigration and Naturalization Services acknowledged was a specialty occupation. Second, the court found that the petitioner had demonstrated that it normally requires a degree for entry into the occupation. To support the claim that the Market Research Analyst occupational classification is a specialty occupation, counsel submitted a copy of an unpublished AAO decision. This decision involved a petitioner that sought to permanently employ the beneficiary in a market research analyst position, and requested classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2).

Citing the U.S. Department of Labor's *Occupational Outlook Handbook* (hereinafter referred to as the *Handbook*), counsel argued that a bachelor's degree in market research or a related field 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.<sup>1</sup> Counsel also maintained that the *Handbook* states that individuals holding such positions should complete courses in statistics, research methods, and marketing, as well as communications and social sciences.

In the RFE response letter dated May 15, 2012, counsel provided the following percentage-of-time breakdown for the proffered position's duties:

- 1) Collect and analyze data on competitors, including prices and methods of distribution of services and marketing (15%);
- 2) Summarize findings and prepare reports to clients (15%);
- 3) Measure the effectiveness of clients' marketing and advertising strategies (20%);
- 4) Analyze financial data provided by the clients (15%);
- 5) Summarize financial data and prepare reports on effectiveness of delivery of [clients'] services, sales, and clients' position in the marketplace (15%);
- 6) Devise and evaluate methods and procedures for obtaining such data (5%);
- 7) Devise methods to identify clients' customer base and factors affecting for clients' services and products (3%);

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<sup>1</sup> The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.

- 8) Develop marketing plans and strategies to increase clients' customer base and market share (10%);
- 9) Prepare reports and memoranda outlining marketing plans and strategies to clients (3%);
- 10) Develop recommendations and strategies on improving delivery of clients' services and operations with the goal of increasing client profitability (5%);
- 11) Communicate with clients on feasibility of the developed recommendations (3%); and
- 12) Monitoring the implementation of the developed recommendation and recommend adjustments as needed (3%).

Based on the duties numbered above, counsel reasoned that the position is clearly a specialty occupation, and stated that the minimum education level for entry into the position is a degree in economics or a related field, or its equivalent. In particular, counsel maintained that the beneficiary completed coursework that is directly relevant to the position, including marketing, statistics, mathematics, financial mathematics, nature management, mathematics of economical and mathematical models, microeconomics, macroeconomics, firm economics, industrial economics, public sector economics, strategic planning, corporate planning, economic analysis, financial management, and budget planning and forecasting.

In further support of the contention that a bachelor's degree in economics is appropriate for a marketing position, counsel submitted a printout from the American Economic Association Internet site at [www.aeaweb.org/students/fields.php](http://www.aeaweb.org/students/fields.php), which states that core fields within economics, such as business administration and business economics, marketing and accounting are directly applicable to positions studying decisions made by firms and maximizing firm profits. Counsel relies upon this publication for the proposition that the businesses normally hire degreed economists for entry-level market research analyst positions. Counsel also advanced another argument, citing the *Handbook on Economists*, and asserting that degreed economists find jobs outside the economics profession as research assistants, financial analysts, market analysts, and similar positions in business and finance.

In response to the director's request for evidence regarding current or prior employees holding the same position, counsel submitted the Master of Business Administration degrees of the current Senior Consultant and the petitioner's president, who is also performing the duties of Senior Consultant. Both of these individuals, according to counsel, have duties associated with the position offered to the beneficiary.

Finally, counsel submitted three consulting agreements that he claims evidence that the duties for the position are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The director denied the petition on May 30, 2012, finding that the proffered position is not a specialty occupation. The director determined that the duties of the proffered position are comparable to the duties performed by Market Research Analysts, as described in the *Handbook*.<sup>2</sup>

On appeal, counsel for the petitioner contends that the proffered position qualifies for classification as a specialty occupation. In particular, counsel contends that the director erred as a matter of fact and law 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. No new evidence was submitted on appeal.

As a preliminary matter, even if the petitioner had substantiated its claim that a bachelor's degree in economics is a minimum requirement for entry into the proffered position – which it has not – that would be 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. In the instant case, the petitioner explicitly states that a bachelor's degree in economics or a related field is suitable for entry into the particular position. Additionally, the petitioner currently employs senior consultants who perform marketing duties, and who earned Master of Business Administration degrees. Since there must be a close correlation between the required specialized studies and the position, accepting individuals who earned 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 administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147

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<sup>2</sup> 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/>.

(1st Cir. 2007).<sup>3</sup>

The petitioner in this matter claims that an individual with either an economics or a related degree may perform the duties of the proffered position. Also, the petitioner finds that a degree in business administration is sufficient for entry into the proffered position, given that its two current employees possess business administration degrees (the AAO notes that the copies of the MBA diplomas submitted into the record do not indicate that the degrees were conferred for any specialization in a particular area of business studies). If the educational requirement of a position may be satisfied by an otherwise undifferentiated degree in business administration, then the position does not qualify as a specialty occupation position. The director's decision must therefore be affirmed and the petition denied on this basis alone.

Nevertheless, for the purpose of performing a comprehensive analysis of whether the proffered position qualifies as a specialty occupation, the AAO turns next to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I): 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**

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<sup>3</sup> 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.

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 March 4, 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 the positions in this occupational classification. 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, or the equivalent, in a specific specialty, 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.<sup>4</sup>

### **Education**

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 March 4, 2013).

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<sup>4</sup> 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.

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., 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, the *Handbook* does not support the proffered position as being one for which the normal entry requirement is at least a bachelor's degree, or the equivalent, in a specific specialty.

Additionally, the AAO finds that the unpublished AAO decision within the record of proceeding is not applicable to the instant matter, because that decision addresses an immigrant visa petition for an advanced degree professional, which involves different legal standards than those applicable to this nonimmigrant visa proceeding. Counsel maintains the submitted AAO decision stands for the proposition that the Market Research Analyst occupational classification, as reflected in O\*NET and the *Handbook*, requires a bachelor's degree at a minimum, not a degree in a specific specialty. Further, counsel claims, that as such, the degree does not need to be in a particular field, provided pertinent coursework is shown as directly applicable to the position. Earlier in this decision, the AAO explained that the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) cannot be construed as 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"). The AAO must point out that counsel's assertion is contrary to the crux of the H-1B statutory and regulatory scheme. Accordingly, the AAO finds counsel's reliance on the unpublished AAO decision is misplaced.

Aside from the fact that the unpublished AAO decision is not on point, the AAO accords no probative value to that prior, unpublished AAO decision as it might relate to the instant nonimmigrant proceeding that is the subject of this decision. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. 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.

Likewise, the AAO is not persuaded by counsel's comments on *Unical Aviation, Inc. v. INS*, 248 F. Supp. 2d 931 (D.C. Cal 2002), and notes that counsel failed to illustrate an analogy to the present matter, in support of the contention that the proffered market research analyst position meets the specialty occupation standard. The material facts of the present proceeding are distinguishable from those in *Unical*. Specifically, *Unical* involves: (1) a record of proceedings that included an organizational chart showing that all of its employees in the marketing department and all employees engaged in marketing duties held bachelor's degrees; and (2) in the court's words, "sufficient evidence to demonstrate that there is a requirement of specialized study for [the beneficiary's] position." Also, the proffered position and related duties in the present proceeding are different from those in *Unical Aviation, Inc.*, where the beneficiary was to liaise with airline and [REDACTED] customers in China for supply of parts and services; analyze and forecast airline and [REDACTED] demands to generate plans to capture business; provide after-sales services to customers in China; and develop new products and services for the China market. Moreover, there is no indication in the record of proceeding that the petitioner is in the same industry as *Unical Aviation, Inc.*; the petitioner has a Will Call Marketing employee with a high school diploma, who would be supervised by the beneficiary; and the petitioner did not present sufficient evidence to demonstrate that there is a requirement of specialized study for the beneficiary's position.

Further, in *Unical Aviation* the Court partly relied upon *Augut, Inc. v. Tabor*, 719 F. Supp. 1158 (D. Mass. 1989), for the proposition that Immigration and Naturalization Service (INS, now USCIS), had not used an absolute degree requirement in applying the "profession" standard at 8 U.S.C. § 1101(a)(32) for determining the merits of an 8 U.S.C. § 1153(a)(3) third-preference visa petition. That proposition is not relevant here, because the H-1B specialty occupation statutes and regulations, not in existence when INS denied the *Augut, Inc.* third-preference petition, mandate not just a baccalaureate or higher degree, or its equivalent, but a degree "in the specific specialty." Section 214(i)(1) of the Act; see also 8 C.F.R. § 214.2(h)(4)(ii). 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.

The record of proceeding contains a printout from the [REDACTED] Internet site at [REDACTED] submitted by counsel in support of the contention that a bachelor's or higher degree in economics is suitable for entry into the Market Research Analyst occupations. Preliminarily, the AAO observes that the [REDACTED] information is not on point because it shows economics as an acceptable field of study for market research analyst positions, but neither this publication nor counsel shows that a bachelor's or higher degree, or the equivalent, in economics is normally required for entry into market research positions in general, or this proffered position in particular. In any event, the

acceptability or suitability of a degree for a particular position is not a measure or criterion for establishing that position as a specialty occupation.

Also, the AAO notes that the *Handbook* states that courses in economics are important to the Market Research Analyst occupational classification, which is distinctly different from meeting the statutory and regulatory framework requiring a baccalaureate degree in the specific specialty.

Finally, counsel advances a claim that the field of Economics is directly related to the position of a market research analyst because, according to the *Handbook* in its "How to Become an Economist," states the following:

Most who complete a bachelor's degree in economics find jobs outside the economics profession as research assistants, financial analysts, *market analysts*, and similar positions in business and finance.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, "Economists," <http://www.bls.gov/ooh/Life-Physical-and-Social-Science/Economists.htm#tab-4> (last visited on March 4, 2013).

While it may be true that economists find work outside the profession, and that some find work as market research analysts, it does not logically follow that economics is necessarily related to, or essential for, entry into the particular position. Although counsel raises a noteworthy point, the burden on the petitioner is to demonstrate the bachelor's level educational imperative as applied to the specific duties for the position here proffered. Counsel lists the beneficiary's courses that he contends are appropriate for entry into the profession of market research, namely, marketing, statistics, mathematics, financial mathematics, nature management, mathematics of economics and mathematical models, microeconomics, macroeconomics, firm economics, industrial economics, public sector economics. The AAO observes that counsel and the petitioner do not explain how these courses, as part of a Bachelor's degree in Economics, are required for performance of the particular position here proffered.

Although counsel asserts on appeal that many proffered market research analyst duties require data manipulation and analysis that require the application of appropriate coursework in a specific bachelor's degree program, the AAO notes that there is no documentary evidence on point. Upon review and consideration of all of the statements submitted by counsel and the petitioner with regard to the proffered position and its constituent duties, the AAO notes that there is nothing in the record of proceeding that specifically illustrates or concretely describes the practical and theoretical applications of specialized knowledge in a specific specialty that the beneficiary would have to use to carry out the stated duties.

For the foregoing reasons, the AAO finds that the petitioner has not satisfied the requirement of 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

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 record also does not contain any evidence to establish that the degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations.

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 finds that the petitioner also has not 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."

The petitioner and counsel do not expressly state that the proffered position is so complex or unique, but counsel does maintain that the market research analyst will perform duties in servicing the petitioner's clientele.

The proposed duties and their percentages-of-time notations, as they were described in the record of proceeding that was before the director at the time of his decision, do not establish 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 finds that the petitioner has failed to provide evidence establishing relative complexity or uniqueness as distinguishing attributes of the proffered position, let alone as 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

to 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.

For instance, the petitioner did not submit information relevant to a detailed course of study 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 fill the position it claims is so complex or unique. Although counsel lists courses within the beneficiary's transcript, such as marketing, statistics, mathematics, financial mathematics, nature management, mathematics of economical and mathematical models, microeconomics, planning, corporate planning, economic analysis, financial management, and budget planning and forecasting, counsel did not describe how the content of these courses are necessarily applied to the constituent duties. While one or two courses within an economics curriculum may be beneficial in performing certain duties of a market research analyst position, the petitioner has failed to demonstrate how an established curriculum of such courses culminating in attainment of 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 positions 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 does not provide any 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. 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 II wage-rate position, a designation for a relatively low-level position for an employee who performs moderately complex tasks that require limited judgment. 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 II wage rate is described by DOL as follows:

**Level II** (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O\*NET Job Zones.

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](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf)

For all of the related reasons, the AAO finds that the petitioner failed 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.

In support of the contention that the petitioner normally requires a degree for entry into the proffered position, counsel submitted the Master of Business Administration degrees of the current Senior Consultant and the petitioner's president, who is also performing the duties of Senior Consultant. Both of these individuals, according to counsel, have duties associated with the position offered to the beneficiary. It is notable that counsel did not take the opportunity to describe the overlap between the Senior Consultant and President roles as compared to the market research analyst position offered to the beneficiary. Some overlap in marketing duties indeed might be true, but the regulation at issue concerns whether the employer normally requires a degree or its equivalent for entry into the particular position for which this petition was filed. Consequently, the AAO finds that this evidence lacks probative value.

In addition, the record of proceeding does not contain any evidence pertaining to the petitioner's recruiting history.

The AAO finds that the record of proceeding does not establish the prior history of recruiting and hiring required to satisfy this particular criterion. Therefore, the record of proceeding does not establish that the petitioner normally requires a degree or equivalent for this position, as required to satisfy the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).<sup>5</sup>

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.

On appeal, counsel maintains that the nature of the beneficiary's duties are specialized and complex. He further argues that non-degreed individuals would be incapable of analyzing and summarizing clients' financial data, and preparing reports on the effectiveness of the client's services, sales, and client's position in the marketplace. While the AAO acknowledges this claim regarding the proposed duties, it is noteworthy that counsel and the petitioner did not

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<sup>5</sup> 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").

provide evidence establishing a particular body of highly specialized knowledge, usually associated with attainment of at least a bachelor's degree in a specific specialty, that performance of the duties would require. Moreover, counsel and the petitioner failed to establish how the knowledge acquired by the beneficiary in her economics degree would be utilized in accomplishing the stated duties of the proffered position.

In support of the claim that the duties of the proffered position are so specialized and complex, counsel submitted three consulting agreements. Each of the three agreements are signed by the company president and indicate the level of services that the petitioner would be expected to provide under each agreement. In sum, these agreements specify the work the petitioner would be doing, but they do not clarify the beneficiary's role in the provision of the client services. The AAO therefore finds that these consulting agreements do not delineate the specialty occupation level of work that would be expected of the beneficiary. As such, these consulting agreements, in themselves, offer no probative value.

The AAO finds that the petitioner did not develop relative specialization and complexity 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.

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 Service finds the proffered position to be a specialty occupation. As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to establish that it is a specialty occupation. Therefore, review of the beneficiary's qualifications is not required for the proper disposition of this petition.

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.