



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **AUG 01 2013**

OFFICE: CALIFORNIA 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]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

for
Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on June 7, 2012. In the Form I-129 visa petition, the petitioner describes itself as an importer and distributor of chemicals and other industrial materials, housewares, and recyclables established in 2009. In order to employ the beneficiary in what it designates as a business research analyst position, the petitioner seeks 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 on September 26, 2012, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements. In support of this assertion, counsel submitted a brief and additional evidence.

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 supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services as a business research analyst to work on a full-time basis at a rate of pay of \$46,000 per year. In a support letter dated June 1, 2012, the petitioner stated that the proffered position involves the following duties:

- Investigate and conduct market research and business analysis on chemical and metal suppliers and perform [sic] statistical analysis on their products, prices, and marketing strategies;
- Perform expense-analysis on various chemicals and metals in current market and make comparison to [the petitioner's] products by creating financial statistics modules utilizing knowledge of Finance and Business statistics;
- Research and analyze customers' specific requests and safety issues related to our chemical and metal products. Calculate additional costs and estimate the effects caused by government regulations and international exchange rates fluctuation by applying knowledge of the Legal Environment of Business and Cost Accounting;
- Prepare economic and financial modules to illustrate the potential financial engagements and economic factors of our new products while applying knowledge of microeconomic, macro-economics, and finance;

- Prepare models of problem areas in one or several equations that relate constants and variables, restrictions, alternatives, conflicting objectives, and their numerical parameters;
- Conduct research and calculate the potential usage of Dichloroethylene, the next generation solvent, within the precision cleaning industry using principles or marketing;
- Compile and analyze financial and statistical data, economics data, and international interest rate information to determine feasibility of importing new products;
- Based on analysis, make recommendations on business plans and strategies development to improve the efficiency and profitability in business operations;
- Review business analysis data for effectiveness of coverage to reduce costs and losses for the company and make recommendations or suggestions on price objectives and alternative operating procedures to the company; [and]
- Make recommendations on long-term/short-term business plans based on current business, marketing analysis, and [the petitioner's] business mission[.]

In its letter of support accompanying the initial I-129 petition, the petitioner stated that the minimum education requirement for the proffered position is "at least a Bachelor's Degree in Business Management, Business Administration, Marketing, Accounting, Economics, or a related field." The petitioner indicated that the beneficiary is qualified to perform services in the proffered position by virtue of her American and foreign education. The petitioner provided a copy of the beneficiary's diploma and transcript from [REDACTED] indicating that she was granted a Master of Accounting Science in May 2011. The petitioner also provided a copy of a foreign diploma and transcript. No evaluation of the beneficiary's foreign education was provided.

In addition, the petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification "Market Research Analysts and Marketing Specialists" - SOC (ONET/OES Code) 13-1161, at a Level II wage.

Along with the Form I-129, the petitioner provided evidence in support of the petition, including copies of tax returns, flyers regarding the petitioner's products, and printouts from the petitioner's website.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on June 20, 2012. The director outlined the evidence to be submitted. The AAO notes that the director specifically requested that the petitioner submit probative evidence to establish that the proffered position is a specialty occupation. In the request, in addition to other evidence, the petitioner was asked to provide a more detailed description of the work to be performed by the beneficiary, along with the percentage of time to be spent on each duty, the level of responsibility, hours per week of work, and the minimum education, training, and experience necessary to do the job.

On September 12, 2012, the petitioner responded to the director's RFE by providing a letter and

additional evidence. Specifically, the petitioner submitted the following: (1) a copy of the Summary page of U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*'s chapter entitled "Market Research Analysts"; (2) additional printouts from the petitioner's website; (3) an organizational chart for the petitioner; (4) documents regarding the qualifications of the petitioner's other employees; (5) additional tax documents; (6) copies of invoices; (7) a printout from the Foreign Labor Certification Data Center Online Wage Library for OES/SOC code 13-1161; (8) a printout of the Occupational Information Network (O*NET) OnLine Summary Report for the occupation "Market Research Analysts and Marketing Specialists"; (9) several job advertisements; (10) industry letters; and (11) copies of previously submitted documents.

In response to the RFE, the petitioner elected not to provide a "more detailed description of the work to be performed by the beneficiary" (as requested by the director). Instead, the petitioner provided duties identical to those already submitted, in a slightly condensed format, with the addition of the percentage of time to be dedicated to each duty. The petitioner bolded some portions of the job duties, presumably to indicate the knowledge required to perform the duty. The petitioner's minimally revised description of the proffered position is as follows:

- Investigate and conduct market research and business analysis on chemical and metal suppliers and perform [sic] statistical analysis on their products, prices, and marketing potential; - 15% - **These duties require the application of professional marketing principles and business management.**
- Perform expense-analysis and on various chemicals and metals in current market and estimate the effects caused by government regulations and international exchange rates fluctuation by applying knowledge of the **Legal Environment of Business and Cost Accounting**; -15%
- Prepare economic and financial modules to illustrate the potential financial engagements and economic factors of our new products while applying knowledge of **microeconomic, macro-economics, and finance**; -15%
- Prepare models of problem areas in one or several equations that relate constants and variables, restrictions, alternatives, conflicting objectives, and their numerical parameters which entail using of **the economic modules method to prepare the diagrams, calculate the equation, compute and compare the results** – 15%
- Conduct research and calculate the potential usage of Dichloroethylene, the next generation solvent, within the precision cleaning industry using principles of **marketing and Business Application Database Management System**; -10%
- Compile and analyze financial and statistical data, economics data, and international interest rate information to determine feasibility of importing new products using **knowledge of finance**; -5%
- Review business analysis data for effectiveness of coverage to reduce costs and

losses for the company and make recommendations or suggestions on price objectives and alternative operating procedures to the company's **business management**; -20%

- Based on analysis, make recommendations on business plans and strategies development to improve the efficiency and profitability in business operations and also participate in long-term/short-term business plans goals development meeting; -5%

In its letter submitted in response to the RFE, the petitioner stated that performance of the duties of the proffered position requires "at least a Bachelor's Degree program in Business or related field." In the same letter, the petitioner subsequently asserted that the minimum education requirement for the proffered position is "at least a Bachelor's Degree in Business Management, Business Administration, Marketing, Accounting, Economics, or a related field."

The director reviewed the information provided in response to the RFE. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The director denied the petition on September 26, 2012. Counsel for the petitioner submitted an appeal of the denial of the H-1B petition.

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position.

The AAO first notes that counsel asserts that the director improperly applied the preponderance of the evidence standard of proof while adjudicating the instant petition. With respect to the preponderance of the evidence standard, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), states in pertinent part the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

* * *

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case.

* * *

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for

relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Thus, in adjudicating the petition pursuant to the preponderance of the evidence standard, USCIS examines each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. The "preponderance of the evidence" standard does not relieve the petitioner from satisfying the basic evidentiary requirements set by regulation. The standard of proof should not be confused with the burden of proof. Specifically, the petitioner bears the burden of establishing eligibility for the benefit sought. A petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. As will be discussed, in the instant case, that burden has not been met.

Based upon a complete review of the record of proceeding, the AAO will make some preliminary findings that are material to the determination of the merits of this appeal.

When determining whether a position is a specialty occupation, the AAO must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. To ascertain the intent of a petitioner, U.S. Citizenship and Immigration Services (USCIS) looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

The AAO observes that the petitioner's stated minimum education requirement for entry into the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly to the duties and responsibilities of the position in question. Since there must be a close correlation between the required specialized studies and the

position, the requirement of a degree with a generalized title, such as "business" or "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 demonstrate 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. 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 (1st Cir. 2007).¹

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

Nevertheless, for the purpose of performing a comprehensive analysis, the AAO will now discuss in detail the applicable statutory and regulatory provisions for determining whether the proffered position qualifies as a specialty occupation. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable 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

¹ 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.

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 providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147 (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 make its determination whether the proffered position qualifies as a specialty occupation, the AAO now turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO will first review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position.

The petitioner stated that the beneficiary would be employed in a business research analyst position, which it likens to a market research analyst position. However, 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 the specific specialty as the minimum for entry into the occupation, as required by the Act.

The AAO recognizes DOL's *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.² As previously mentioned, the

² 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/>.

petitioner asserts in the LCA that the proffered position falls under the occupational category "Market Research Analysts and Marketing Specialists."

The AAO reviewed the chapter of the *Handbook* entitled "Market Research Analysts," including the sections regarding the typical duties and requirements for this occupational category. However, the *Handbook* does not indicate that "Market Research Analysts" comprise an occupational group for which at least a bachelor's degree *in a specific specialty*, or its equivalent, is normally the minimum requirement for entry.

The subchapter of the *Handbook* entitled "How to Become a Market Research Analyst" states the following about this occupational category:

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.

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, on the Internet at <http://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm#tab-4> (last visited July 31, 2013).

When reviewing the *Handbook*, the AAO notes that the petitioner designated the proffered position as a Level II (qualified level) position on the LCA.³ The wage levels are defined in the U.S. Department of Labor (DOL) "Prevailing Wage Determination Policy Guidance."⁴ A Level II wage

³ Wage levels should be determined only after selecting the most relevant O*NET 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.

⁴ Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate

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 U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance, Nonagric. Immigration Programs* (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

Thus, in designating the proffered position at a Level II wage, the petitioner has indicated that the proffered position is a comparatively low position relative to others within the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, the selected wage rate indicates that the beneficiary is only required to perform "moderately complex tasks that require limited judgment." Based upon the petitioner's designation of the proffered position as a Level II position, it does not appear that the beneficiary will be expected to serve in a senior or leadership role or in a top research or technical research position.

The *Handbook* does not state that a baccalaureate or higher degree in a specific specialty, or its equivalent is normally the minimum requirement for entry into the occupation. This passage of the *Handbook* reports that market research analysts have degrees and backgrounds in a wide-variety of disparate fields. The *Handbook* states that employees typically need a bachelor's degree in market research or a related field, but the *Handbook* continues by indicating that many market research analysts have degrees in fields such as statistics, math, or computer science. According to the *Handbook*, other market research analysts have a background in fields such as business administration, one of the social sciences, or communications. The *Handbook* notes that various courses are essential to this occupation, including statistics, research methods, and marketing. The *Handbook* states that courses in communications and social sciences (such as economics, psychology, and sociology) are also important.

In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however,

with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) 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.

a minimum entry requirement of a degree in disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties.⁵ Section 214(i)(1)(B) of the Act (emphasis added).

Here, although the *Handbook* indicates that an advanced degree is typically needed for these positions, it also indicates that baccalaureate degrees in various fields are acceptable for entry into the occupation. In addition to recognizing degrees in disparate fields and backgrounds (i.e., social science and computer science) as acceptable for entry into this occupation, the *Handbook* also states that "others have a background in business administration." As previously discussed, 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. As noted *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. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. Cf. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558. 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 normally the minimum entry requirement for this occupation. Accordingly, as the *Handbook* indicates that working as a market research analyst does not normally require at least a bachelor's degree in a specific specialty, or its equivalent, for entry into the occupation, it does not support the proffered position as qualifying as a specialty occupation.

In response to the RFE, counsel provided an O*NET Summary Report for the occupational category "Market Research Analysts and Marketing Specialists" to support the assertion that the proffered position qualifies as a specialty occupation. The AAO reviewed the report but finds that counsel's reliance on the report is misplaced. That is, O*NET assigns this occupation a Job Zone Four rating, which groups it among occupations that are described as follows: "[m]ost of these occupations require a four-year bachelor's degree, but *some do not* (emphasis added)." O*NET does not report that for those occupations with an academic degree requirement, that such a degree must be in a *specific specialty* directly related to the occupation. As previously discussed, 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 duties and responsibilities of the position. Further, "most" is not indicative that a position normally requires at least a bachelor's degree in a specific specialty, or its equivalent, (the criterion at

⁵ Whether read with the statutory "the" or the regulatory "a," both readings denote a singular "specialty." Section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Still, the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. As just stated, this also includes even seemingly disparate specialties provided the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

8 C.F.R. § 214.2(h)(4)(iii)(A)(I)), or that a position is so specialized and complex as to require knowledge usually associated with attainment of a baccalaureate or higher degree in a specific specialty (the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4)).⁶ Notably, O*NET indicates that some of these occupations do not require a four-year bachelor's degree.

In response to the RFE and on appeal, the petitioner submitted a printout regarding "Market Research Analysts" from the OFLC Data Center's – Online Wage Library (OWL). The AAO reviewed the printout in its entirety. However, upon review of the printout, the AAO finds that it is insufficient to establish that the position qualifies as a specialty occupation normally requiring at least a bachelor's degree in a *specific specialty*, or its equivalent, for entry into the occupation. As noted above, the occupation "Market Research Analysts" has a designation of Job Zone 4. As discussed, a Job Zone Four rating is not probative evidence that any position within an occupation with such a rating qualifies as a specialty occupation. On appeal, counsel points to the "Education and Training Code: 3 – master's degree" as "unimpeachable proof" that the proffered position qualifies as a specialty occupation. The OWL indicates that an Education and Training Code of "3" signifies that the occupation requires "[c]ompletion of the degree program usually requires 1 or 2 years of full-time equivalent study beyond the bachelor's degree."⁷ However, the AAO notes that no specific specialty is indicated. The AAO further observes that the petitioner has not indicated that a master's degree (or 1 or two years of full-time equivalent study beyond a bachelor's degree) is required for the proffered position. Most importantly, the *Federal Register* indicates that the Education and Training Code is not intended to be used to qualify a position for an H-1B visa, which is what counsel and the petitioner attempt to do here. Therefore, despite counsel's assertion to the contrary, the printout is not probative evidence to establish that the proffered position qualifies as a specialty occupation.⁸

⁶ 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 such positions require a four-year bachelor's degree, it could be said that "most" of the 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, which as previously noted has been designated on the LCA as a Level II position. 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.

⁷ For additional information on Education and Training Codes, see Education and Training Codes for Professional Occupations at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatacenter.com/TrainingCodes.aspx> (last visited July 31, 2013).

⁸ The Program Electronic Review Management ("PERM") process was developed by DOL to streamline the filing and processing of labor certifications for foreign workers. It went into effect on March 28, 2005. Professional occupations and the related education and training category codes are listed in Appendix A to the Preamble of the PERM regulations. For additional information, see the *Federal Register*, Vol. 69, No. 247 at 77345 and Appendix A to the Preamble-Professional Recruitment Occupations-Education and Training Categories at 77377 (December 27, 2004).

On appeal, counsel cites *Immigration Law Sourcebook*, 13th Edition, by Ira J. Kurzban, (*Kurzban*) as an "authoritative" source. From *Kurzban*, counsel cites two cases, *Unical Aviation, Inc. v. INS*, 248 F.Supp.2d 931 (C.D. Cal. 2002) and a non-precedent AAO decision, for the proposition that market research analyst positions are specialty occupation positions. As applied to the instant matter, these citations are not persuasive.

The material facts of the present proceeding are distinguishable from those in *Unical*. Specifically, *Unical* involved: (1) a position for which there was a companion position held by a person with a Master's degree; (2) a record of proceedings that included an organizational chart showing that all of its employees in the marketing department held bachelor's degrees; and, in the court's words, (3) "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 Maintenance Repair Organization ("MRO") customers in China for supply of parts and services; analyze and forecast airline and MRO 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.

However, the AAO notes that the assertion that the occupational category "Market Research Analysts" has been assigned an "Education and Training Code: 3" is insufficient to establish that the proffered position qualifies for eligibility as a specialty occupation. More specifically, the *Federal Register* indicates that the purpose of the list of occupations at Appendix A is not for determining whether a position is a specialty occupation. In fact, the *Federal Register* specifically states that "**the list is not intended to be used to qualify an alien for purposes of eligibility under the H-1B and H-1B1 program** (emphasis added)." Moreover, the *Federal Register* clearly states that "[t]he primary purpose of the list of occupations is to provide employers with the necessary information to determine whether to recruit under the standards provided in the regulations for professional occupations or for nonprofessional occupations." The *Federal Register* continues by stating that "the only presumption the list of occupations should create is that if the occupation involved in the application is on the list of occupations in Appendix A, employers must follow the recruitment regiment for professional occupations at § 656.17(e) of this final rule."

Although the petitioner and its counsel indicate that the proffered position qualifies as a specialty occupation based upon the education and training code assigned to the occupation "Market Research Analysts," the AAO finds no merit in the assertion. The petitioner and its counsel cite no statutory or regulatory authority, case law, or precedent decision to support it. Moreover, neither the statutory nor regulatory provisions governing USCIS adjudication of Form I-129 petitions provide for the approval of an H-1B specialty occupation petition on the grounds argued by the petitioner's counsel, or even indicate that an employer's recruitment regiment for permanent labor certification is relevant to USCIS adjudications of Form I-129 H-1B specialty occupation petitions. The AAO notes that the current, primary, and fundamental difference between qualifying as a profession and qualifying as a specialty occupation is that specialty occupations require the U.S. bachelor's or higher degree to be in a specific specialty (or its equivalent). An occupation assigned an "Education and Training Code: 3" does not demonstrate that a bachelor's degree in any *specific specialty* is required, and does not demonstrate that a position so designated is in a specialty occupation as defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). For the reasons discussed, the printout is not probative evidence that the proffered position falls under an occupational category that qualifies as a specialty occupation.

Moreover, there is no indication in the record of proceeding that the petitioner is in the same industry or is in any way similar in size or type of business as *Unical Aviation, Inc.*

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." § 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.

In addition, counsel cites a non-precedent AAO decision for the proposition that although the *Handbook* did not require a degree in the occupation at issue in that case, the AAO reviewed the duties of the proffered position in that matter and determined that they were "complex and specialized," and thus, determined that the position at issue that matter qualified as a specialty occupation. Counsel did not provide a copy of the decision. The AAO observes that, as specified by the relevant regulations cited above, a petitioner need only satisfy one of the four criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). Thus, although a particular position may not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position, it may qualify under a different criterion, such as 8 C.F.R. § 214.2(h)(4)(iii)(A), which requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. Counsel does not adequately explain the relevancy of the cited non-precedent decision to the instant matter.

On appeal, counsel also cites numerous service center approvals of petitions for positions designated under the occupational classification of "market research analysts." The AAO observes that each petition is decided on its own merits. When any person makes an application for a "visa or any other document required for entry, or makes an application for admission [. . .] the burden of proof shall be upon such person to establish that he is eligible" for such relief. 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I. & N. Dec. 190. Counsel did not provide sufficient underlying facts of these petitions to establish that the duties of the approved petitions are substantially similar to those of the instant petition. Any suggestion that USCIS must request and review the case file relevant to every service center decision cited by counsel, while being impractical and inefficient, would also be tantamount to a shift in the evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act. Further, the AAO notes that it is not bound by service center decisions.

The petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding, particularly in light of the Level II wage designation on the LCA, do not indicate that the position is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO will review the record of proceeding regarding 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).

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports an industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the AAO incorporates by reference the previous discussion on the matter. Also, there are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement.

In support of its assertion that the proffered position is a specialty occupation position, the petitioner submitted four job announcements and two letters from companies that the petitioner represents are in its industry. However, upon review of the evidence, the AAO finds that the petitioner's reliance on the job announcements and letters is misplaced.

In the Form I-129, the petitioner stated that it is an importer and distributor of chemicals and other industrial materials, housewares, and recyclables established in 2009, and has 4 employees. The petitioner stated its gross annual income as approximately \$9 million. It did not report its net annual income on the Form I-129, but subsequently submitted a tax return indicating a net income of approximately \$93,000. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 424690 – "Other chemical and allied products merchant wholesalers."⁹ The U.S. Department of Commerce, Census Bureau website

⁹ NAICS is used to classify business establishments according to type of economic activity, and each establishment is classified to an industry according to the primary business activity taking place there. See U.S. Dep't of Commerce, U.S. Census Bureau, NAICS, on the Internet at <http://www.census.gov/eos/www/naics/> (last visited July 31, 2013).

describes this NAICS code as follows:

This industry comprises establishments primarily engaged in the merchant wholesale distribution of chemicals and allied products (except agricultural and medicinal chemicals, paints and varnishes, fireworks, and plastics materials and basic forms and shapes).

See U.S. Dep't of Commerce, U.S. Census Bureau, 2007 NAICS Definition, 424690 – Other chemical and allied products merchant wholesalers on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited July 31, 2013).

The AAO notes that under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), the petitioner must establish that "the degree requirement is common to *the industry in parallel positions among similar organizations* (emphasis added)." That is, this prong requires the petitioner to establish that a requirement of a bachelor's 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.

The submitted documentation does not establish that the proffered position qualifies as a specialty occupation under this criterion of the regulations. For instance, the advertisement for [REDACTED] states that an "undergraduate degree in business, economic, or social sciences" is required. Although the Monster.com Job Summary section states the "education level" as bachelor's degree, the advertising organization has not specified that a bachelor's degree (as opposed to another "undergraduate degree" such as an associate's degree) is required. Further, the advertising organization will accept a general-purpose degree, such as a degree in business or social sciences. Similarly, the posting from [REDACTED] indicates that the advertising organization will accept an individual with a bachelor's degree in business. As previously discussed, since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business or social sciences, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558.

The "confidential posting" indicates that the advertising organization seeks an individual with a master's degree in business administration; however the employer is "willing to accept any suitable combo of education, training or experience." The posting does not indicate how many years of experience and training the advertising organization would accept in lieu of a degree. Thus, it is not apparent that the posting organization requires the equivalent of a bachelor's degree as defined by the regulations that govern the provision of H-1B visas. Further, as discussed above, a degree in business administration is not considered a degree in a specific specialty.

Further, none of the advertisements contain a sufficient description of the advertised positions such that a legitimate comparison with the proffered position can be conducted. The Spanish Market Research Analyst/Journalist position appears to be obviously not parallel. [REDACTED] seeks an individual fluent in a specific language who will publish daily articles. The duties of the proffered position do not include writing articles, and the petitioner has not represented that the beneficiary will be focusing on a specific foreign market, requiring fluency in a foreign language. Similarly, the posting from Trent

requires fluency in a foreign language and experience evaluating fine jewelry. The posting from indicates that the position involves tracking North American rig activity. Thus, these advertised positions do not appear to be parallel to the proffered position.

Furthermore, the petitioner fails to establish the relevancy of just four examples to the issue here.¹⁰ That is, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from advertisements for three positions with regard to determining the common educational requirements for entry into parallel positions in similar organizations.¹¹

In addition to the job advertisements, the petitioner provided two letters it received in response to a "survey" it undertook in support of the instant petition.¹² The first letter is from writes that his company has employed a business research analyst with "at least a bachelor's degree in business management" since 1997 and that the company currently employs two individuals in this position. indicates that his company has 10 employees and approximately 5 million in annual revenue. The AAO observes that the letter does not specify if both individuals who hold the position of business research analyst at have the same degree. However, the AAO notes that, as previously discussed, a degree in business or business management, is not considered a degree in a specific specialty. The second letter is from .

¹⁰ As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed.

¹¹ According to the *Handbook's* detailed statistics on market research analysts, there were approximately 282,700 persons employed as market research analysts and marketing research specialists in 2010. *Handbook*, 2012-13 ed., available at <http://www.bls.gov/ooh/Business-and-Financial/Market-research-analysts.htm#tab-6> (last accessed July 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 the job postings with regard to the common educational requirements for entry into parallel positions in similar organizations. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that organizations similar to the petitioner in its industry, for positions parallel to the proffered position, commonly require at least a bachelor's or higher degree in a specific specialty, or its equivalent, it cannot be found that just these few postings (which 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, or its equivalent, for entry into the occupation in the United States.

¹² The AAO observes that the petitioner did not disclose any statistics regarding its survey, such as how many companies were surveyed, the rate of response, or whether it received any responses indicating that a bachelor's degree was not required.

_____ writes that his company employs five to ten people on a regular basis and has an annual revenue of \$1-2 million. _____ states that he performs all of the market research and analysis functions for his company, and he has a bachelor's degree in chemistry. Mr. _____ further indicates that if he were to hire an individual to perform market research duties, that person would need to have a bachelor's degree. No specific specialty was indicated. On appeal, counsel provided a second version of the letter indicating that _____ would require a degree in business for "anyone performing the market research and analysis function for [his] company." The AAO observes that the fact that _____ has been performing market research duties with a degree in chemistry suggests that a degree in business is not required to perform market research duties at _____. The AAO further observes that a degree in business is not considered a degree in a specific specialty. As previously discussed, since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business or social sciences, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558. Thus, contrary to the purpose for which they were submitted, the letter provided by the petitioner indicate that a bachelor's degree in a specific specialty is *not* required in positions considered parallel by the petitioner to the proffered position, in organizations the petitioner has represented as similar to itself.

Thus, based upon a complete review of the record of proceeding, the AAO finds that the petitioner has not established that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. Thus, 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).

The AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner shows that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

The AAO acknowledges that the petitioner and its counsel may believe that the proffered position qualifies as specialty occupation under this criterion of the regulations. In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted various documents, including evidence regarding its business operations. For example, the petitioner provided copies of tax documents, flyers regarding the petitioner's products, printouts from the petitioner's website, an organizational chart, documents regarding the qualifications of the petitioner's other employees, and copies of invoices. The AAO reviewed the record of proceeding in its entirety. However, upon review of the record, the AAO finds that the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of business research analyst.

A review of the record of proceeding indicates that the petitioner has failed to credibly demonstrate 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 only be performed by a person with at least a bachelor's degree in a specific specialty, or its equivalent. Additionally, the AAO finds that the petitioner has

not provided sufficient 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, or its equivalent.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, the AAO incorporates by reference and reiterates its earlier discussion that the LCA indicates that the position is a low-level position relative to others within the occupation. Based upon the Level II wage rate, the beneficiary is only required to perform "moderately complex tasks that require limited judgment." Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."¹³

Thus, based upon the record of proceeding, including the LCA, it does not appear that the proffered position is so complex or unique that it can only be performed by an individual who has completed a baccalaureate program in a specific discipline that directly relates to the proffered position. Specifically, the petitioner fails to demonstrate how the duties of the position as described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it may believe are so complex and unique. While a few related courses may be beneficial, or even required, in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position. The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

The AAO observes that the petitioner has indicated that the beneficiary's educational background in accounting and management will assist her in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. In the instant case, the petitioner does not establish which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner failed to

¹³ For additional information regarding wage levels as defined by DOL, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

demonstrate that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent. Consequently, 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 third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. To this end, the AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

To merit approval of the petition under this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. Upon review of the record of proceeding, the petitioner has not established a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

While a petitioner may believe or otherwise assert that a proffered position requires a specific degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty, or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent, to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific

specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

In response to the director's RFE, the petitioner submitted an organizational chart, resumes of other employees, and copies of foreign diplomas in the names of other employees. The AAO notes that in the Form I-129, the petitioner indicated that it was established in 2009. The petitioner has not indicated that anyone else other than the beneficiary has held the proffered position. The AAO observes that evidence regarding the petitioner's hiring history of positions other than the proffered position is not probative regarding the petitioner's hiring history for the proffered position. Further, it appears that the proffered position is a new position.

Upon review of the record, the petitioner has not provided sufficient evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

The AAO acknowledges that the petitioner and counsel may believe that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. Moreover, the AAO reviewed the documentation submitted by the petitioner regarding the proffered position and its business operations (including copies of tax documents, flyers regarding the petitioner's products, printouts from the petitioner's website, an organizational chart, documents regarding the qualifications of the petitioner's other employees, and copies of invoices), but finds that it fails to establish to support the petitioner's assertion that the proffered position qualifies as a specialty occupation under this criterion of the regulations. More specifically, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position.

Furthermore, the AAO also reiterates its earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level II position. That is, the Level II wage designation is indicative of a low-level position relative to others within the occupational category of "Market Research Analysts," and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, DOL indicates that a Level II designation is appropriate for positions that entail "moderately complex tasks that require limited judgment." Without further evidence, it is simply not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, as previously mentioned, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

The petitioner has submitted inadequate probative evidence to satisfy this criterion of the regulations. Thus, the petitioner has not established that the duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The AAO, therefore, concludes that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that 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 evidence to demonstrate that the proffered 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 whether it will require a baccalaureate or higher degree in a specific specialty or its equivalent. Absent this determination that a baccalaureate or higher degree in a specific specialty or its equivalent is required to perform the duties of the proffered position, it also cannot be determined whether the beneficiary possesses that degree or its equivalent. Therefore, the AAO need not and will not address the beneficiary's qualifications further.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.