



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **AUG 27 2013** OFFICE: VERMONT SERVICE CENTER

IN RE: Petitioner:

Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (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,

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The service center director 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 Vermont Service Center on October 31, 2011. In the Form I-129 visa petition and supporting documents, the petitioner describes itself as an Indian meal manufacturer established in 2002. In order to employ the beneficiary in what it designates as a market 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 February 7, 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.

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. The AAO reviewed the record in its entirety before issuing its decision.<sup>1</sup>

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 market analyst to work on a full-time basis at a rate of pay of \$68,000 per year. In a support letter dated September 28, 2011, the petitioner stated that the market analyst would perform the following job duties:

**Forecast and track marketing/sales trends and Support Forecast and S&OP Process.**

- Perform forecast accuracy analysis and work with Sales and Supply Chain to improve item/DC forecasts.
- Work with Field Sales to forecast type of Item/Customer level expected to be in demand.
- Prepare pricing and marketing strategies
- Forecast and track marketing and sales trends, analyzing collected data

**Prepare and Analyze Food Service finding market reports.**

- Support implementation of new systems reporting in Foodservice Marketing and Sales functions.

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<sup>1</sup> The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

- Publish monthly Sales reports for Foodservice and other channels (actual vs. budget and forecast).
- Create and maintain Distributor Review deck for Regional Sales Managers prior to customer visits.
- Perform value-added analysis to reduce burden on Sales and Marketing Managers (pull Company data for bids, build complex reports as required, analysis if Buying Groups).
- Prepare reports of findings, illustrating data graphically and translating complex findings into written text
- Gather data on competitors and analyze their prices, sales, and method of marketing and distribution

**Coordinate Marketing Activities**

Maintain Price Lists for Foodservice organization.

- Addition/removal of SKUs.
- Price changes from Product Managers.
- Coordinate special pricing for various customers with Customer Service.

**Item Setup and Discontinuance.**

- Champion item setup process for Foodservice group, ensure deadlines are met as required by Sales and Marketing.
- Provide Supply Chain with required documentation for discontinuance.
- Coordinate item discontinuance with Marketing Communication Manager.
- Ensure discontinued items are removed from forecast or moved to replacement SKUs.

Maintain Right Start Administration.

- Enter Right Start information into SalesForce.com as required by Sales or Marketing.
- Assign Right Start numbers to new projects and track project progress.
- Ensure maintenance of [REDACTED] (status updates, cancellations, etc.) to support reporting

**Maintain Systems Integrity.**

- Develop and maintain system audit reports
- Make system changes to correct attribute issues ensuring integrity of reporting systems and accurate commission payments to brokers.
- Ensure New Customers are correctly setup by DRM Analyst and IT Administrator.
- Perform weekly process to link customers/items in Company systems.

(Text and formatting as they appear in the original.) In its letter of support accompanying the initial Form I-129 petition, the petitioner described the requirements for the proffered position as "a minimum of a bachelor's degree in business administration, international business, marketing,

economics, or a related field, and knowledge of import/export management, and logistics/supply chain."

The petitioner indicated that the beneficiary is qualified to perform services in the proffered position by virtue of her foreign degree and work experience. The petitioner provided copies of the beneficiary's foreign diploma and transcript, and an employment verification letter from what claims to be the petitioner's Canada office.<sup>2</sup> The petitioner also submitted an evaluation of the beneficiary's credentials prepared by Foreign Credential Evaluations, Inc., which states that the beneficiary's education and work experience is equivalent to a "Bachelor of Arts in Marketing, for employment purposes, from an accredited educational institute in the United States."

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.

In support of the Form I-129 petition, the petitioner also provided a copy of its 2010 federal tax return and a brochure regarding its business operations.<sup>3</sup>

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on November 8, 2011. 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 qualifies as a specialty occupation. The director requested the petitioner to submit a detailed description of the proffered position, including the percentage of time to be spent on each duty.

On January 26, 2012, the petitioner and counsel responded to the director's RFE by providing a letter from the petitioner and additional evidence, including printouts of several online job postings and an opinion letter from [REDACTED]

In its letter dated November 11, 2011 submitted in response to the RFE, the petitioner provided the following description of the proffered position:

**Forecast and track marketing/sales trends and Support Forecast and S&OP Process. 30%**

- Perform forecast accuracy analysis and work with Sales and Supply Chain to improve item/DC forecasts.

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<sup>2</sup> The AAO observes that the petitioner did not mention that it has a Canadian office or that the beneficiary was employed at that office.

<sup>3</sup> The brochure includes the following website addresses for the petitioner: [REDACTED] and [REDACTED]. The AAO made several attempts to access the websites but received error messages indicating that the websites are not functioning.

- Work with Field Sales to forecast type of Item/Customer level expected to be in demand.
- Prepare pricing and marketing strategies
- Forecast and track marketing and sales trends, analyzing collected data

**Prepare and Analyze Food Service finding market reports. 30%**

- Support implementation of new systems reporting in Foodservice Marketing and Sales functions.
- Publish monthly Sales reports for Foodservice and other channels (actual vs. budget and forecast).
- Create and maintain Distributor Review deck for Regional Sales Managers prior to customer visits.
- Perform value-added analysis to reduce burden on Sales and Marketing Managers (pull Company data for bids, build complex reports as required, analysis if Buying Groups).
- Prepare reports of findings, illustrating data graphically and translating complex findings into written text
- Gather data on competitors and analyze their prices, sales, and method of marketing and distribution

**Coordinate Marketing Activities 25%**

- Maintain Price Lists for Foodservice organization.  
Addition/removal of SKUs.  
Price changes from Product Managers.  
Coordinate special pricing for various customers with Customer Service.
- Item Setup and Discontinuance.  
Champion item setup process for Foodservice group, ensure deadlines are met as required by Sales and Marketing.  
Provide Supply Chain with required documentation for discontinuance.  
Coordinate item discontinuance with Marketing Communication Manager.  
Ensure discontinued items are removed from forecast or moved to replacement SKUs.
- Maintain Right Start Administration.  
Enter Right Start information into SalesForce.com as required by Sales or Marketing.  
Assign Right Start numbers to new projects and track project progress.  
Ensure maintenance of [REDACTED] (status updates, cancellations, etc.) to support reporting

**Maintain Systems Integrity. 25%**

- Develop and maintain system audit reports
- Make system changes to correct attribute issues ensuring integrity of reporting systems and accurate commission payments to brokers.

- Ensure New Customers are correctly setup by DRM Analyst and IT Administrator.
- Perform weekly process to link customers/items in Company systems.
- **Prepare reports of findings, illustrating data graphically and translating complex findings into written text.**
- **Seek and provide information to help companies determine their position in the marketplace.**
- **Gather data on competitors and analyze their prices, sales, and method of marketing and distribution.**
- **Collect and analyze data on customer demographics, preferences, needs, and buying habits to identify potential markets and factors affecting product demand.**
- **Devise and evaluate methods and procedures for collecting data, such as surveys, opinion polls, or questionnaires, or arrange to obtain existing data.**
- **Monitor industry statistics and follow trends in trade literature.**
- **Measure and assess customer and employee satisfaction.**
- **Measure the effectiveness of marketing, advertising, and communications programs and strategies.**
- **Forecast and track marketing and sales trends, analyzing collected data.**
- **Attend staff conferences to provide management with information and proposals concerning the promotion, distribution, design, and pricing of company products or services.**

(Errors in the original. New text is bolded.) The AAO observes that the percentages provided account for 110% of the beneficiary's time. No explanation was provided.

Further, although the director requested that the petitioner provide a more detailed description of the proffered position, the petitioner elected to provide the identical list of duties that it initially provided, along with several "tasks" copied verbatim from the Occupational Information Network (O\*NET) OnLine Summary Report for the occupation "Market Research Analysts and Marketing Specialists," (appearing in bold above). See U.S. Department of Labor, Employment & Training Administration, O\*NET OnLine, 13-1161.01 – Market Research Analysts and Marketing Specialists, on the Internet at <http://www.onetonline.org/link/summary/13-1161.00> (last visited August 26, 2013).

The director reviewed the information provided by the petitioner. 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 February 7, 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. 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."

Thus, a crucial aspect of this matter is whether the petitioner has sufficiently described the duties of the proffered position, such that USCIS may discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through attainment of at least a baccalaureate degree in a specific discipline. The AAO finds that the petitioner has not done so.

The AAO observes numerous inconsistencies in the record. As previously noted, in response to the director's RFE, the petitioner provided a revised list of duties of the proffered position, in which it added, verbatim, the tasks from O\*NET OnLine Summary Report for the occupation "Market Research Analysts and Marketing Specialists." The AAO notes that providing job duties for a proffered position from O\*NET is generally not sufficient for establishing H-1B eligibility. That is, while this type of generalized description may be appropriate when defining the range of duties that may be performed within an occupational category, it cannot be relied upon by a petitioner when discussing the duties attached to specific employment for H-1B approval as this type of generic description fails to adequately convey the substantive work that the beneficiary will perform within the petitioner's business operations. In establishing a position as qualifying as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in the context of the petitioner's business operations, demonstrate a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition.

Further, the AAO observes that in the petitioner's letter, dated November 11, 2011, immediately following the duties and copied excerpt from O\*NET, the petitioner made the following statement: "[The beneficiary's] job function is exactly as described and defined above. (Please add some statement regarding the importance of this position eg. E-commerce developing, etc.)"<sup>4</sup> **Thus she will not be relieved from performing non-qualifying functions.** (Emphasis in original.)

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<sup>4</sup> The AAO finds it questionable that the letter includes the statement to "(Please add some statement regarding the importance of this position eg. E-commerce developing, etc.)." No explanation was provided by the petitioner or counsel.

The petitioner claims that the beneficiary "will not be relieved from performing non-qualifying functions." This brings into question how much of the beneficiary's time can actually be devoted to "qualifying" duties. Given the lack of explanation, the record does not demonstrate that the beneficiary will serve in a position that qualifies as a specialty occupation.

Thus, the AAO finds that it is not evident that the proposed duties as described in this record of proceeding, and the position that they comprise, merit recognition of the proffered position as a specialty occupation. The petitioner's job description is, at least in part, copied from another source, and the petitioner has specifically stated that the beneficiary will not be relieved from performing non-qualifying duties. The AAO finds the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire period requested, so as to persuasively support the claim that the position's actual work would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific specialty directly related to the duties and responsibilities of the proffered position. Moreover, the petitioner has failed to communicate (1) the actual work that the beneficiary would perform on a day-to-day basis; (2) the complexity, uniqueness and/or specialization of the tasks; and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. The petitioner's assertion with regard to the educational requirement for the position is conclusory and unpersuasive, as it is not supported by the job description or probative evidence.

The AAO notes the various statements regarding the duties of the proffered position provided by the petitioner, and observes that the totality of the evidence fails to establish the substantive nature of the proffered position such that the AAO can ascertain in what capacity the beneficiary will actually be employed. Consequently, the petitioner has not demonstrated that the proffered position qualifies as a specialty occupation, and the appeal may be dismissed and the petition denied on this basis alone.

Furthermore, the petitioner's statements regarding the academic requirements for the market analyst position do not establish that the position qualifies as a specialty occupation. That is, in its letter of support accompanying the initial Form I-129 petition, the petitioner described the education requirement for the proffered position as "a minimum of a bachelor's degree in business administration, international business, marketing, economics, or a related field." 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 general-purpose degree (or 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).

As previously mentioned, 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 (including 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).<sup>5</sup>

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. That is, the petitioner claims that a degree in business administration is sufficient for the proffered position. The petitioner's 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.

For the purpose of performing a comprehensive analysis of whether the proffered position qualifies as a specialty occupation, the AAO will continue its discussion of the proffered position and the evidence of record under the applicable statutory and regulatory provisions. More specifically, 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 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:

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<sup>5</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.

*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 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 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). In the instant case, the petitioner has failed to establish nature of the proffered position and in what capacity the beneficiary will actually be employed. The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Nevertheless, assuming, *arguendo*, that the duties of the proffered position as described by the petitioner would in fact be the duties performed by the beneficiary, the AAO will analyze them and the evidence in the record of proceeding to determine whether the proffered position as described would qualify as a specialty occupation. To make its determination as to whether the employment described by the petitioner qualifies as a specialty occupation, 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)(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.

The petitioner stated that the beneficiary would be employed in a market analyst position. However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. As previously mentioned, 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 the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>6</sup> As previously mentioned, the 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 August 26, 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.<sup>7</sup> The wage levels are defined in DOL's

<sup>6</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/>.

<sup>7</sup> 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,

"Prevailing Wage Determination Policy Guidance."<sup>8</sup> 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 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](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.

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skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.

<sup>8</sup> Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate 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.

In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in 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.<sup>9</sup> 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, 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. Thus, it does not support the proffered position as qualifying as a specialty occupation.

In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner provided an opinion letter from [REDACTED]

[REDACTED] As a preliminary matter, the AAO notes that the term "recognized authority" means a person or an organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. 8 C.F.R. § 214.2(h)(4)(ii). A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past

<sup>9</sup> 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.

opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. *Id.*

states that she based her opinion on the following documents:

a) a description of the job position from [the petitioner]; b) related information from [the petitioner]; c) [the beneficiary's] academic transcripts from [redacted] India; d) an employment verification letter; e) [the beneficiary's] resume; f) an evaluation from a foreign credential evaluation service; and g) documents from the Department of Homeland Security.

The AAO observes [redacted] did not include a copy of the documents with her letter. Further, the petitioner did not state whether any of the documents referenced by [redacted] are in the record. Notably, the beneficiary's resume was not provided.

Based on her review of the above mentioned documents, [redacted] concludes that "it is usual and customary in the industry for the particular position described by [the petitioner] to require a minimum Bachelor's degree [in] Marketing or a closely related business administration discipline (or equivalent through education and industry experience)." [redacted] further "assert[s] that in the case of [the petitioner], higher education and specialized training are *essential* to adequately perform the duties of the job." However, upon review of the opinion letter, there is no indication that [redacted] possesses any knowledge of the petitioner's proffered position and its business operations beyond the documents she reviewed (which she described as "related information from [the petitioner]"). There is no evidence that [redacted] has visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. She does not demonstrate or assert in-depth knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise.

Notably, it does not appear that [redacted] is aware that the petitioner designated the proffered position as a Level II position on the LCA. As previously discussed, 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." It appears that [redacted] would have found this information relevant for the opinion letter. Moreover, without this information, the petitioner has not demonstrated that [redacted] possessed the requisite information necessary to adequately assess the nature of the petitioner's position.

[redacted] claims that her qualifications to provide an opinion letter are based upon her education, teaching experience, and research. In addition, she states that she is a member of several organizations and has served as an ad hoc reviewer. Upon review of her curriculum vitae, it appears that the vast majority of her experience, including her current work, is in the academic setting. According to her resume, she has served as an assistant professor at [redacted] since

2007, teaching (1) consumer and organizational buyer behavior; (2) principles of marketing; and (3) a first year seminar. The AAO notes that, while [REDACTED] may, in fact, be a recognized authority on various topics, she has failed to provide sufficient information regarding the basis of her claimed expertise on this particular issue. Neither her self-endorsement nor her resume establishes her expertise pertinent to the recruiting and hiring practices of organizations seeking to fill positions similar to the proffered position in the instant case. Without further clarification, it is unclear how her education, training, skills or experience would translate to expertise or specialized knowledge regarding the *current recruiting and hiring practices* of a business that manufactures Indian cuisine (as stated by the petitioner in the letter of support) similar to the petitioner for market analyst positions.

Moreover, there is no indication that [REDACTED] has published any work or conducted any research or studies pertinent to the educational requirements for *market analysts* in the petitioner's industry for similar organizations, and no indication of recognition by professional organizations that she is an authority on those specific requirements. Notably, [REDACTED] resume indicates that much of her recent work has focused on the use of "gift cards."<sup>10</sup> The opinion letter contains no evidence that it was based on scholarly research conducted by [REDACTED] in the specific area upon which she is opining. In reaching her conclusions, she provides no documentary support for her assertions regarding the education required for the position (e.g., statistical surveys, authoritative industry or government publications, or professional studies). She asserts a general industry educational standard for organizations similar to the petitioner, without referencing any supporting authority or any empirical basis for the pronouncements. Notably, she failed to provide the basis for her conclusions supported by copies or citations of any research material used.

The AAO may, in its discretion, use as advisory opinions or statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). As a reasonable exercise of its discretion the AAO discounts the advisory opinion letter as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). For efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the opinion letter into its analyses of each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

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<sup>10</sup> In the resume, under the heading "Refereed Conference Proceedings," [REDACTED] indicated that she has been involved in four proceedings since 2006. All of these proceedings dealt with gift cards (e.g., [REDACTED]). Under the heading "Referred Documentary Videos," [REDACTED] indicated that she was involved [REDACTED] in 2010. Furthermore, [REDACTED] contributed a book chapter in 2007 entitled, "Peer-to-Peer Media Opportunities." In the past few years, she has participated in refereed conference presentations on such topics as hedonic 'thrifting' (in 2011) and gift cards usage (2009 and 2010) and has a paper under review regarding gift card selections (2010), as well as working papers and projects dealing primarily with gift cards.

record of proceeding 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 reviews 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 the petitioner's assertion that the proffered position qualifies as a specialty occupation position, the record of proceeding contains job announcements and the opinion letter discussed above. However, upon review of the evidence, the AAO finds that the petitioner's reliance on the job announcements and opinion letter is misplaced.<sup>11</sup>

In the Form I-129 and supporting documents, the petitioner described itself as an Indian meal manufacturer.<sup>12</sup> The petitioner further indicated that it was established in 2002, and that it has 80

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<sup>11</sup> The AAO hereby incorporates its previous discussion and analysis regarding the opinion letter from Ms. [REDACTED]

<sup>12</sup> The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 722210. The North American Industry Classification System (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 <http://www.census.gov/eos/www/naics/> (last viewed August 26, 2013).

According to the U.S. Department of Commerce, Census Bureau website, the NAICS code 722210 is not a valid code. U.S. Dep't of Commerce, U.S. Census Bureau, 2007 NAICS Definition, 722210, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last viewed August 14, 2013). The AAO notes, however, that the entry for the NAICS code 72221 states the following:

employees. The petitioner stated its gross annual income as \$8 million and net annual income as \$4.7 million. The AAO observes that the petitioner's 2010 tax return lists ordinary business income as approximately \$62,000.

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 (or higher) 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.

For the petitioner to establish that an advertising organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, postings submitted by a petitioner are generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the advertising organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner and counsel to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

The AAO reviewed the job advertisements submitted by the petitioner. The petitioner did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

Upon review of the documentation, the petitioner fails 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.

More specifically, none of the advertisements appear to be for positions that are parallel to the proffered position. Although the petitioner has failed to adequately establish the duties of the proffered position, the AAO observes that most of the advertisements provided appear to be for senior financial analyst positions. The AAO notes that the petitioner designated the proffered

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This industry comprises establishments primarily engaged in (1) providing food services where patrons generally order or select items and pay before eating or (2) selling a specialty snack or nonalcoholic beverage for consumption on or near the premises. Food and drink may be consumed on the premises, taken out, or delivered to the customers location. Some establishments (except snack and nonalcoholic beverage bars) in this industry may provide these food services in combination with selling alcoholic beverages.

position at a Level II wage, which suggests that it is not a senior position. Further, the advertised positions largely focus on accounting and budgeting, as opposed to market research. For example, the posting from [REDACTED] is for a Senior Financial Analyst and the posting states that the advertised position entails "[r]eview[ing] and evaluat[ing] monthly reporting to ensure accounting is handled appropriately." For this position, a degree is desired (not required) and the employer is seeking an individual with 4 to 8 years in finance. The petitioner has not represented that the beneficiary will be involved in overseeing its accounting processes. Similarly, the advertisement for a Sr. Financial Analyst with [REDACTED] states that the position requires a strong fundamental knowledge of GAAP [Generally Accepted Accounting Principles] to "[p]rovide specific, actionable and forward – looking commentary on changes in the monthly/quarterly financial forecasts." The employer seeks an individual with a degree and "five plus years of experience in financial analysis and data management."

In addition, some of the postings do not indicate that a degree in a specific specialty is required. For example, the posting for a financial analyst I at [REDACTED] indicates that a "B.A. or B.S. Degree [is] required." Since there must be a close correlation between the required specialized studies and the position, the requirement of a general bachelor's degree, 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).

Further, none of the advertisements contain sufficient information regarding the advertising organizations such that the AAO can conduct a legitimate comparison of the organizations to the petitioner. However, several of the postings are from organizations that appear to be dissimilar to the petitioner (and the petitioner has not established otherwise). For example, the posting from [REDACTED] states that the advertising organization "has operations in more than 40 countries and distributes its world-famous brands in more than 180 countries." The petitioner also included a posting from [REDACTED] "the worldwide leader in the design manufacture and marketing of toys and family products." The petitioner provided job postings from major national brands such as [REDACTED]. The petitioner failed to supplement the record of proceeding to establish that the advertising organizations are similar to it. That is, the petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organizations.

The AAO observes that even if all of the job postings indicated that a requirement of bachelor's degree in a specific specialty, or its equivalent, is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from these advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.<sup>13</sup> 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

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<sup>13</sup> 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 August 26, 2013).

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").

Thus, even if the job announcements supported the finding that the position required a bachelor's or higher degree in a specific specialty, or its equivalent, for organizations that are similar to the petitioner, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the statistics-based findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not normally require at least a baccalaureate degree in a specific specialty (or its equivalent) for entry into the occupation in the United States.

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. The evidence does not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is common to the industry in parallel positions to the proffered position, among similar organizations to the petitioner.

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 submitted a brochure regarding its products and services and its 2010 tax return. The petitioner also submitted an opinion letters from [REDACTED] discussed at length above. 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 market analyst.

A review of the record of proceeding indicates that the petitioner has failed to credibly demonstrate 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, which indicates a Level II wage. 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."<sup>14</sup>

The petitioner failed to establish how the beneficiary's responsibilities and day-to-day duties are so complex or unique that the position can be performed only by an individual with a bachelor's degree in a specific specialty, or its equivalent. 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 AAO observes that 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 and prior work experience will assist him 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

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<sup>14</sup> 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](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 RFE, the petitioner indicated that the proffered position is a new position. Thus, the petitioner did not submit any documentation regarding employees who have previously held the position. In addition, the petitioner did not submit any documentation regarding its recruiting and hiring practices. The record is therefore devoid of information to satisfy this criterion of the regulations.

Upon review of the record, the petitioner has not provided probative 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 (including the brochure regarding its products and services, tax documents, and opinion letter) but finds that it fails to establish 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 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, except to note that, in any event, the evaluation of the beneficiary's combined education and work experience submitted by the petitioner is insufficient to establish that the beneficiary possesses the equivalent of a U.S. bachelor's degree in any specific specialty.

Specifically, as the claimed equivalency was based in part on experience, there is no evidence that the evaluator had authority to grant college-level credit for training and/or work experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience and that the beneficiary also has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty. See 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) and (D)(1).

In the instant case, there is no independent evidence in the record from appropriate officials, such as deans or provosts, to establish that currently [REDACTED] is, in the language of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(1), "an official [with] authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience."<sup>15</sup>

Thus, as since evidence was not presented that the beneficiary has at least a U.S. bachelor's degree in any specific specialty, or its equivalent, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.<sup>16</sup>

<sup>15</sup> The AAO notes that [REDACTED] letter specifically states that it "does not necessarily reflect the views of the administration of [REDACTED]"

<sup>16</sup> As the petitioner has not established that the proffered position qualifies as a specialty occupation, the

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.

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AAO need not detail every deficiency of the documentation submitted to qualify the beneficiary to perform services in a specialty occupation position.