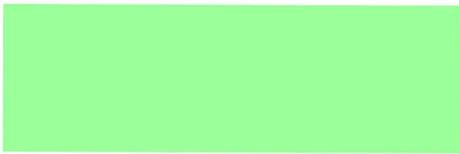
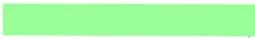


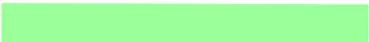


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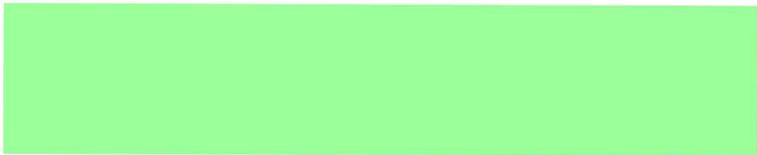


DATE: **JAN 25 2013** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

 Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on November 22, 2011. In the Form I-129 visa petition, the petitioner describes itself as a tennis academy established in 2008.¹ In order to employ the beneficiary in what it designates as a market 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 March 2, 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.

Later in this decision, the AAO will also address two additional, independent grounds, not identified by the director's decision, that the AAO finds also preclude approval of this petition. Specifically, beyond the decision of the director, the AAO finds that the petitioner (1) failed to submit a Labor Condition Application (LCA) that complies with the applicable statutory and regulatory provisions; and (2) failed to establish that the beneficiary is qualified to serve in a specialty occupation position. For these additional reasons, the petition may not be approved, with each considered as an independent and alternative basis for denial.²

In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services as a market research analyst to work on a full-time basis at a rate of pay of \$63,128 per year. In a support letter dated November 21, 2011, the petitioner stated the following regarding the proffered position:

¹ In the Form I-129 petition, the petitioner failed to provide its gross annual income and net annual income. No explanation was provided.

² The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

As a Market Research Analyst, [the beneficiary] is responsible for researching competitors in the local market places, demographic details for potential client pools, as well as learning the most effective advertising means to employ in each of the various locales. She is responsible for researching corporate sponsorships, potential for additional revenue streams, as well as the costs and benefits of engaging and implementing them. She is responsible for providing key research, analysis, forecasting, benchmarking and strategy recommendations to enable [the petitioner] to gain market share. In doing so, she is responsible for setting up, managing, and closing Web-based market research surveys, conducting interviews, preparing financial analysis, and preparing data tabulations and charts of the survey results. This information is then provided to the Management of the company to make informed decisions about various advertising opportunities as well as whether or not to pursue offering its services in certain local markets.

In its letter of support accompanying the initial I-129 petition, the petitioner described the minimum educational requirements for the proffered position as a bachelor's degree in "Business Administration, Economics, Marketing, or their equivalents." The petitioner also provided what appears to be an academic transcript issued to the beneficiary.³

In addition, the petitioner submitted an 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 I (entry level) wage.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on December 6, 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 is a specialty occupation. In the request, the petitioner was asked to provide a more detailed description of the work to be performed by the beneficiary for the entire period requested, including the specific job duties, the percentage of time to be spent on each duty, level of responsibility, etc.

On February 24, 2012, the petitioner responded to the director's RFE by providing a revised description of the duties of the proffered position and additional evidence. Specifically, the petitioner provided the following description of its market research analyst position, along with the percentage of time that the beneficiary would spend performing each of the duties:

³ The AAO notes that the translation for the document appears to be incomplete. Moreover, the evidence is not accompanied by a full English language translation that has been certified by the translator as complete and accurate, and that the translator is competent to translate from the foreign language into English. Because the petitioner failed to submit a certified translation of the document, the AAO cannot determine whether the evidence supports the petitioner's claims. See 8 C.F.R. § 103.2(b)(3). In the instant case, the petitioner elected not to comply with the requirement. Accordingly, the evidence that is in a foreign language that does not comply with 8 C.F.R. § 103.2(b)(3) is not probative and will not be accorded any weight in this proceeding. The AAO will not attempt to decipher or "guess" the meaning of documents that are not accompanied by a full, certified English language translation.

- Devise and evaluate methods and procedures for collecting data, such as surveys opinion polls, interviews or questionnaires, or arrange to obtain existing data – 5%
 - [The beneficiary] will decide what are the best tools to gather data for [the petitioner's] needs and will be responsible for making quantitatively [sic] research on this aspects [sic], finding what tools and processes are used by [the petitioner's] competition and what latest statistical, economical and marketing related tools will help [the petitioner] get the data [it] need[s].
- Perform complex research on new market areas, including demographic research for new client pools – 12%
 - [The beneficiary] will use the tools she has analyzed to gather data on new market areas where [the petitioner] might be able to expand. This will include demographics, economics, trends, weather conditions and any other data she will decide as important.
- Competitive intelligence research – Research and analyze competitor positioning, prices, locations, focus and client demographics – 15%
 - One of the biggest tasks [the beneficiary] will be undergoing is to develop a Business Intelligence model to understand [the petitioner's] competition. This will include positioning tables, financial models, game theory models in order to predict the competition's actions and forecast the results of the market in the short and medium term.
- Prepare reports, data tabulations and charts of the survey results – 15%
 - The candidate will then report the data findings to the CEO and other management in a clear, durable and actionable way, translating numbers and data to clear guidelines.
- Develop, monitor, and update the academy's business and marketing plan – 18%
 - Another major task of [the beneficiary]'s work will be the development and monitoring of the academy's business plan. [The petitioner] will rely on [the beneficiary's] insights supported by solid data and [the petitioner's] management's judgment to drive [its] strategy and decisions.
- Research potential for additional revenue streams as well as the costs and benefits of engaging and implementing new business lines – 10%
 - [The beneficiary] will explore new revenue possibilities with market research, product testing and economic testing.
- Provide key research, analysis, forecasting, benchmarking and strategy recommendations for new products and services – 10%
 - [The beneficiary] will provide documents, presentations and findings about new products including training DVDs, new training clinics, international academies products, summer camps, and more.

- Analyze, forecast, plan and measure impact of potential mergers, alliances, partnerships and/or acquisitions – 5%
 - As [the petitioner] is growing fast, [it] will rely on [the beneficiary's] finding to understand how potential mergers and acquisitions might impact and benefit the activity, profitability and business of the academy.
- Uncover trends and key insights to drive marketing and development decisions – 5%
 - [The beneficiary] will study trends [sic] in the industry to drive [the petitioner's] long-term strategic vision, making sure that [the petitioner] is always up-to-date with the latest technologies, strategies and trends in the sports sector.
- Develop a promotional calendar based on marketing research and analysis – 5%
 - [The beneficiary], starting from the data collected, will develop promotional activities that will maximize the academy clients [sic] number and profitability, thanks to her studies and experience in marketing.

In addition, the petitioner submitted an excerpt from the 2010-2011 edition of the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* regarding "Market and Survey Researchers"; printouts from [redacted] regarding market research analyst positions at other companies; a job posting for a company/organization called [redacted] a copy of a diploma for [redacted] and a copy of a job posting for the proffered position.

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 March 2, 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, 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."

In the instant case, the AAO observes that the petitioner's claimed entry requirement of at least a bachelor's degree in "Business Administration, Economics, Marketing, or their equivalents" for the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. That is, the petitioner indicated that a degree in business administration is sufficient for the proffered position. 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 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).⁴

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.

Further, upon review of the record of proceeding, the AAO notes that the enclosed LCA does not appear to correspond to the claimed duties and requirements of the proffered position.

⁴ 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.

Consequently, as will be discussed below, the petitioner has failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed.

More specifically, the petitioner provided an LCA in support of the instant petition that indicates the occupational classification for the position is "Market Research Analysts" at a Level I (entry level) wage. Wage levels should be determined only after selecting the most relevant Occupational Information Network (O*NET) occupational code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.⁵ 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.⁶ DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received as indicated by the job description.

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

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

⁵ For additional information on wage levels, see DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

⁶ A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

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

In the instant case, the petitioner and its counsel repeatedly claim that the nature of the proffered position involves complex, unique and/or specialized tasks. In its letter dated November 21, 2011, the petitioner stated that it was in the process of purchasing a new \$7 million facility and that the beneficiary was needed to "perform the data collection and analysis that will guide [the petitioner] in making such crucial decisions on the part of the company." The petitioner further reported that the beneficiary would be "responsible for providing the key research, analysis, forecasting, benchmarking and strategy recommendations to enable [the petitioner] to continue to gain market share." Further, in a statement submitted in response to the RFE, the petitioner stated that it is looking to "expand operations" and "explore new revenue streams," and that the beneficiary "will help drive [the petitioner] in the right direction . . . deciding which locations, what type of clients and what kind of products and services [the petitioner] should and will focus on." The petitioner asserted that the beneficiary "will have a significant degree of independent involvement in very key aspects of [the] company functions." Additionally, the petitioner claimed that it will "leverage her professional expertise in attracting business." Thus, the petitioner has indicated that it will be relying heavily on the beneficiary's work product to make critical decisions regarding the direction of the company and that she will have a significant degree of independent involvement in various key company functions. Such reliance on the beneficiary's work appears to surpass the expectations of a Level I position, as described above, where the employee works under close supervision, performing routine tasks that require only a basic understanding of the occupation and limited exercise of judgment. Here, rather than the beneficiary's work being "monitored and reviewed for accuracy," the petitioner is relying on the accuracy of the beneficiary's work product to make major business decisions about the direction of the company.

Additionally, in a letter dated February 8, 2012, the petitioner asserted that the proffered position is "particularly complex, and perhaps more complex than standard Market Research Analyst positions." According to the job description submitted by the petitioner in response to the RFE, the proffered position entails "complex research" which requires a candidate to possess a degree and one to two years of marketing or research experience. Further, counsel represented in the April 15, 2012 brief, that the detailed job description provided by the petitioner is "sophisticated," and "would require the expertise of not only an individual with a Baccalaureate level of education, but with several years of experience performing market research in the industry." Here, the represented level of expertise required to perform the duties of the proffered position appears to be at odds with a Level I position, i.e., a position that requires "only a basic understanding of the occupation."

Thus, upon review of the assertions made by the petitioner and counsel, the AAO must question the level of complexity, independent judgment and understanding actually required for the proffered position as the LCA is certified for a Level I entry-level position. This characterization of the position and the claimed duties and responsibilities as described by the petitioner and counsel conflict with the wage-rate element of the LCA selected by the petitioner, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within

the occupation. In accordance with the relevant DOL explanatory information on wage levels, the selected wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. See section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A).

The AAO notes that the prevailing wage of \$63,128 per year on the LCA corresponds to a Level I position for the occupational category of "Marketing Research Analysts" for Santa Clara County (Palo Alto, CA).⁷ Notably, if the proffered position had been designated at a higher level, the prevailing wage at that time would have been \$83,762 per year for a Level II position, \$104,416 per year for a Level III position, and \$125,050 per year for a Level IV position.

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct wage level in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different wage level at a lower prevailing wage than the one that it claims it is offering to the beneficiary. Therefore, the petitioner has failed to establish that it would pay the beneficiary an adequate salary for her work, as required under the Act, if the petition were granted.

This aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the petitioner's assertions regarding the demands, level of responsibilities and requirements of the proffered position. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

As noted below, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) specifies that certification of an LCA does not constitute a determination that an occupation is a specialty occupation:

⁷ For additional information regarding the prevailing wage for Market Research Analysts in Palo Alto, California, see the All Industries Database for 7/2011 - 6/2012 for Market Research Analysts at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatabase.com/OesQuickResults.aspx?code=13-1161&area=41940&year=12&source=1> (last visited January 16, 2013).

Certification by the Department of Labor [DOL] of a labor condition application in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. The director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. The director shall also determine whether the particular alien for whom H-1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit a valid LCA that corresponds to the claimed duties and requirements of the proffered position, that is, specifically, that corresponds to the level of work, responsibilities and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work, responsibilities and requirements in accordance with the pertinent LCA regulations.

The statements regarding the claimed level of complexity, independent judgment and understanding required for the proffered position are materially inconsistent with the certification of the LCA for a Level I entry-level position. This conflict undermines the overall credibility of the petition. The AAO finds that, fully considered in the context of the entire record of proceedings, the petitioner failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed.

For the foregoing reasons, a review of the enclosed LCA indicates that the information provided does not correspond to the level of work and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and requirements in accordance with the pertinent LCA regulations. As a result, even if it were determined that the petitioner overcame the director's basis for denial of the petition (which it has not), the petition could not be approved for this independent reason.

The AAO will now specifically address the director's basis for denial of the petition, namely that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, and for the specific reasons described

below, 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 occupation that requires:

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

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

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

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

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

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 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 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 interest of efficiency, the AAO hereby incorporates the above discussion and analysis regarding the duties and requirements of the proffered position into the analysis of each criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which follows below.

⁸ In the appeal brief, counsel references 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) and states that "this particular requirement simply states that the position must be one that requires a 'Baccalaureate or higher degree or its equivalent' as the minimum entry into a particular position." As discussed *supra*, 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). To interpret 8 C.F.R. § 214.2(h)(4)(iii)(A) as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in the illogical and absurd result of particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory definition at Section 214(i)(1) of the Act or the regulatory definition at 8 C.F.R. § 214.2(h)(4)(ii). *See Defensor v. Meissner*, 201 F.3d at 387.

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 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. 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 *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁹ As previously mentioned, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Market Research Analysts."

The AAO notes that in response to the director's RFE, the petitioner stated that the *Handbook* indicates a minimum education requirement of a bachelor's degree for entry-level market and survey research jobs. 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:

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

⁹ 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/>.

(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 January 16, 2013).

When reviewing the *Handbook*, the AAO must again note that the petitioner designated the wage level of the proffered position as a Level I position on the LCA. As previously discussed, this designation is indicative of a comparatively low, entry-level position relative to others within the occupation and signifies that the beneficiary is only expected to possess a basic understanding of the occupation and will perform routine tasks that require limited, if any, exercise of judgment. In accordance with the relevant DOL explanatory information on wage levels, the beneficiary will be closely supervised and her work closely monitored and reviewed for accuracy. Furthermore, she will receive specific instructions on required tasks and expected results. Thus, the petitioner has not established that the beneficiary will serve in a high-level or leadership position or in a position that performs technical research.

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, a minimum entry requirement of a degree in two 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.¹⁰ Section 214(i)(1)(B) of the Act (emphasis added).

¹⁰ 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

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." 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 discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. 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 being a specialty occupation.

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 I 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).¹¹

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.

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.

¹¹ In the appeal, counsel cites the beneficiary's academic credentials in reference to this criterion of the regulations. However, USCIS is required to follow long-standing legal standards and determine first, whether the proffered position is a specialty occupation, and second, whether a beneficiary is qualified for the position at the time the nonimmigrant visa petition is filed. Cf. *Matter of Michael Hertz Assoc.*, 19 I&N Dec. 560 ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation]."). Thus, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.

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. Furthermore, the petitioner did not submit any letters or affidavits from similar firms or individuals in the petitioner's industry attesting firms "routinely employ and recruit only degreed individuals."

In the Form I-129, the petitioner stated that it is a tennis academy established in 2008. The petitioner further stated that it has 12 employees. The petitioner failed to provide its gross annual income and net annual income. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 611620.¹² The AAO notes that this code is designated for "Sports and Recreation Instruction." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

This industry comprises establishments, such as camps and schools, primarily engaged in offering instruction in athletic activities to groups of individuals. Overnight and day sports instruction camps are included in this industry.

See U.S. Dep't of Commerce, U.S. Census Bureau, 2007 NAICS Definition, 611620 – Sports and Recreation Instruction, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last viewed January 16, 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.

For the petitioner to establish that organizations are similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such information, evidence submitted by a petitioner is generally outside the scope of consideration for this criterion, which

¹² According to the U.S. Census Bureau, 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 January 16, 2013).

encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and an 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. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

In response to the RFE, the petitioner submitted one job announcement for a position with USTA for a tennis market development specialist. Notably, the announcement does not contain any information regarding the advertising employer's general characteristics. Without such information, the advertisement is devoid of sufficient information regarding the advertising employer to conduct a legitimate comparison of the organization to the petitioner. The petitioner failed to supplement the record of proceeding to establish that the advertising organization is similar to it. That is, the petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organization.

Moreover, the advertisement contains limited information regarding the offered position and includes just three job duties. Based upon the information provided, it does not appear to be for a parallel position. That is, the position does not appear to have similar duties and requirements to the proffered position. For example, the job function for the advertised position is listed as "Tennis Teaching Pro." Furthermore, the advertisement states that a major duty of the position is to "[c]onduct training for pros, coaches and organizers." Moreover, a candidate for the position must be a nationally recognized tennis professional and have extensive experience in teaching, programming and events, as well as experience conducting trainings at the national/section level. Upon review of the advertisement, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised position are parallel to the proffered position.

Additionally, contrary to the purpose for which the advertisement was submitted, it does not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the position. That is, the posting states that a bachelor's degree is required, but it does not provide any further specification. Thus, it does not indicate that a bachelor's degree in a *specific specialty* that is directly related to the occupation is required. The AAO here reiterates that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a *specific specialty* that is directly related to the duties and responsibilities of the position.

Furthermore, the petitioner fails to establish the relevancy of just one example to the issue here. That is, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from one advertisement with regard to determining the common educational requirements for entry into parallel positions in similar organizations.¹³

¹³ According to the *Handbook's* detailed statistics on market research analysts, there were approximately

Upon review of the record of proceeding, the AAO notes that the petitioner also submitted several printouts regarding market research analyst positions from the websites [REDACTED] and [REDACTED] in support of this criterion of the regulations. The petitioner and counsel refer to the printouts as "job notices" and "job postings." In response to the RFE, the petitioner claims the printouts refer to cases that "have been already approved by USCIS." In the appeal, counsel states that "those records came from the records of the USCIS of previously approved H-1B petitions." Counsel continues by stating that the printouts show that "H-1B petitions were approved in 2010 for Market Research Analysts working for tennis academies, with at least one of them in the same county as that of the Petitioner."

The AAO reviewed the information but finds that the petitioner's reliance on the printouts is misplaced. More specifically, the printouts are taken from websites that collect information regarding various occupations and salary information, but according to the websites the information does not refer to current job openings. Furthermore, contrary to the assertions of the petitioner and counsel, the information does not refer to approved H-1B petitions. Rather the information provided by the websites appears to have been collected from the U.S. Department of Labor in connection with Labor Condition Applications.¹⁴ Notably, as previously discussed, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) specifies that certification of an LCA does not constitute a determination that an occupation is a specialty occupation:

Certification by the Department of Labor [DOL] of a labor condition application in an occupational classification does not constitute a determination by that agency that

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 January 16, 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 one job posting 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 advertisement was 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 announcement supported the finding that an organization similar to the petitioner in its industry, for a position parallel to the proffered position, commonly requires at least a bachelor's or higher degree in a specific specialty, or its equivalent, it cannot be found that just one posting (which appears 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.

¹⁴ For example, the section of the Foreign Labor Certification Data Center website containing this information is accessible on the Internet at <http://www.flcdatacenter.com/CaseH1B.aspx>. The website states that the employer-specific case information that appears on FLCDataCenter.com is provided to DOL by employers who submit foreign labor certification applications.

the occupation in question is a specialty occupation. The director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. The director shall also determine whether the particular alien for whom H-1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.

The AAO finds no merit that the submission of labor condition applications to DOL by *other organizations* is relevant to the issue here. Counsel cites no statutory or regulatory authority, case law, or precedent decision to support it. Moreover, neither the statutory nor regulatory provisions governing the adjudication of Form I-129 petitions provide for the approval of an H-1B petition on this basis, or even indicate that *another organization's submission of an LCA* is relevant to USCIS adjudications of H-1B specialty-occupation petitions. Moreover, in the instant case, the printouts indicate that only some of the applications were certified by DOL.

The AAO is not persuaded by the claim that the printouts demonstrate that these organizations submitted H-1B petitions and that the petitions were approved by USCIS. It is not sufficient for the petitioner and counsel to make such a claim, without providing a legitimate basis for such an assertion. Copies of these allegedly approved petitions were not included in the record. If a petitioner wishes to have unpublished service center decisions considered in the adjudication of a petition, the petitioner is permitted to submit copies of such evidence that it either obtained itself and/or received in response to a Freedom of Information Act request filed in accordance with 6 C.F.R. Part 5. Otherwise, "[t]he non-existence or other unavailability of required evidence creates a presumption of ineligibility." 8 C.F.R. § 103.2(b)(2)(i).

Again, the petitioner in this case failed to submit copies of these petitions and their respective approval notices. As the record of proceeding does not contain evidence of any decisions made by USCIS, there are no underlying facts to be analyzed and, therefore, no substantive determinations can be made to determine what facts, if any, are analogous to those in this proceeding. That is, the petitioner and counsel have furnished insufficient evidence to establish that the facts of the instant petition are analogous to any other cases adjudicated by USCIS.¹⁵

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 (Reg. Comm'r 1972). Furthermore, any suggestion that USCIS must review unpublished decisions and possibly request and review each case file relevant to those decisions, 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

¹⁵ Furthermore, the printouts lack sufficient information to establish their relevancy here. None of the printouts make any mention of the job duties of the positions. Thus, the petitioner has failed to establish that the positions are parallel to the proffered position. While the printouts contain the names and addresses of the organizations, they fail to provide any further pertinent information. That is, the printouts do not contain any information regarding the organizations' general characteristics. Without such evidence, there is insufficient information to conduct a legitimate comparison of the organizations to the petitioner. Moreover, none of the printouts state that the positions require at least a bachelor's degree in a *specific specialty*, or its equivalent.

the Act, 8 U.S.C. § 1361. Accordingly, neither the director nor the AAO was required to request and/or obtain a copy of the allegedly approved petitions cited by the petitioner and counsel.

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 claims that its particular position is so complex and/or unique that it can be performed only by an individual with at least a bachelor's degree. However, the petitioner did not submit sufficient probative evidence regarding its business operations or the proffered position 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. Moreover, the petitioner and counsel fail to credibly demonstrate exactly what the beneficiary will do on a day-to-day basis such that complexity or uniqueness can even be determined. The petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position. 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.

More specifically, the petitioner fails to demonstrate how the duties of the proffered position as described in the record of proceeding require the theoretical and practical application of a body of highly specialized knowledge such that a baccalaureate 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 that it claims are so complex or unique. While related courses may be beneficial, or even required, in performing certain duties of the proffered 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 particular position here.

The AAO again notes that the petitioner's assertion that a bachelor's degree in "business administration" is a sufficient minimum requirement for entry into the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. As noted above, a petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. 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 147. The petitioner and counsel make various claims about the complexity and/or uniqueness of the duties of the proffered position, but they fail to explain or clarify 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 AAO reviewed the record in its entirety and 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 LCA indicates a wage level based upon the occupational classification "Market Research Analysts" at a Level I (entry level) wage. The wage-level of the proffered position indicates that the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

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."

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. Thus, the record lacks sufficient probative evidence 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 evidence of record does not establish that this position is significantly different from other market research analyst positions such that it refutes the *Handbook's* information to the effect that there is a spectrum of preferred degrees for these positions, including a degree not in a specific specialty. In other words, the record lacks sufficiently detailed information to discern the proffered position as unique from or more complex than similar 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 and counsel have indicated that the beneficiary's educational background and experience in the industry will assist her in carrying out the duties of the proffered position, and takes particular note of her academic degrees and professional tennis experience. 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. The petitioner does not explain or clarify at any time in the record 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 has thus failed to establish the proffered position as satisfying the second prong of the criterion at 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.

In response to the RFE, the petitioner stated that "[redacted] was employed [with the petitioner] for one year where she performed as a market research [a]nalyst." The petitioner submitted a copy of a diploma issued to [redacted] in May 2009, indicating that she was granted a bachelor's degree in communication studies, with a minor in theatre arts. Although requested in the RFE, the petitioner did not submit any evidence in support of the assertion that [redacted] was employed by the petitioner (e.g., employment records, pay statements, Form W-2). Moreover, the AAO observes that the degree granted to [redacted] does not correspond to the petitioner's stated requirements for the proffered position. Specifically, the petitioner claimed that the proffered position requires at least a bachelor's degree in "Business Administration, Economics; Marketing, or their equivalents." Further, while the petitioner provided a general statement that it had previously employed an individual to serve as a market research analyst, the petitioner failed to provide the job duties and day-to-day responsibilities of the position that it claims is the same as the proffered position. The petitioner did not provide any information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, aside from job title, it is unclear whether the duties and responsibilities of this individual are the same or related to the proffered position.

Additionally, in response to the RFE, the petitioner submitted a job posting for the proffered position. The document is not dated. Notably, the petitioner and counsel did not submit any documentation to establish that the text was actually published or posted. The petitioner stated in the Form I-129 petition that it has 12 employees and that it was established in 2008 (approximately three years prior to the H-1B submission). Without further information, the submission of the text of *one job posting over three year period* is not persuasive in establishing that the petitioner normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the position.

Further, based on the statement made by the petitioner with regard to its own claimed educational requirements for the position (i.e., the acceptance of a degree in business administration), it is clear that a general bachelor's degree is sufficient to perform the duties. As previously noted, 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 147.

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.

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.

On appeal, counsel asserts that the proffered position satisfies this criterion of the regulations because the *Handbook* indicates that it is a position that "always requires as a minimum a Bachelor's degree." The AAO hereby incorporates its earlier discussion regarding the matter, and finds that counsel's claim is not supported by the *Handbook*. Moreover, the AAO observes that in its letter dated November 21, 2011, the petitioner stated that it was in the process of purchasing a new \$7 million facility and that the beneficiary was needed to "perform the data collection and analysis that will guide [the petitioner] in making such crucial decisions on the part of the company." The petitioner further reported that the beneficiary would be "responsible for providing the key research, analysis, forecasting, benchmarking and strategy recommendations to enable [the petitioner] to continue to gain market share." Additionally, in a statement submitted in response to the RFE, the petitioner claimed that as it is looking to "expand operations" and "explore new revenue streams," the beneficiary "will help drive [the petitioner] in the right direction . . . deciding which locations, what type of clients and what kind of products and services [the petitioner] should and will focus on." The petitioner did not submit probative evidence regarding its business operations, such as documentation substantiating its plan to purchase a new facility, expand operations and explore new revenue streams, as well as evidence regarding the beneficiary's role in these plans.

The AAO acknowledges that the petitioner believes 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 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 I (the lowest of four assignable levels). That is, the Level I wage designation is indicative of a low, entry-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 I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation." 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 that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree in a specific specialty, or its equivalent, also cannot be determined. However, the AAO will again briefly note that the petitioner failed to submit a full English language translation of the beneficiary's foreign transcript in accordance with 8 C.F.R. § 103.2(b)(3). Furthermore, the petitioner failed to submit documentation equating the beneficiary's credentials to a U.S. baccalaureate or higher degree, as described in the provisions at 8 C.F.R. § 214.2(h)(4)(iii)(D), such as an evaluation of the beneficiary's education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials. As such, since evidence was not presented that the beneficiary has at least a bachelor's degree in a specific specialty, or its equivalent, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 145 (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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. Here, that burden has not been met.

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