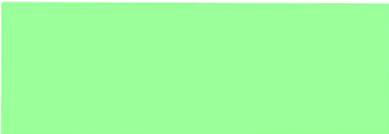




U.S. Citizenship
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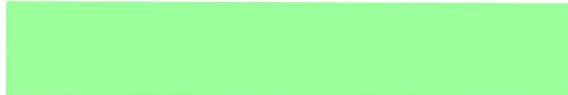
(b)(6)



DATE: JUN 14 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,


for Ron Rosenberg
Acting 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 petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as a media, technology, software, and advertising company¹ established in 2004. In order to employ the beneficiary in what it designates as a marketing research and product specialist position,² the petitioner seeks to classify him 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 the basis of her determination that the petitioner failed to demonstrate that the proposed position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B and supporting documentation.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director's ground for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

The AAO will now address its determination that the evidence in the record of proceeding fails to establish that the proffered position is a specialty occupation.

To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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

- (A) theoretical and practical application of a body of highly specialized knowledge, and

¹ The petitioner provided a North American Industry Classification System (NAICS) Code of 541910, "Marketing Research and Public Opinion Polling." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "541910 Marketing Research and Public Opinion Polling," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (accessed May 6, 2013).

² The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for the SOC (O*NET/OES) Code 19-3021.00, the associated Occupational Classification of "Market Research Analysts," and a Level I (entry-level) prevailing wage rate.

- (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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires [(1)] 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 requires [(2)] 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, the 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), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing “a degree requirement in a specific specialty” as “one that relates directly to the duties and responsibilities of a particular position”). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely upon a proffered position’s title. The specific duties of the 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 at 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.

In its July 1, 2010 letter of support, the petitioner described the duties of the proffered position as follows:

[The beneficiary] will provide in-depth marketing research on marketing strategies, offers, services and products, assessment of strategic direction and analysis as we work to bring our web and video syndication portal solutions the international market. In doing so, he will perform primary and secondary qualitative and quantitative market research; collect and analyze data on customer demographics, preferences, needs[,] and buying habits to identify potential markets and factors effecting product demand; complete competitive analysis including price, sales, marketing[,] and distribution methods of competitors; present our product within international distribution channels; and identify sales opportunities to launch [the petitioner’s] web video portal solutions in international markets. [The beneficiary] will be responsible for conducting competitive pricing research and developing an international pricing and discount strategy.

[The beneficiary’s] research will be an integral part of our launch in the international market. His work will help us to identify new target industries, companies[,] and products in the international market and help determine potential international sales of our web video portal products. [The beneficiary’s] research will help determine

how [the petitioner] should re-conceptualize [its] web and video portals to best meet the needs of our international target audience. He will also be responsible for developing custom marketing strategies to appeal to our target international clientele.

In its November 9, 2010 letter submitted in response to the director's RFE, the petitioner added the following:

[The beneficiary] will perform primary and secondary qualitative and quantitative market research, targeted to particular clients in food, health care, government[,], and other industries, including:

Research and Analysis of Customer Habits 20%: [The beneficiary] will collect and analyze data on customer demographics, preferences, needs[,], and buying habits in the Asian and European markets. He will prepare reports documenting and analyzing his findings, and will use his research to help identify potential markets and factors effecting product demand. [The beneficiary's] research will help determine how [the petitioner] should re-conceptualize [its] web and video portals to best meet the needs of our international target audience. He will also be responsible for developing custom marketing strategies to appeal to our target international clientele.

Research and Analysis of Competitors 35%: [The beneficiary] will complete competitive analysis including price, sales, marketing[,], and distribution methods of competitors, which requires an advanced knowledge of marketing strategies and marketing policy. Such research will help determine [the petitioner's] position in the international marketplace. His work will also help us to identify new target industries, companies[,], and products in the international market and help determine potential international sales of our web video portal products.

Product Presentation 15%: [The beneficiary] will present our product within international distribution channels and identify sales opportunities to launch [the petitioner's] web video portal solutions in international markets. He will utilize his expertise in public relations, government relations communication[,], and international business to work on the internationalization of [the petitioner's] custom-developed web video portal and specifically target it to distinct international markets. He will use his knowledge of marketing strategies, project management, sales management, and his complex understanding of international markets to successfully integrate the product into Asian and European markets.

Pricing Research 30%: [The beneficiary] will be responsible for conducting competitive pricing research and developing an international pricing and discount strategy. He will utilize his knowledge of economic theory, financial markets, account management, company income policies, risk management, cost management[,], and company investment strategy when analyzing his research findings and preparing pricing strategies.

The AAO will first discuss a material aspect of this petition that has a significant bearing upon the outcome of this appeal, namely, the opinions that the petitioner has obtained regarding the educational requirements for the proffered position. These opinions appear in a series of six letters, which the AAO will now identify. Two of these letters are from professors, and the remainder are from recruiting or college placement officials.

There is a one-page letter from [REDACTED] who states that he is a marketing professor at the [REDACTED] and a visiting professor at the [REDACTED]

A one-page letter was also submitted from [REDACTED] who states that she is the “chair at the Department of Marketing, [REDACTED]” that her department “offers a B.Sc. in Marketing, an MBA in Market Analysis”; that she “currently teach[es] market segmentation and in the past [has] taught consumer behavior, marketing management and an interdisciplinary decision making course”; has “also taught marketing strategy and brand positioning for corporate clients and consulted on a variety of projects involving consumer insight development and survey research”; and “[has] been published in [REDACTED] and other academic journals.”

The petitioner also submitted a one-page letter from a [REDACTED], writing as the Associate Director for the Portfolio Center at [REDACTED], which, [REDACTED] writes, “is dedicated to providing professional preparation, industry events and valuable post[-]graduation benefits, such as networking and job placement services, to [REDACTED] students and alumni looking for positions in the communication, media arts and marketing fields.” [REDACTED] offers his opinion based upon his claim that, “through [his] work in the Portfolio Center and as an Internship Coordinator for the largest Film School in the world,” he is “extremely familiar with duties and minimum requirements listed by hiring employers for various marketing positions.”

There is also a one-page letter from [REDACTED], PHR, ACIR, who signs as the Senior Recruiter, [REDACTED] and offers her opinion on the basis of what she describes as “seven years of combined staffing experience placing top notch professionals with Fortune 100 companies ([REDACTED] also states that she “conducted a similar search for the Marketing team at [REDACTED] in “looking for a Master’s/MBA level candidate with extensive experience in quantitative and qualitative marketing analysis that would enable him/her to analyze complex fluctuations of consumer trends and make strategic recommendation[s] on pricing and market expansion based on demographics, cost of living, supply demand gaps and cultural diversity.”

Next, writing as the Managing Director of [REDACTED], is [REDACTED] whose one-page letter provides an opinion that [REDACTED] based upon her company’s experience in employing “numerous marketing professionals over the past 10 years.”

Finally, there is another one-page letter from [REDACTED] the Director of Human Resources for [REDACTED] describes her firm as “the largest specialized staffing agency,

placing full-time professionals in five distinct divisions - advertising, creative, marketing, visual communication, and interactive fields.”

As will now be discussed, the AAO finds that none of these opinions is probative evidence of the proffered position satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

At the outset, the AAO notes that, with regard to the professors’ letters in particular, none are accompanied by, or expressly state, the full content of whatever documentation and/or oral transmissions upon which they are based. Accordingly, the AAO finds that, on this ground alone and independent of the other material deficiencies to be noted below, these opinions are not probative evidence of the proffered position satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO notes further that none of these individuals discuss the fact that the petitioner submitted an LCA certified for a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation, which signifies that the beneficiary is only expected to possess a basic understanding of the occupation.³ These authors’ omission of such an important factor severely diminishes the evidentiary value of their assertions, particularly those regarding the complexity, specialization, and/or uniqueness of the proffered position and its constituent duties.

Furthermore, the AAO observes that only the letter from [REDACTED] contains a description of the duties upon which the opinion is proffered, and, the AAO finds, that description is limited to general terms that do not relate either significant knowledge or assessment of the particular position

³ The *Prevailing Wage Determination Policy Guidance* (available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf (last accessed May 6, 2013)) issued by DOL states the following with regard to Level I wage rates:

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 [emphasis in original].

The proposed duties’ level of complexity, uniqueness, and specialization, as well as the level of independent judgment and occupational understanding required to perform them, are questionable, as the petitioner submitted an LCA certified for a Level I, entry-level position. The LCA’s wage-level indicates that the proffered position is actually a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to possess a basic understanding of the occupation; that he will be expected to perform routine tasks requiring limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

that is the subject of this petition. In this regard, the AAO notes that [REDACTED] letter opines only upon what he refers to as the position's "essential duties," which he describes in his letter as "including" the following:

Providing in-depth market research on marketing strategies, offers, services, and products; assessing strategic direction and analysis; performing primary and secondary qualitative and quantitative market research; collecting and analyzing data; completing competitive analysis; and conducting competitive pricing research and developing an international pricing and discount strategy.

This letter neither identifies, nor reflects that its author has considered, substantive evidence of specific matters that would actually engage the beneficiary in the performance of the particular position that is the subject of this petition. Rather, the professor appears to find the above-quoted generic description as sufficient in itself to establish the educational requirements for the proffered position – and by implication, any position that could be so generically described. After all, immediately after the statement of the "essential duties," [REDACTED] pronounces, without any analysis, that they "describe a position requiring the type of theoretical training normally gained only through a graduate education in in marketing, business administration or a related specialty field."

The AAO further notes that the remainder of [REDACTED] letter continues on a path that ascribes to the proffered position attributes and requirements for which its author presents no supportive evidence, as it states:

And within the specific context of the offered position,⁴ and for a company engaged in media, advertising, and ancillary services, it would be unreasonable to expect such an employer to hire a professional to handle such responsibilities without having theoretical knowledge in the specialty.⁵ The described position is intended to provide management with quantitative and qualitative data and analysis allowing the investigation of new areas of interest, content positioning, and advertising opportunities – responsibilities generally requiring analysis of findings in reliable and precise measures through focus hypotheses, and marketing measuring tools within the context of the competitor's cost analysis, customer demographics and cultural sensitivity, product demand factors, pricing strategies, profitability analysis, and forecasting of marketing and sales trends.⁶

⁴ [REDACTED] does not describe what he means by "the specific context of that position"; and he does not explain the information from which he distilled that "specific context."

⁵ The letter does not explain the factual basis for this pronouncement of unreasonableness. Further, expectations or desires of a petitioner are relevant only to the extent that they are shown to comport with the position's actual performance requirements as established by the evidence in the record of proceeding – and here such comportment has not been established.

⁶ [REDACTED] cites no basis for ascribing such features to the proffered position.

These coordinated tasks, requiring critical thinking and analytical-based skills, make a graduate level theoretical foundation necessary in order to perform the duties in a reasonable manner such that I attest that the nature of the specific duties are [sic] so specialized and complex that the knowledge to perform the duties would normally be associated with the attainment of a relevant Master's degree in the specialty – in this case, in Marketing, Business Administration or a related specialty field.

The AAO finds that [redacted] ultimate opinion - stated in the final paragraph excerpted above - is conclusory, and therefore, unpersuasive. That is, it is built upon generally described duties that do not convey the specific attributes that this professor petitioner ascribes to them and, further, in that the professor fails to provide an analytical and factual discussion relating how he has arrived at the definite conclusion that only “a relevant Master's degree” would enable a person to perform the proffered position.

[redacted] discussed her professional credentials, listed the duties of the proffered position, and stated that, in her opinion, its duties are so specialized and complex that their performance is usually associated with the attainment of a graduate degree in marketing, business administration, or a related field. However, [redacted] description of the proposed job duties was contained within one sentence, and that single sentence did not convey those duties with any meaningful degree of specificity. Nor did she discuss those duties within the context of the petitioner's specific business operations or indicate whether she spoke with anyone affiliated with the petitioner or visited its business premises or otherwise familiarized herself with the specific business operations for which, and in whose context, the proffered position would be performed. For all of these reasons, the record does not establish that [redacted] has sufficient knowledge of the petitioner's recruiting and hiring practices, and their bases, for her opinion to merit deference or significant weight.

The letter from [redacted] fails to establish the proffered position as a specialty occupation for similar reasons. According to [redacted], the proffered position requires an individual with a master's degree because its duties are “specialized and complex.” The AAO finds this letter cursory, superficial, and conclusory, as it fails to establish a substantive factual and analytical foundation for its opinion. Further, [redacted] did not discuss the duties of the proffered position or the nature of the petitioner's business in meaningful detail. He did not indicate whether he spoke with anyone affiliated with the petitioner or visited its business premises. Also, the record does not establish that [redacted] has sufficient knowledge of the petitioner's recruiting and hiring practices, and their bases, for his opinion to merit deference or significant weight.

[redacted] stated that she had reviewed the duties proposed for the beneficiary, and claimed that a master's degree is normally required to perform them. She also spoke to the “complex and specialized” nature of those duties. However, [redacted] letter contains many of the same deficiencies as the prior two letters. She did not discuss the duties of the proffered position, the petitioner's business operations, or the petitioner's designation of the proffered position on the LCA as a low-level, entry position relative to others within the occupation, and she did not indicate whether she had spoken with anyone affiliated with the petitioner or visited its business premises. This document, too, lacks a substantive factual and analytical discussion that establishes its ultimate conclusion as reliable and worthy of probative evidentiary weight. Further, [redacted] letter

does not establish that she has sufficient knowledge of the petitioner's recruiting and hiring practices, and their bases, for her opinion to merit deference or significant weight.

The letter from [REDACTED] contains similar evidentiary deficiencies. Although she claimed that her company has employed "numerous marketing professionals" to perform duties similar to those proposed for the beneficiary, her claim is not supported by any documentary evidence. Simply 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). [REDACTED] did not discuss the duties of the proffered position or the petitioner's business operations. [REDACTED] did not indicate whether she had spoken with anyone affiliated with the petitioner or visited its business premises, or list any reference materials upon which she relied as a basis for her conclusions. Also, [REDACTED] letter does not establish that she has sufficient knowledge of the petitioner's recruiting and hiring practices, and their bases, for her opinion to merit deference or significant weight.

[REDACTED] claimed that she is familiar with the duties of the proffered position, and stated that because those duties are so specialized and complex, the knowledge required to perform them is usually associated with the attainment of a graduate-level degree. However, [REDACTED] did not describe the basis of her familiarity with the duties of the proffered position or discuss the duties in any meaningful way. Nor did she discuss the petitioner's business operations. [REDACTED] did not indicate whether she had spoken with anyone affiliated with the petitioner or visited its business premises, and she did not list any reference materials upon which she relied as a basis for her conclusions. Also, [REDACTED] letter does not establish that she has sufficient knowledge of the petitioner's recruiting and hiring practices, and their bases, for her opinion to merit deference or significant weight. For all of these reasons, [REDACTED] did not provide a sufficient factual and analytical foundation to establish that the ultimate opinion expressed in her letter merits any significant weight.

The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988).

For all of these reasons, the AAO finds that the letters from [REDACTED] [REDACTED] are not probative evidence that the petitioner has satisfied any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Having made these initial findings, the AAO will now discuss the application of each supplemental, alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

The AAO will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which is satisfied by establishing that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of the petition.

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 it addresses.⁷ The AAO agrees with the petitioner that the proposed duties generally align with those of market research analysts.

In relevant part, the *Handbook* summarizes the duties typically performed by market research analysts as follows:

Market research analysts typically do the following:

- Monitor and forecast marketing and sales trends
- Measure the effectiveness of marketing programs and strategies
- Devise and evaluate methods for collecting data, such as surveys, questionnaires, or opinion polls
- Gather data about consumers, competitors, and market conditions
- Analyze data using statistical software
- Convert complex data and findings into understandable tables, graphs, and written reports
- Prepare reports and present results to clients or management

Market research analysts perform research and gather data to help a company market its products or services. They gather data on consumer demographics, preferences, needs, and buying habits. They collect data and information using a variety of methods, such as interviews, questionnaires, focus groups, market analysis surveys, public opinion polls, and literature reviews.

Analysts help determine a company's position in the marketplace by researching their competitors and analyzing their prices, sales, and marketing methods. Using this information, they may determine potential markets, product demand, and pricing. Their knowledge of the targeted consumer enables them to develop advertising brochures and commercials, sales plans, and product promotions.

Market research analysts evaluate data using statistical techniques and software. They must interpret what the data means for their client, and they may forecast future

⁷ The *Handbook*, which is available in printed form, may also be accessed online at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are from the 2012-13 edition available online.

trends. They often make charts, graphs, or other visual aids to present the results of their research.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Market Research Analysts," <http://www.bls.gov/ooh/Business-and-Financial/Market-research-analysts.htm#tab-2> (accessed May 6, 2013).

The *Handbook* states the following with regard to the educational requirements necessary for entrance into this field:

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.

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.

Id. at <http://www.bls.gov/ooh/Business-and-Financial/Market-research-analysts.htm#tab-4>.

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.⁸ Section 214(i)(1)(b) of the Act (emphasis added).

⁸ 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 a bachelor's or higher degree is required, it also indicates that baccalaureate degrees in various fields are acceptable for entry into the occupation. In addition to recognizing degrees in disparate fields, i.e., social science and computer science as acceptable for entry into this field, the *Handbook* also states that "others have a background in business administration." Although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147. Therefore, the *Handbook's* recognition that a general, non-specialty "background" in business administration is sufficient for entry into the occupation strongly suggests that a bachelor's degree *in a specific specialty* is not a normal, minimum entry requirement for this occupation. Accordingly, as the *Handbook* indicates that working as a market research analyst does not normally require at least a bachelor's degree in a specific specialty or its equivalent for entry into the occupation, it does not support the proffered position as being a specialty occupation.

Next, the AAO notes that the materials from DOL's Occupational Information Network (O*NET OnLine) do not establish that the proffered position qualifies as a specialty occupation under the first criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A), either. O*NET OnLine is not particularly useful in determining whether a baccalaureate degree in a specific specialty, or its equivalent, is a requirement for a given position, as O*NET OnLine's Job Zone designations make no mention of the specific field of study from which a degree must come. As was noted previously, the AAO 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 proposed position. The Specialized Vocational Preparation (SVP) rating is meant to indicate only the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. For all of these reasons, the O*NET OnLine excerpt submitted by counsel is of little evidentiary value to the issue presented on appeal.

Nor does the record of proceeding contain any persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion in this occupational category is sufficient in and of itself to establish the proffered position as, in the words of this criterion, a "particular position" for which "[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry."

Finally, it is noted again that the petitioner submitted an LCA was certified for a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its

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.

occupation, which signifies that the beneficiary is only expected to possess a basic understanding of the occupation.⁹

As the evidence in the record of proceeding does not establish that a baccalaureate degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of this petition, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d at 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Nor do the letters submitted by the petitioner and discussed above establish such an industry-wide requirement.

Nor does the record contain any submissions from professional associations in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions.

Nor do the three job-vacancy announcements submitted into the record satisfy the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). First, counsel has not submitted any evidence to demonstrate that these advertisements are from companies "similar" to the petitioner in size, scope, and scale of operations, business efforts, expenditures, or other fundamental dimensions.¹⁰ Second,

⁹ Given the petitioner's submission of an LCA certified for a wage-level appropriate only for a comparatively low, entry-level position relative to others within its occupation, counsel's argument on appeal that the duties proposed for the beneficiary are "far different than [those] described in the [*Handbook*] for an entry level market and survey research job" is unpersuasive.

¹⁰ As noted above, the petitioner described itself on the Form I-129 a media, technology, software, and advertising company, and provided a North American Industry Classification System (NAICS) Code of 541910, "Marketing Research and Public Opinion Polling." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "541910 Marketing Research and Public Opinion Polling," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (accessed May 6, 2013).

the petitioner has not established that these three positions are “parallel” to the proffered position.¹¹ Nor has the petitioner established that the job-vacancy announcements require a bachelor’s degree, or the equivalent, in a specific specialty.¹² Nor does the petitioner submit any evidence regarding how representative these advertisements are of the industry’s usual recruiting and hiring practices with regard to the types of positions advertised. Simply 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. at 165.¹³

On appeal, counsel describes the petitioner as “a web-based, e-learning and video facility that was a pioneer of Web TV development.”

However, the unnamed company advertising its vacancy through [REDACTED] conducts business in the “consumer packaged goods manufacturing” industry, [REDACTED] describes its “line of business” as “grocery stores & supermarkets,” and [REDACTED] claims to be a security company. The petitioner does not explain how it is similar to any of these companies.

¹¹ For example, it is noted that work experience is required for all three of these positions. However, as noted above, the petitioner indicated by the wage-level in the LCA that its proffered position is a comparatively low, entry-level position relative to others within its occupation and signifies that the beneficiary is only expected to possess a basic understanding of the occupation. It is therefore difficult to envision how these attributes assigned to the proffered position by the petitioner by virtue of its wage-level designation on the LCA would be parallel to these positions described in these job vacancy announcements.

¹² For example, although the unnamed company advertising its vacancy through Segue Staffing requires an individual with a bachelor’s degree for its data and market research analyst position, it does not mandate that the degree be in any particular specialty.

¹³ Furthermore, according to the *Handbook* there were approximately 282,700 persons employed as market research analysts and marketing specialists in 2010. *Handbook* at <http://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm#tab-6> (last accessed May 6, 2013). Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the three submitted vacancy announcement with regard to determining 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 these advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that “[r]andom selection is the key to [the] process [of probability sampling]” and that “random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error”).

As such, even if these three job-vacancy announcements established that the employers that issued them routinely recruited and hired for the advertised positions only persons with at least a bachelor’s degree in a specific specialty closely related to the positions, it cannot be found that these three job-vacancy announcements which appear to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not normally require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

Therefore, the petitioner has not satisfied the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not establish a requirement for at least a bachelor's degree in a specific specialty as 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.

Next, the AAO finds that the petitioner did not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree."

In this particular case, the petitioner has failed to credibly demonstrate that the duties the beneficiary will 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, or the equivalent, in a specific specialty.

The record of proceeding does not contain evidence establishing relative complexity or uniqueness as aspects of the proffered position, let alone that the position is so complex or unique as to require the theoretical and practical application of a body of highly specialized knowledge such that a person with a bachelor's or higher degree in a specific specialty or its equivalent is required to perform that position. Rather, the AAO finds, that the petitioner has not distinguished either the proposed duties, or the position that they comprise, from generic market-research-analysis work, which, the *Handbook* indicates, does not necessarily require a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

The petitioner therefore failed to establish how the beneficiary's responsibilities and day-to-day duties comprise a position so complex or unique that the position can be performed only by an individual with a bachelor's degree, or the equivalent, in a specific specialty.

Additionally, the AAO incorporates here by reference and reiterates its earlier discussion regarding the LCA and its indication that the petitioner would be paying a wage-rate that is only appropriate for a low-level, entry position relative to others within the occupation, as this factor is inconsistent with the relative complexity and uniqueness required to satisfy this criterion. Based upon the wage rate, the beneficiary is only required to have a basic understanding of the occupation. Moreover, that wage rate indicates that the beneficiary will perform routine tasks that require limited, if any, exercise of independent judgment; that the beneficiary's work will be closely supervised and monitored; that he will receive specific instructions on required tasks and expected results; and that his work will be reviewed for accuracy.

Consequently, as it did not show that the particular position for which it filed this petition is so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO turns next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which entails an employer demonstrating that it normally requires a bachelor's degree, or the equivalent, in a specific specialty for the position.

The AAO's review of the record of proceeding under this criterion necessarily includes whatever evidence the petitioner has submitted with regard to its past recruiting and hiring practices and employees who previously held the position in question.

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. 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 the performance requirements of the proffered position.¹⁴ In the instant case, the record does not establish a prior history of recruiting and hiring for the proposed position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty.

Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position 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 at 387. 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 a 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 proposed position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific

¹⁴ Any such assertion would be undermined in this particular case by the fact that the petitioner indicated in the LCA that its proffered position is a comparatively low, entry-level position relative to others within its occupation.

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.

As proof of eligibility under this criterion, the petitioner submits the credentials of the individual with whom it previously contracted to perform the duties of the proposed position. In his November 9, 2010 letter, counsel claimed that this individual, R-P-¹⁵ has both a bachelor's degree and a master's degree. However, the record lacks a copy of either degree. Again, simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici* at 165. Furthermore, the copy of R-P-'s resume that counsel submits indicates he was merely a master's degree *candidate* at the time the petitioner contracted for his services, which undermines the argument that actual *possession* of such a degree is a prerequisite.¹⁶ Although the submitted resume indicates that R-P- earned a bachelor's degree in "social sciences" from [REDACTED] in 1977, counsel did not submit any evidence to establish that R-P-'s foreign degree is equivalent to a bachelor's degree awarded by an institution of higher education in the United States. Also, the fact that the petitioner found R-P-'s degree in social sciences acceptable for the proposed position cements further our determination that a degree from a wide variety of fields would be sufficient preparation for performance of the duties of the proposed position and that a bachelor's degree, or its equivalent, *in a specific specialty* is not required. Finally, the petitioner has not established that the beneficiary would actually be performing the same duties as R-P-. Although R-P- performed his duties as an outsourced contractor and therefore presumably operated with at least some degree of professional autonomy, the LCA for the position proposed here was certified for a Level I, entry-level position and, again, that wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

As the petitioner has failed to demonstrate a history of recruiting and hiring only individuals with a bachelor's degree, or the equivalent, in a specific specialty for the proffered position, it has failed to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Next, the AAO finds that the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires the petitioner to establish that the nature of the proffered position's 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 the specialty.

¹⁵ Name withheld to protect individual's identity.

¹⁶ The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

Both on its own terms and also in comparison with the three higher wage-levels that can be designated in an LCA, the petitioner's designation of an LCA wage-level I is indicative of duties of relatively low complexity.

As earlier noted, the *Prevailing Wage Determination Policy Guidance* issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

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 [emphasis in original].

The pertinent guidance from the Department of Labor, at page 7 of its *Prevailing Wage Determination Policy Guidance* describes the next higher wage-level 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.

The above descriptive summary indicates that even this higher-than-designated wage level is appropriate for only "moderately complex tasks that require limited judgment." The fact that this higher-than-here-assigned, Level II wage-rate itself indicates performance of only "moderately complex tasks that require limited judgment," is very telling with regard to the relatively low level of complexity imputed to the proffered position by virtue of its Level I wage-rate designation.

Further, the AAO notes the relatively low level of complexity that even this Level II wage-level reflects when compared with the two still-higher LCA wage levels, neither of which was designated on the LCA submitted to support this petition.

The aforementioned *Prevailing Wage Determination Policy Guidance* describes the Level III wage designation as follows:

Level III (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years

of experience or educational degrees that are at the higher ranges indicated in the O*NET Job Zones would be indicators that a Level III wage should be considered.

Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. . . .

The *Prevailing Wage Determination Policy Guidance* describes the Level IV wage designation as follows:

Level IV (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

Here the AAO again incorporates its earlier discussion and analysis regarding the implications of the petitioner's submission of an LCA certified for the lowest assignable wage-level. By virtue of this submission the petitioner effectively attested that the proffered position is a low-level, entry position relative to others within the occupation, and that, as clear by comparison with DOL's instructive comments about the next higher level (Level II), the proffered position did not even involve "moderately complex tasks that require limited judgment" (the level of complexity noted for the next higher wage-level, Level II).

The AAO also finds that, separate and apart from the petitioner's submission of an LCA with a wage-level I designation, the petitioner has also failed to provide sufficiently detailed documentary evidence to establish that the nature of the specific duties that would be performed if this petition were approved 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.

For all of these reasons, the evidence in the record of proceeding fails to establish that the proposed duties meet the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As the petitioner has not satisfied at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation. Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

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.