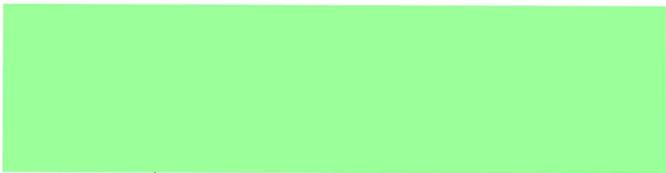


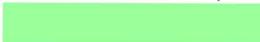
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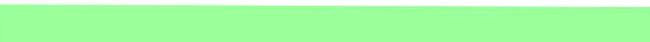
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



DATE: **MAY 01 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)

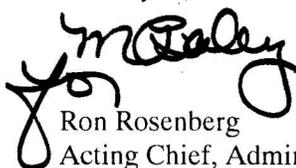
ON BEHALF OF PETITIONER:


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 April 9, 2012. In the Form I-129 visa petition and supporting documents, the petitioner describes itself as an enterprise that was established in 2004 to engage in operating and managing a Mongolian BBQ buffet restaurant. In order to employ the beneficiary in what it designates as a marketing analyst position, 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 October 20, 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.

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 discuss 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 establish that it would pay an adequate salary for the beneficiary's work, as required under the applicable statutory and regulatory provisions; and (2) failed to submit a Labor Condition Application (LCA) that corresponds to the petition. Thus, the petition cannot be approved for these reasons as well. They are considered independent and alternative bases for denial of the petition.¹

In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services as a marketing analyst to work on a full-time basis at a rate of pay of \$30,000 per year. In a support letter dated March 7, 2012, the petitioner stated that the marketing analyst would perform the following job duties:

1. Analyze statistical data on established and prospective customers to determine

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

- consumer preferences and advisability of new food product lines. Conduct feasibility studies on expansion of restaurant locations.
2. Compile and analyze data on local and national markets and on competitors to evaluate the pricing, food variety, and promotion of [the petitioner's] restaurants. Prepare reports based on the data gathered using Excel, PowerPoint, Crystal Reports and Microsoft Office products. Present the reports and make recommendations to the management for decision-making.
 3. Participate in the development of marketing campaigns. Compile information regarding trends affecting the food service industry. Develop and formulate marketing plans, promotional planning and local and national expansion strategies.
 4. Analyze operating procedures for maximum information flow and cost-benefit analysis of various promotional and marketing plans. Responsible for ensuring operational adherence to federal and local safety and sanitation standards, regulations, and legislations.
 5. Coordinate the planning and production of marketing brochures, billboards, and advertising in newspapers, TVs and other mediums. Perform cost-benefit analysis of various promotional and marketing plans.

In its letter of support accompanying the initial I-129 petition, the petitioner described the minimum requirements for the proffered position as "a strong background, with appropriate college level degree in Business Administration/Marketing with applicable experience." The petitioner provided a newspaper advertisement for the proffered position. The advertisement is located in the Midland Daily News classified section, dated October 20, 2011, and states, "Marketing Analyst, Full-time. Bachelor's degree required. Please e-mail resume to [petitioner's e-mail address]."

The petitioner asserted that the beneficiary is qualified to perform services in the proffered position by virtue of his bachelor's degree in business administration with majors in marketing and management. The petitioner provided a copy of the beneficiary's diploma from Northwood University and an unofficial transcript in the beneficiary's name.

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 May 14, 2012. The director outlined the evidence to be submitted. The AAO notes that the director specifically requested that the petitioner submit probative evidence to establish that the proffered position qualifies as a specialty occupation.

On July 30, 2012, counsel responded to the director's RFE by providing a letter and additional evidence, including (1) a line-and-block organizational chart; (2) a letter and curriculum vitae from [REDACTED] (3) a letter and resume from [REDACTED] (4) information regarding [REDACTED] (companies that counsel claims are the petitioner's competitors); (5) a copy of a newspaper announcement (undated) for a marketing analyst position placed by the petitioner; (6) documents relating to [REDACTED] and (7) documentation described by the counsel as marketing materials.

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 October 20, 2012. Counsel for the petitioner submitted an appeal of the denial of the H-1B petition.

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, the AAO will make some preliminary findings that are material to the determination of the merits of this appeal.

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

In the instant case, the petitioner has provided inconsistent information regarding the requirements of the proffered position. Furthermore, the petitioner's statements regarding the academic requirements for the marketing analyst position do not establish that the position qualifies as a specialty occupation.

That is, with the initial petition and in response to the RFE, the petitioner provided newspaper advertisements for the proffered position, which state, "Marketing Analyst, Full-time. Bachelor's degree required." The newspaper advertisements indicate that a bachelor's degree is required, but do not indicate that any particular field of study or discipline is necessary. The AAO notes 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 position. See 214(i)(1)(b) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). Thus, the petitioner's job postings do not establish that the proffered position requires the theoretical and practical application

of a body of highly specialized knowledge and the attainment of a bachelor's degree or higher in the *specific specialty*, or its equivalent, as a minimum for entry into the occupation. See § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

Moreover, in its letter of support dated March 7, 2012, the petitioner described the minimum requirements for the proffered position as "a strong background, with appropriate college level degree in Business Administration/Marketing with applicable experience." The petitioner's stated requirements are not consistent with its newspaper advertisements for the proffered position. No explanation was provided for the variance. The AAO observes that in the letter of support, the petitioner did not specify any particular level of education (e.g., associate's degree, baccalaureate, master's degree). That is, the petitioner did not state in its letter that at least a bachelor's degree is required. Furthermore, the petitioner's statement that the position requires an "appropriate college level degree in Business Administration/Marketing" is unclear. However, it appears that the petitioner will accept a degree in business administration or marketing.² On appeal, counsel claims that "[t]he requirement of bachelor's degree in business administration clearly satisfies the 'specialty occupation' requirement under 8 C.F.R. 214.2(h)(4)(iii)(A)(2)."

Contrary to counsel's claim, 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).³

² The petitioner and counsel claim that the industry standard for such positions is a Bachelor of Business Administration.

³ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* the following:

[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:

Again, the petitioner in this matter claims that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree. That is, the petitioner submitted job postings indicating that a bachelor's degree (no specific discipline) is acceptable, and, thereafter, claimed that a degree in business administration is sufficient for the proffered position. The petitioner's assertions are 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. 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) code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.⁴ Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate 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.⁵ DOL emphasizes that these guidelines should not be implemented in a mechanical fashion

elsewise, 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.

Id.

⁴ 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.

⁵ 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.

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.

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 claims that the nature of the proffered position involves complex, unique and/or specialized tasks. Moreover, in its letter dated March 7, 2012, the petitioner claims that the proffered position requires a degree and applicable experience. The petitioner also states that the beneficiary will "present . . . reports and make recommendations to management." The petitioner further asserts that the beneficiary's work will be used to "guide . . . management decisions" and "identify opportunities most likely to result in increased sales and revenue."

In response to the RFE, the petitioner submitted an organizational chart, indicating that the beneficiary will report directly to the president of the petitioning company. In addition, the petitioner provided an opinion letter from [REDACTED] who states that the proffered position is "instrumental to the employer's . . . aims of business expansion." According to [REDACTED] the proffered position involves "deep engagement in analytical as well as operational areas that will bear significant impact upon the employer's overall business development and overall expansion." [REDACTED] further indicates that the beneficiary will be "working at an advanced level." [REDACTED] references the "intellectual caliber and sophistication" of the duties of the position. Additionally, he claims that the position is a "critical role" in the petitioner's expansion plans. He asserts that generalized knowledge of business fields is not sufficient. Moreover, according to [REDACTED] "[t]he position should be differentiated from a standard position in the field of hospitality marketing." He continues by indicating that the proffered position is distinct because the "position is responsible not for overseeing a single restaurant's marketing operations but rather for analyzing and planning the possible opening of multiple restaurant locations and executing broad accordant marketing and analytical functions." [REDACTED] discusses the necessity for "marketing expertise" and indicates that the proffered position involves "specialized marketing" and "complex issues." [REDACTED] asserts that the duties of the proffered position go beyond performing market research.

He claims that the beneficiary will perform market research and "then using the research to generate abstract yet reliable forecasts and strategies." He states that this is an example of "a sophisticated and complex rendering of marketing concepts." In response to the RFE, the petitioner also submitted a letter from [REDACTED] which indicates that the "proffered position of Marketing Analyst is an advanced level professional position." On appeal, counsel references the "complex duties" of the proffered position and claims that the beneficiary must possess "advanced knowledge and training."

The petitioner claims that it will be relying heavily on the beneficiary's work product to make critical decisions regarding the direction of the company and that he 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," it appears that the petitioner claims that it will be relying on the accuracy of the beneficiary's work product to make major business decisions about the direction of the company.

Thus, upon review of the assertions regarding the proffered position, 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 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.

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 \$28,038 per year on the LCA corresponds to a Level I position for the occupational category of "Market Research Analysts" for Bay County (Midland, MI).⁶ Notably, if the proffered position had been designated at a higher level, the prevailing wage

⁶ For additional information regarding the prevailing wage for Market Research Analysts in Midland, Michigan, 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

at that time would have been \$35,422 per year for a Level II position, \$42,827 per year for a Level III position, and \$50,211 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 an adequate salary for the beneficiary's 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:

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.

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 other independent reason for the director's denial, the petition could still not be approved for this reason.

The AAO will now 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, 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.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 147 (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which

petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO now turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

The petitioner stated that the beneficiary would be employed in a marketing 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.⁷ As previously mentioned, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Market Research Analysts and Specialists."

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

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

Market research analysts need strong math and analytical skills. Most market research analysts need at least a bachelor's degree, and top research positions often require a master's degree.

⁷ 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/>.

Education

Market research analysts typically need a bachelor's degree in market research or a related field. Many have degrees in fields such as statistics, math, or computer science. Others have a background in business administration, one of the social sciences, or communications. Courses in statistics, research methods, and marketing are essential for these workers; courses in communications and social sciences—such as economics, psychology, and sociology—are also important.

Many market research analyst jobs require a master's degree. Several schools offer graduate programs in marketing research, but many analysts complete degrees in other fields, such as statistics, marketing, or a Master of Business Administration (MBA). A master's degree is often required for leadership positions or positions that perform more technical research.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Market Research Analysts, on the Internet at <http://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm#tab-4> (last visited April 29, 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 his work closely monitored and reviewed for accuracy. Furthermore, he 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.⁸ Section 214(i)(1)(B) of the Act (emphasis added).

Here, although the *Handbook* indicates that an advanced degree is typically needed for these positions, it also indicates that baccalaureate degrees in various fields are acceptable for entry into the occupation. In addition to recognizing degrees in disparate fields and backgrounds (i.e., social science and computer science) as acceptable for entry into this occupation, the *Handbook* also states that "others have a background in business administration." As previously discussed, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147. As 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 qualifying as 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 do not indicate that the position is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO reviews the record of proceeding regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to

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 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.

the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

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

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

In support of the petitioner's assertion that the proffered position qualifies as a specialty occupation position, the record of proceeding contains job announcements and two opinion letters. However, upon review of the evidence, the AAO finds that the petitioner's reliance on the job announcements and opinion letters is misplaced.

In the Form I-129 and supporting documents, the petitioner stated that currently has one "Mongolian BBQ buffet style" restaurant. The petitioner further indicated that it was established in 2004, and that it has 22 employees. The petitioner stated its gross annual income as approximately \$750,000 and net annual income as approximately \$11,000. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 722110 – "Full-Service Restaurants."⁹ The U.S. Department of Commerce, Census Bureau website describes this NAICS code as follows:

This industry comprises establishments primarily engaged in providing food services to patrons who order and are served while seated (i.e. waiter/waitress service) and pay after eating. These establishments may provide this type of food services to patrons in combination with selling alcoholic beverages, providing carry out services, or presenting live nontheatrical entertainment.

See U.S. Dep't of Commerce, U.S Census Bureau, 2007 NAICS Definition, 722110 – Full-Service Restaurants on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited April 29, 2013).

⁹ NAICS is used to classify business establishments according to type of economic activity, and each establishment is classified to an industry according to the primary business activity taking place there. See U.S. Dep't of Commerce, U.S. Census Bureau, NAICS, on the Internet at <http://www.census.gov/eos/www/naics/> (last visited April 29, 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 (or higher) in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

For the petitioner to establish that 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 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 job announcements for marketing analyst positions at [REDACTED] (dated August 2010) and at [REDACTED] (dated December 2007). Notably, the advertisements state a requirement for a bachelor's degree in business administration. As discussed above, a requirement for a general-purpose degree, such as business administration, does not demonstrate a requirement for a degree in a specific specialty. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 147. Moreover, the advertisements contain limited information regarding the marketing analyst positions. The record of proceeding does not contain sufficient information regarding the day-to-day duties, complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received to make a legitimate comparison of the advertised positions to the proffered position. The petitioner has failed to supplement the record of proceeding to establish that the duties and responsibilities of the advertised positions are the same or parallel to the proffered position.

Moreover, counsel claims that the advertisements are for [REDACTED] and submitted printouts from the Internet to support this assertion (including a printout from yellowpages.com). The printouts indicate that the petitioner and counsel used the following search terms: [REDACTED]

[REDACTED] Counsel claims that the companies "are very similar in size and income as compared with the petitioner." However, counsel did not provide the basis for his conclusions or reference any documentation to support this statement. No further information regarding the advertising employers was provided (e.g., documentation regarding the particular scope of the employers' operations, level of revenue and staffing – to list just a few elements that may be considered when relevant). Furthermore, the petitioner and counsel did not provide any independent evidence of how representative the job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. As they are only

solicitations for hire, they are not evidence of the employers' actual hiring practices. In the instant case, the petitioner has failed to establish the relevancy of the advertisements to the issue here.¹⁰

In addition to the job advertisements, the petitioner submitted two opinion letters in support of the instant petition. As a preliminary matter, the AAO notes that the term "recognized authority" means a person or an organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. 8 C.F.R. § 214.2(h)(4)(ii). A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. *Id.*

The first opinion letter is from [REDACTED] professor of marketing at [REDACTED]. The letter is dated July 5, 2012. As noted previously, [REDACTED] states that based on his review of the duties of the proffered position and the information provided to him regarding the petitioner's plans for future expansion, he finds that the proffered position involves "deep engagement in analytical as well as operational areas that will bear significant impact upon the employer's overall business development and overall expansion." [REDACTED] further indicates that the beneficiary will be "working at an advanced level," and states that "the position is responsible not for overseeing a single restaurant's marketing operations, but rather for analyzing and planning the possible opening of multiple restaurant locations and executing broad accordant marketing and analytical functions."

[REDACTED] states that he "reviewed an outline of the job duties required for the position, as contained in the employer's March 7, 2012 support letter." Upon review of the opinion letter, there is no indication that [REDACTED] possesses any knowledge of the petitioner's proffered position and its business operations beyond this information. There is no evidence that [REDACTED] has visited the

¹⁰ According to the *Handbook's* detailed statistics on market research analysts, there were approximately 282,700 persons employed as market research analysts and marketing research specialists in 2010. *Handbook*, 2012-13 ed., available at <http://www.bls.gov/ooh/Business-and-Financial/Market-research-analysts.htm#tab-6> (last accessed April 29, 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 these few job postings with regard to the common educational requirements for entry into parallel positions in similar organizations. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the 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 announcements supported the finding that organizations 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 these few postings (which appear to have been consciously selected) could credibly refute the statistics-based findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not normally require at least a baccalaureate degree in a specific specialty, or its equivalent, for entry into the occupation in the United States.

petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. He does not demonstrate or assert in-depth knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise. The very fact that he attributes various attributes to such a generalized treatment of the proffered position undermines the credibility of his opinion.

Notably, it does not appear that [REDACTED] is aware that the petitioner designated the proffered position as a Level I (entry) position in 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. The petitioner's designation of the position under this wage level signifies that the beneficiary will be expected to work under close supervision and receive specific instructions on required tasks and expected results. Additionally, the beneficiary will be expected to perform routine tasks that require limited, if any exercise of judgment. Moreover, the beneficiary's work will be closely monitored and reviewed for accuracy. It appears that [REDACTED] would have found this information relevant for the opinion letter. Moreover, without this information, the petitioner has not demonstrated that [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately determine parallel positions based upon job duties and responsibilities.

The second letter is from [REDACTED] department chair for hospitality studies at [REDACTED]. The letter is dated June 19, 2012. The AAO reviewed the letter in its entirety. However, as discussed below, the letter is not persuasive in establishing the proffered position as qualifying as a specialty occupation position.

In the appeal, counsel repeatedly claims that [REDACTED] is "a renowned scholar and expert of the hospitality industry." With the opinion letter, [REDACTED] submitted her resume. She did not provide any further supporting documentation to establish her credentials as a recognized authority on the relevant educational requirement for the proffered position. [REDACTED] resume indicates that she was granted a doctorate in July 2011, and she began serving as director of facilities and events and as an associate professor at [REDACTED] in June 2012 (the same month as the opinion letter was written). Previously she worked concurrently at [REDACTED] and as a sales associate/cashier at [REDACTED]. Her prior work experience includes serving as a general manager for [REDACTED], serving as a concierge/hostess at [REDACTED] and serving as a front desk manager at [REDACTED]. Counsel claims that [REDACTED] "memberships are quite extensive" and that she bi-annually participates in a program for local and state entities in an advisory capacity. However, the AAO observes that there is no evidence regarding the requirements for membership into the organizations, as well as [REDACTED] specific role within the organizations and bi-annual event.

In her letter, [REDACTED] lists the duties of the proffered position. She then concludes, based on her "knowledge, experience and education," and her "familiarity with the local and national hospitality markets" that the proffered position is "an advanced level professional position within the hospitality industry." She further states that "[a] bachelor or higher degree in a specific field of

study (Business Administration/Marketing) is the standard minimum requirement for entry into this particular position for companies that are comparable in size and similarly situated."

Upon review of the opinion letter, the AAO notes that [REDACTED] has not demonstrated or asserted in-depth knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise. Her opinion does not relate her conclusion to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for the conclusion about the educational requirements for the particular position here at issue.

Moreover, the AAO observes that in characterizing the proffered position as an "advanced level" position, it appears that [REDACTED] is also unaware that the petitioner designated the proffered position as a Level I (entry level) position on the LCA. Again, as previously noted, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that he would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results.

It appears that both [REDACTED] have based their assessments on incomplete information regarding the proffered position. Without this information, the petitioner has not demonstrated that [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately determine parallel positions based upon job duties and responsibilities.

Furthermore, the AAO notes that, while [REDACTED] may, in fact, be recognized authorities on various topics, they have failed to provide sufficient information regarding the basis of their claimed expertise on this particular issue. Neither their self-endorsement nor their resumes establish their expertise pertinent to the recruiting and hiring practices of organizations seeking to fill positions similar to the proffered position in the instant case. Without further clarification, it is unclear how their education, training, skills or experience would translate to expertise or specialized knowledge regarding the *current recruiting and hiring practices* of "Mongolian BBQ buffet style restaurants" (as stated by the petitioner in the letter of support) similar to the petitioner for marketing analyst positions.

Moreover, there is no indication that [REDACTED] have published any work or conducted any research or studies pertinent to the educational requirements for *marketing analysts* in the petitioner's industry for similar organizations, and no indication of recognition by professional organizations that they are an authority on those specific requirements. The opinion letters contain no evidence that they were based on scholarly research conducted by [REDACTED] and [REDACTED] in the specific area upon which they are opining. In reaching their conclusions, they provide no documentary support for their assertions regarding the education required for the position (e.g., statistical surveys, authoritative industry or government publications, or professional studies). They assert a general industry educational standard for organizations similar to the petitioner, without referencing any supporting authority or any empirical basis for the pronouncements.

Notably, they failed to provide the basis for their conclusions supported by copies or citations of any research material used.

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

Thus, based upon a complete review of the record of proceeding, the AAO finds that the petitioner has not established that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. Thus, for the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

The AAO acknowledges that the petitioner and its counsel may believe that the proffered position qualifies as specialty occupation under this criterion of the regulations. In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted various documents, including evidence regarding its business operations. For example, the petitioner submitted documentation regarding its corporate status; printouts from its website; marketing materials; and tax documents. The petitioner also submitted opinion letters from [REDACTED] as discussed at length above. The AAO reviewed the record of proceeding in its entirety. However, upon review of the record, the AAO finds that the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of marketing analyst.

A review of the record of proceeding indicates that the petitioner has failed to credibly demonstrate the duties the beneficiary will be responsible for or perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty, or its equivalent. Additionally, the AAO finds that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent. This is further evidenced by the LCA submitted by the petitioner in support of the instant petition, which indicates a Level I (entry level) wage. Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For example, a Level IV

(fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."¹¹

The petitioner failed to establish how the beneficiary's responsibilities and day-to-day duties are so complex or unique that the position can be performed only by an individual with a bachelor's degree in a specific specialty, or its equivalent. Thus, based upon the record of proceeding, including the LCA, it does not appear that the proffered position is so complex or unique that it can only be performed by an individual who has completed a baccalaureate program in a specific discipline that directly relates to the proffered position. Specifically, the petitioner fails to demonstrate how the duties of the position as described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it may believe are so complex and unique. While a few related courses may be beneficial, or even required, in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position.

The AAO observes that the description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

The AAO observes that the petitioner has indicated that the beneficiary's educational background and prior work experience will assist him in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. In the instant case, the petitioner does not establish which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner failed to demonstrate that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent. Consequently, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. To

¹¹ For additional information regarding wage levels as defined by DOL, see Employment and Training Administration (ETA), *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

this end, the AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

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

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

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. See generally *Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. See *id.* at 388.

In the instant case, the petitioner submitted job postings for the proffered position. One of the postings is dated October 20, 2011, the date on the second posting is not visible. As previously noted, the postings state that a "[b]achelor's [d]egree [is] required." The postings do not state that a bachelor's degree in a *specific specialty* is required. As discussed above, although a general-

purpose bachelor's degree 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.

In response to the RFE, the petitioner submitted an organizational chart. The chart indicates two individuals, the beneficiary and [REDACTED] will serve in the marketing department. Notably, the petitioner failed to provide any information regarding [REDACTED] role in the marketing department, job duties and academic credentials.

Counsel asserts that the position of marketing analyst was previously held by [REDACTED]. The petitioner and counsel submitted an unofficial transcript from [REDACTED] that indicates that [REDACTED] completed a Bachelor of Business Administration with a major in marketing/management. The petitioner and counsel also provided a Form W-2, Wage and Tax Statement, indicating that the petitioner paid [REDACTED] \$8,800. Based upon the salary paid to Ms. [REDACTED] it appears that she was only employed for a few months. No further documentation was provided. The petitioner did not state the total number of people who currently or in the past have served in the marketing analyst position.

The AAO observes that although counsel provided a general statement that the petitioner had previously employed an individual to serve as a marketing analyst, the petitioner failed to provide the job duties and day-to-day responsibilities of the position that counsel claims is the same as the proffered position. Further, the AAO notes that the duties of the proffered position, as provided by the petitioner, indicate that the beneficiary will "conduct feasibility studies on expansion of restaurant locations." Both the petitioner and counsel have emphasized that the proffered position is deeply involved in the petitioner's potential expansion to a second location in [REDACTED]. However, the petitioner has not established that the individual who was previously employed in the position performed similar duties with regard to the petitioner's expansion and development plans. Moreover, 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, it is unclear whether the duties and responsibilities of this individual are the same or related to the proffered position.

The petitioner stated in the Form I-129 petition that it has 22 employees and that it was established in 2004 (approximately eight years prior to the H-1B submission). Without further information, the submission of the academic credentials of one employee *over an eight 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.

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 petitioner has submitted sufficient evidence in support of the petition to establish that proffered position satisfies this criterion of the regulations. The AAO acknowledges that the petitioner and counsel believe that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. Moreover, the AAO reviewed the documentation submitted by the petitioner (including corporate documents; printouts from its website; marketing materials; tax documents, and opinion letters) but finds that it fails to establish that the proffered position qualifies as a specialty occupation under this criterion of the regulations. More specifically, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position.

Furthermore, the AAO also reiterates its earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level 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.

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.