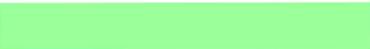




U.S. Citizenship  
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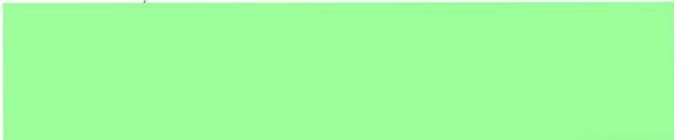


DATE: NOV 22 2013 OFFICE: CALIFORNIA SERVICE CENTER 

IN RE: Petitioner:   
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The service center director initially denied the nonimmigrant visa petition. Upon further review, the director subsequently reopened the matter, on Service motion, in order to afford the petitioner an additional opportunity to establish its eligibility for the benefit sought. In the reopened proceeding the director once again concluded that the petition should be denied, and she certified her decision to the Administrative Appeals Office (AAO) for review. The director's decision recommending denial of the petition will be affirmed. The petition will be denied.

The petitioner described itself as a nine-employee wealth management firm. It seeks approval of this Petition for a Nonimmigrant Worker (Form I-129) so that it may employ the beneficiary as an H-1B temporary 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), and the related regulations at 8 C.F.R. § 214.2(h).

The petition was filed for a part-time position to which the petitioner assigned the job title "Business Marketing Specialist." In support of this petition, the petitioner submitted a Labor Condition Application (LCA) that had been certified for a job offer falling within the "Market Research Analysts and Marketing Specialists" occupational category, at a Level I (entry-level) prevailing wage rate.

The record reflects that [REDACTED] awarded the beneficiary a bachelor's degree in Business Administration, with a major in Fashion Marketing and Management, in 2010. The petitioner submitted copies of the beneficiary's diploma and related academic transcripts from [REDACTED].

With regard to the minimum educational credentials necessary to perform the duties of the position, the petitioner's initial letter of support stated the following:

We require an individual with a minimum of a Bachelor's degree in Business, preferably with a concentration in Marketing.

In its response to the director's request for additional evidence (RFE), the petitioner widened the range of acceptable educational credentials, and stated the educational requirement as follows:

Minimum of a Bachelor's Degree in Business Administration, Marketing, Finance, Accounting or related field.

The director denied the petition on October 26, 2012, concluding that the petitioner had failed to establish that the proffered position is a specialty occupation.

Upon further review, the director subsequently reopened the matter on Service motion on March 28, 2013, and issued another RFE on that same date. She issued a third RFE on May 9, 2013. Counsel submitted a timely answer that replied to both RFEs jointly.

Not persuaded by the petitioner's response, the director again denied the petition. She certified this decision to the AAO on August 22, 2013 and issued the requisite Notice of Certification to the petitioner.

In both her initial decision on the petition and in her subsequent decision upon reopening, the director denied the petition. In both instances, the director determined that the evidence of record failed to establish the proffered position as a specialty occupation. The director's certification of her decision on the Service motion is now before the AAO.

On September 20, 2013, the AAO received counsel's brief and allied exhibits responding to the Notice of Certification. The exhibits enclosed with the brief are:

- Exhibit A: A copy of the one-page "Important Note" segment of the "Acknowledgements and Important Note" introducing the Internet version of the U.S. Department of Labor's *Occupational Outlook Handbook, 2012-13 Edition*.
- Exhibit B: A compilation of the following excerpts from a full-color document entitled "World Wealth Report 2013," produced by the [REDACTED] the cover/title page; a one-page table of contents; the preface; pages 28-40; pages 45-46; and a page containing both a copyright notice and a disclaimer.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's first RFE; (3) the petitioner's response to the first RFE; (4) the director's initial decision denying the petition; (5) the director's service motion combined with the second and third RFEs; (6) counsel's response to the combined service motion and RFEs; (7) the director's Form I-290C, Notice of Certification; and (8) counsel's responding brief with two documentary exhibits.

As will be discussed below, the AAO finds that the petitioner has failed to overcome the director's proposed ground for denying this petition. Consequently, the director's decision recommending denial of the petition will be affirmed, and the petition will be denied.

### **I. Standard of Review**

As a preliminary matter, and in light of counsel's references to the requirement that the AAO apply the "preponderance of the evidence" standard, the AAO affirms that, in the exercise of its administrative review in this matter, as in all matters that come within its purview, the AAO follows the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), unless the law specifically provides that a different standard applies. In pertinent part, that decision states the following:

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

\* \* \*

The "preponderance of the evidence" of "truth" is made based on the factual circumstances of each individual case.

\* \* \*

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

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

*Id.*

The AAO conducts its review of service center decisions on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, the AAO applies the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon its review of the present matter pursuant to that standard, however, the AAO finds that the evidence in the record of proceeding does not support counsel's contentions that the evidence of record requires that the petition at issue be approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, the AAO finds that the director's determination that the petitioner did not establish the proffered position as a specialty occupation was correct. Upon its review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, the AAO finds that the evidence of record does not establish that the proffer of a specialty occupation position is "more likely than not" or "probably" true. In other words, as the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads the AAO to believe that the petitioner's claim that the proffered position qualifies as a specialty occupation is "more likely than not" or "probably" true.

## II. The Statutory and Regulatory Framework

To meet the petitioner's burden of proof with regard to the proffered position's classification as an H-1B specialty occupation, 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
- (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 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 rely simply 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 beneficiary, 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.

### **III. Preliminary Findings With Regard to the Petitioner, the Proffered Position, and the Proposed Duties**

As will be reflected in the discussions below, the evidence of record presents a relatively broad view of the petitioner, its business operations, the duties that the petitioner ascribes to the proffered position, and the position itself. Consequently, as will be evident below, the AAO finds that the evidence of record does not present the proffered position or its constituent duties in sufficient detail to establish that the substantive nature of either the position or its duties as actually performed within the context of the petitioner's business operations would be so specialized, complex, and/or unique as to require the need for at least a bachelor's degree level of a body of highly specialized knowledge.

The Petitioner

The petitioner filed the instant petition on April 9, 2012. The Form I-129 that the petitioner filed in this matter relates several items of interest with regard to the petitioner and its operations at the time of the petition's filing.

According to the entries on the Form I-129, at the time of the petition's filing the petitioner had been doing business as a "Wealth Management Firm" since 2006, currently employed nine persons, and had a gross annual income of \$2,500,000.<sup>1</sup>

As for the pertinent North American Industry Classification System (NAICS) Code identifying its industry, the petitioner entered "52390."<sup>2</sup> This is the NAICS Code designated for the Investment Advice industry. Navigating the NAICS official Internet site for the related definition yields the following:<sup>3</sup>

**523930 Investment Advice**

This industry comprises establishments primarily engaged in providing customized investment advice to clients on a fee basis, but do not have the authority to execute trades. Primary activities performed by establishments in this industry are providing financial planning advice and investment counseling to meet the goals and needs of specific clients.

**Illustrative Examples:**

Financial investment advice services, customized, fees paid by client

Investment advisory services, customized, fees paid by client

Financial planning services, customized, fees paid by client

The March 22, 2012 letter of support, which was signed by the petitioner's Managing Director and filed with the Form I-129, described the petitioner as a "global wealth management firm created to service the financial needs of professional athletes and high net worth individuals." That letter further states that the petitioner "offer[s] custom tailored plans and advice to our 150+/- clients, applying a comprehensive life management approach," and that the petitioner "represent[s] many professional athletes who participate in the [redacted] and other elite sports," and

<sup>1</sup> The petitioner left blank the Form I-129 space for stating its net annual income.

<sup>2</sup> The North American Industry Classification System (NAICS) is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy, is maintained by the United States Department of Commerce, U.S. Census Bureau, and is accessible on the Internet at <http://www.census.gov/eos/www/naics/>.

<sup>3</sup> 2012 NAICS Definition for NAICS Code 523930, accessed at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited Nov. 19, 2013).

that those clients "tend to earn substantial sums over a relatively short timespan, necessitating non-traditional fiscal planning and financial management."

In an informational brochure attached to its March 22, 2012 letter of support, the petitioner also described itself as follows:

[Person's name] and [person's name] formed [redacted] in 2006 with the goal of creating an open-architecture wealth management platform specifically designed for professional athletes, entertainers and high net worth individuals. Through this innovative paradigm, [redacted] has forged a new path using proven methods which empower clients to grow their wealth long into retirement. Since inception, [redacted] has successfully grown its asset base and expanded advisory services to athletes in all sports. . . .

\* \* \*

Our clients include more than 150 Professional Athletes who participate in the [redacted] international leagues and other elite sports. They have the ability to earn substantial income over a short period of time and therefore it is critical that they plan accordingly. With a focus on education and a commitment to financial transparency, our systematic approach prepares them for this exceptional lifestyle. Through our experience and extensive network in the industry, we help Entertainers navigate the peaks and valleys inherent in their business. They more than others experience an unpredictable work environment that necessitates a balance of income and frequent liquidity. Together, we define and monitor a financial plan throughout their producing years that accommodate[s] their lifestyle for generations to come. We have created a specialized financial management platform for our High Net Worth clients. We offer direct access to proprietary and non-proprietary investments. These unique investments provide the opportunity to enhance overall portfolio returns for investors.

Thus, as reflected in the above review of information that the petitioner provided about itself, the petitioner presents itself as a successful and growing nine-employee firm specializing in wealth-management services for a substantial number of High Net Worth clients, particularly professional athletes and entertainers.

The AAO finds, however, that the petitioner provides little by way of substantive information about its particular business operations. Rather, it confines itself to descriptions of general attributes of its services and its clientele. Thus, while the petitioner avers that it provides the "non-traditional fiscal planning and financial management" necessitated by the peculiar careers and earning patterns of its wealthy clients, the evidence does not convey substantive details of such planning and management services, or of how they would manifest themselves in terms of specific, substantive work that the beneficiary would perform. Likewise, the evidence of record does not establish any substantive details of any particular work that the petitioner's "specialized financial management platform," its

"proven methods," or its planning and financial management services would generate for the proffered position.

The AAO's review of the total record of proceeding, of course, extends to counsel's argument with regard to the petitioner's assertion, in its letter of reply to the July 22, 2012 RFE, that, to earn the trust – and the business – of its High Net Worth clients, it "must employ individuals who have formal education at the university level." At the same time, this assertion is not persuasive.

Counsel's premise, that the expectations or preferences of the petitioner's client are a sufficient basis for establishing its position as an H-1B specialty occupation, is incorrect. As noted earlier in this decision's discussion of the pertinent statutory and regulatory framework, and as clear in the plain language of the controlling definitions of an H-1B specialty occupation, at section 214(i)(1) of Act, and at 8 C.F.R. § 214.2(h)(4)(ii), the determinative element is whether the evidence of record establishes that 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.<sup>4</sup>

The AAO finds that, although there appears to have been a major escalation in the regulations affecting wealth-management businesses and also an associated increase in the regulatory responsibilities of wealth managers, the evidence of record does not establish how, if at all, those factors have impacted upon the performance requirements of the proffered position, an assistant position that is subordinate to the petitioner's wealth managers. This will be further reflected in the later discussion of the document submitted with regard to the current and growing regulatory environment (i.e., Exhibit B of the counsel's brief in reply to the Notice of Certification),

#### The Proffered Position and its Constituent Duties

As already noted, the petitioner refers to the proffered position by the job title "Business Marketing Specialist." On the Form I-129, the petitioner attested that the beneficiary would work part-time, "10-20" hours per week, at \$25 per hour. As also noted, the petitioner submitted an LCA that had been certified for a job offer falling within the "Market Research Analysts and Marketing" occupational category, at a Level I (entry-level) prevailing wage rate.

In the letter of support referenced above, the petitioner described the duties of the proffered position as follows:

This position will involve researching, analyzing, and engaging in business and marketing strategies to increase client base and company growth. [The beneficiary]

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<sup>4</sup> In any event, the evidence in the record of proceeding does not document the clients' expectations or preferences with regard to the particular position that is the subject of this petition. Further, as this position has never before been a part of the petitioner's organization, there is no basis for the petitioner's clients to have even registered expectations about it. 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)).

will research and advise on effective management methods to ensure long term growth, effectiveness and competition. She will assist Senior Advisors in overseeing client expenditures, executing budget[s], and budget management. [The beneficiary] will research methods to increase market share and target market segmentation, analyze, review and discuss financial matters with clientele and manage existing relationships. She will prepare and present potential client budgets and spending summaries, utilizing theoretical principles of business, marketing and finance needed for this position. She will also prepare and execute marketing and competitor data to determine expansion and business opportunities.

The director issued an RFE on July 23, 2012 which requested, among other items, a more detailed job description. The petitioner's response included a September 7, 2012 letter from the petitioner which, in part, attested that the beneficiary would devote twenty percent (20%) her time to each of the following five sets of duties, quoted verbatim from the record:

- [1.] Research methods to increase market share & target market segmentation – identify marketing opportunities by identifying requirements of customer base; define market, competitor's share; establish targeted market share. Collect and analyze marketing data and industry trends. Improve product/service marketability and profitability by researching, identifying and capitalizing on market opportunities.
- [2.] Assist Senior Advisers in overseeing client expenditures, executing budget & budget management – Prepare financial reports for clients' portfolios, including return-on-investment analysis, cash flow analysis, depreciation/appreciation of real property; income projections; expense projections. Preparation of monthly, quarterly and annual Income Statements, Balance Sheets, and *ad hoc* financial reports for executive management; analyze financial reports. Based on the analysis, make recommendations to Executive Management regarding marketing and/or financial changes. Prepare clients' budgets for review and approval by executive management; compare and analyze actual earnings, revenues and expenses to the budget; report to management on budget shortfalls or overruns; adjust budgets, as necessary.
- [3.] Meet marketing and financial objectives by forecasting requirements; preparing an annual budget; scheduling expenditures; analyzing variances; [and] initiating corrective actions. Accomplish marketing objectives by planning, developing, implementing and evaluating marketing programs.
- [4.] Develop and present marketing information and recommendations for strategic planning to executive management and review marketing operational objectives; prepare and execute marketing plans; develop and implement productivity and quality assurance standards; identify market trends, determine improvements and implement changes.

- [5.] Oversee the design and production of printed collateral (brochures and presentations) and online materials (website design, content management, SEO improvement) to build awareness of the firm and recruit clients.

At this point the AAO will address the evidentiary value of the above set of duties that the petitioner ascribed to the proffered position. It should be noted that the AAO's comments and findings here will have a material bearing upon its analyses of the application of the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the AAO incorporates them by reference into its later discussion of the particular criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO sees the above-quoted paragraphs as essentially dividing the proffered position into two very broadly described components, namely, (1) general duties usually associated with Market Research Analysts and (2) duties beyond the scope of such positions (i.e., those under the umbrellas of (a) assisting Senior Advisors in their oversight of clients' wealth management, and (b) managing the promotional or marketing aspects of the petitioner's business). Thus, the AAO agrees with the general proposition, advanced by both the petitioner and the director, that, as presented, the scope of the proposed duties includes but is not exclusively associated with those of a market research analyst.

Next, the AAO finds that the constellation of duties presented in the five paragraphs indicate a position containing elements of several occupational groups as defined in the Standard Occupational Classification (SOC) system, the occupational classification system used by H-1B petitioners and USCIS as a standard way to classify and thereby identify particular positions within defined occupational categories.<sup>5</sup>

As described in the aforementioned five-paragraphs, the spectrum of proposed duties includes at least some duties that appear to relate to the following occupational categories: Market Research Analysts (the occupational group claimed in the petition and the related LCA), Personal Financial Advisors, Accountants, and Advertising Promotions and Marketing Managers.

As just noted, the record's descriptions of the proposed duties are sufficient to associate them, to some extent, with particular occupational categories. At the same time, the AAO also finds that the duty descriptions are not sufficiently detailed to identify any substantive aspects that would distinguish the proposed duties, or the position that they comprise, as so specialized, complex, and/or unique that their actual performance would require at least a bachelor's degree in a specific specialty or its equivalent. As clearly evident in the above quotations of the record's duty descriptions, they describe the proposed

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<sup>5</sup> The SOC system is accessible on the Internet at <http://www.bls.gov/soc/> (last visited Nov. 19, 2013). That website introduces the SOC system as follows:

The 2010 Standard Occupational Classification (SOC) system is used by Federal statistical agencies to classify workers into occupational categories for the purpose of collecting, calculating, or disseminating data. All workers are classified into one of 840 detailed occupations according to their occupational definition. To facilitate classification, detailed occupations are combined to form 461 broad occupations, 97 minor groups, and 23 major groups. Detailed occupations in the SOC with similar job duties, and in some cases skills, education, and/or training, are grouped together. . . .

duties exclusively in terms of general functions that the beneficiary would perform. As such, they do not inform the AAO of the substantive nature of the work that the beneficiary would perform, the substantive application of specialized knowledge that performance of those duties would involve, or any particular level of educational attainment in any specialty that would be required to perform them.

Before applying the criteria to the evidence in this record of proceeding, the AAO will address several issues specified in the petitioner's response to the Notice of Certification, the resolution of which will bear materially upon the AAO's later analysis of the application of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence of record. Also before proceeding to address these regulatory standards, the AAO will address the document that the petitioner submitted for consideration as expert evidence.

#### IV. Analysis of the Documentary Exhibits in the Certification Response

##### Use of the *Occupational Outlook Handbook*

USCIS and its predecessor agency (Immigration and Naturalization Service (INS)) have long relied upon the Department of Labor's (DOL's) *Occupational Outlook Handbook* (hereinafter referred to as the *Handbook*) as an authoritative source of information on the wide variety of occupations it addresses.<sup>6</sup>

The *Handbook* introduces itself as follows:

Welcome to the Nation's premier source for career information! The profiles featured here cover hundreds of occupations and describe What They Do, Work Environment, How to Become One, Pay, and more. Each profile also includes BLS employment projections for the 2010–20 decade.

Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2012-13 Edition*, Home, on the Internet at <http://www.bls.gov/ooh/> (last visited Nov. 19, 2013).

Under the heading "Occupational Information Included in the [the Handbook]," the *Handbook* states, in part:

Occupational Information Included in the Occupational Outlook Handbook (OOH) is a career guidance resource offering information on the hundreds of occupations that provide the overwhelming majority of jobs in the United States. Each occupational profile discusses what workers in that occupation do, their work environment, the typical education and training needed to enter the occupation, pay, and the job

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<sup>6</sup> The *Handbook*, which is available in printed form from third-party publishers, 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.

outlook for the occupation. Each profile is in a standard format that makes it easy to compare occupations.

Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2012-13 Edition*, Occupational Information Included in the OOH, on the Internet at <http://www.bls.gov/oooh/about/occupational-information-included-in-the-oooh.htm> (last visited Nov. 19, 2013).

The Bureau of Labor Statistics produces the *Handbook*. In the following item from the "Frequently Asked Questions" segment of its Internet site, the Bureau identifies itself as follows:

**Question: What is the Bureau of Labor Statistics (BLS)?**

**Answer:** The Bureau of Labor Statistics (BLS) is the principal fact-finding agency for the Federal Government in the broad field of labor economics and statistics. The BLS is an independent national statistical agency that collects, processes, analyzes, and disseminates essential statistical data to the American public, the U.S. Congress, other Federal agencies, State and local governments, business, and labor. The BLS also serves as a statistical resource to the Department of Labor.

BLS data must satisfy a number of criteria, including relevance to current social and economic issues, timeliness in reflecting today's rapidly changing economic conditions, accuracy and consistently high statistical quality, and impartiality in both subject matter and presentation.

Bureau of Labor Statistics, U.S. Department of Labor, Frequently Asked Questions (FAQs), on the Internet at [http://www.bls.gov/dolfaq/bls\\_ques26.htm](http://www.bls.gov/dolfaq/bls_ques26.htm) (last visited Nov. 19, 2013).

Counsel asserts that the service center director erred by according too much weight to the *Handbook*. Partially quoting the *Handbook's* introductory Acknowledgement and Important Note, counsel states:

CSC's [(i.e., the California Service Center's)] apparently absolute reliance upon [the *Handbook*] as a legally binding source of occupational data is misplaced. As stated in the [*Handbook*] itself:

"... the Handbook provides a general, composite description of jobs and cannot be expected to reflect work situations in specific establishments or localities. **The Handbook, therefore, is not intended, and should never be used, for any legal purpose.**

... the information in the Handbook should not be used to determine if an applicant is qualified to enter a specific job in an occupation."

To place the above quotes in the context in which they originally appear, the AAO quotes below the two paragraphs that contain this language cited by counsel. Those paragraphs read as follows:

The Handbook describes the job outlook over a projected 10-year period for occupations across the nation; consequently, short-term labor market fluctuations and regional differences in job outlook generally are not discussed. Similarly, *the Handbook provides a general, composite description of jobs and cannot be expected to reflect work situations in specific establishments or localities. The Handbook, therefore, is not intended, and should never be used, for any legal purpose.* For example, the Handbook should not be used as a guide for determining wages, hours of work, the right of a particular union to represent workers, appropriate bargaining units, or formal job evaluation systems. Nor should earnings data in the Handbook be used to compute future loss of earnings in adjudication proceedings involving work injuries or accidental deaths.

The Bureau of Labor Statistics has no role in establishing educational, licensing, or practicing standards for any occupation; any such standards are established by national accrediting organizations and are merely reported by BLS in the Handbook. The education information provided by the Handbook pertains to the typical requirements for entry into that occupation and does not describe the education and training of those individuals already employed in the occupation. In addition, education requirements for occupations may change over time and often vary by employer or state. Therefore, the information in the Handbook should not be used to determine if an applicant is qualified to enter a specific job in an occupation.

Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2012-13 Edition*, Acknowledgments and Important Note, on the Internet at <http://www.bls.gov/ooh/about/acknowledgements-and-important-note.htm> (last visited Nov. 19, 2013) (emphasis added).

Counsel errs to the extent that she may be claiming that the *Handbook* proscribes its use as documentary evidence in administrative proceedings before USCIS. In this regard, the examples that the pertinent paragraph provides of unintended uses are relevant and instructive. They are (1) using the *Handbook* as a guide for determining (a) wages, (b) hours of work, (c) the right of a particular union to represent workers, (d) appropriate bargaining units, or (e) formal job evaluation systems; and (2) using the *Handbook's* data to compute future loss of earnings in adjudication proceedings involving work injuries or accidental deaths. In light of the Bureau of Labor Statistics own endorsement of the *Handbook* as a reliable source of information on occupational categories and their entry requirements, and in light of the examples of unintended uses cited in the *Handbook's* "Important Note," the AAO finds that, if in fact it is counsel's intent to so argue, the argument against the use of the *Handbook* in USCIS adjudications is without merit. However, the AAO concurs with counsel to the extent that counsel may be asserting that it would be erroneous to accord to the *Handbook* the weight or directive power of statute, regulation, or any legally binding document or directive.

That said, the AAO also finds that counsel has not clearly articulated the particular bases for her reference to the director's "apparently absolute reliance upon [the *Handbook*] as a legally binding source of occupational data." In this regard, given that the *Handbook's* information is published by the Bureau of Labor Statistics and on the basis of that Bureau's own research and analysis, the AAO finds no fault with the director's treatment of the *Handbook's* information as reliable. The AAO, however, also does not discern from the record that the director failed to either (a) fully and fairly consider and accord appropriate evidentiary weight to any countervailing evidence from any other source or (b) properly determine the ultimate impact of the *Handbook's* information upon the issues for which the *Handbook* was considered, including any evidence contrary to the *Handbook*.

Upon reviewing in its entirety all portions of the [REDACTED] submitted as Exhibit B to the petitioner's brief on certification, the AAO acknowledges that the authors address the dramatically increasing weight of regulations that confront wealth-managers and wealth-management-firms and that complicate the investing experience for the High Net Worth Individuals whom they serve. However, the AAO finds nowhere in Exhibit B any specific discussion of any impact that the burgeoning regulatory environment has had, or will have, upon academic degree-levels or academic concentrations required for any specific position in the wealth-management industry. Further, nowhere does this submission specifically address the particular type of position that is the subject of this petition, the minimum educational credentials required to perform such a position, or any correlation between the increased regulatory environment and the minimum educational credentials required for the proffered position. Accordingly, the AAO finds that the [REDACTED] has no probative value towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Further, based upon its review of the full content of the [REDACTED] exhibit, the AAO does not find that this exhibit contains sufficient evidence to support counsel's assertion that "the complexity of the petitioner's industry makes it more likely than not that the proffered position qualifies as a specialty occupation." 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

#### V. The Letter Submitted for Consideration as an Expert Opinion

Here the AAO will discuss why it accords no probative value to the letter that the petitioner submitted from [REDACTED]

In his letter, dated September 13, 2012, [REDACTED] (1) describes the credentials that he asserts qualify him to opine upon the nature of the proffered position, (2) briefly lists the duties proposed

for the beneficiary, (3) claims that wealth management firms typical require candidates for similar positions to possess a bachelor's degree, and (4) states his belief that the performance of the duties he lists requires at least a bachelor's degree in business administration, finance, or a related field.

As will now be discussed, the AAO finds that [REDACTED] letter does not constitute probative evidence of the proffered position satisfying any criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A).

First, [REDACTED] submission does not discuss the duties of the proffered position in any substantive detail. To the contrary, he simply listed them in bullet-point fashion with little analysis. As a result, the degree to which [REDACTED] analyzed these duties prior to formulating his letter is not evident.

Next the letter is not accompanied by, and does not expressly state the full content of, whatever documentation and/or oral transmissions upon which it may have been based. For instance, [REDACTED] does not indicate whether he visited the petitioner's business premises or communicated with anyone affiliated with the petitioner as to what the performance of the general list of duties cited by the professor would actually require. Nor does the professor's letter articulate whatever familiarity he may have obtained regarding the particular content of the work products that the petitioner would require of the beneficiary. In short, while there is no standard formula or "bright line" rules for producing a persuasive opinion regarding the educational requirements of a particular position, a person purporting to provide an expert evaluation of a particular position should establish greater knowledge of the particular position in question than [REDACTED] has done here.

Nor does [REDACTED] reference and discuss any studies, surveys, industry publications, other authoritative publications, or other sources of empirical information which he may have consulted in the course of whatever evaluative process he may have followed.

Furthermore, [REDACTED] description of the position upon which he opines does not indicate that he considered, or was even aware of, the fact that the petitioner submitted an LCA that was certified for a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation which, as noted *infra*, signifies that the beneficiary is only expected to possess a basic understanding of the occupation. In any event, the professor nowhere discusses this aspect of the proffered position. The AAO considers this a significant omission, in that it suggests an incomplete review of the position in question and a faulty factual basis for the professor's ultimate conclusion as to the educational requirements of the position upon which he opines.

As noted earlier, the LCA submitted by the petitioner in support of the instant position was certified for use with a job prospect within the "Market Research Analysts and Marketing" occupational classification, SOC (O\*NET/OES) Code 13-1161, and a Level I (entry-level) prevailing wage rate,

the lowest of the four assignable wage-levels.<sup>7</sup> The *Prevailing Wage Determination Policy Guidance* 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.

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](http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf) (last visited Nov. 19, 2013).

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 same 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 she will be expected to perform routine tasks requiring limited, if any, exercise of

<sup>7</sup> DOL has stated clearly that its LCA certification process is cursory, that it does not involve substantive review, and that it makes the petitioner responsible for the accuracy of the information entered in the LCA. With regard to LCA certification, the regulation at 20 C.F.R. § 655.715 states the following:

*Certification* means the determination by a certifying officer that a labor condition application is not incomplete and does not contain obvious inaccuracies.

Likewise, the regulation at 20 C.F.R. § 655.735(b) states, in pertinent part, that "[i]t is the employer's responsibility to ensure that ETA [(the DOL's Employment and Training Administration)] receives a complete and accurate LCA."

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) also makes clear that certification of an LCA does not constitute a determination that a position qualifies for classification as a specialty occupation:

Certification by the Department of Labor 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.

judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

omission of such an important factor as the LCA wage-level significantly diminishes the evidentiary value of his assertions.

Furthermore, finds that a range of degrees, including a general-purpose bachelor's degree – i.e., a bachelor's degree in business administration – would adequately prepare an individual to perform the duties of this position. That statement, however, is tantamount to a conclusion that the proffered position is not in fact a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. 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).

In addition to proving that a job requires the theoretical and practical application of a body of specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must also establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As explained above, USCIS interprets the supplemental degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) as requiring a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, 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.

Finally, and in any event, the record contains no evidence supporting claim that that wealth management firms typically require candidates for similar positions to possess a bachelor's degree in marketing, business administration, finance, or a related field. Again, 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 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

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 letter is not probative evidence towards satisfying any criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). For economy's sake, the AAO hereby incorporates the above discussion and findings into its analysis of each of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

## VI. Application of the Regulatory Provisions to the Record of Proceeding

Having made the initial findings discussed above, 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 now discuss its determination that the evidence of record has not satisfied at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position that is the subject of the instant petition.

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

As noted, the LCA submitted in support of this petition was certified for a job offer falling within the "Market Research Analysts and Marketing" occupational category, and counsel cited to the *Handbook's* entry for that occupational category in her October 10, 2012 letter. The AAO agrees that most of the duties proposed for the beneficiary fall within this occupational category.

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

Market research analysts study market conditions in local, regional, or national areas to examine potential sales of a product or service. They help companies understand what products people want, who will buy them, and at what price.

### Duties

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

U.S. Dept 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> (last visited Nov. 19, 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> (last visited Nov. 19, 2013).

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 (or its equivalent)" 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 (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties.<sup>8</sup> Section 214(i)(1)(B) of the Act (emphasis added).

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." Again, 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 standard, 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 particular position proffered here as being a specialty occupation.

In her July 29, 2013 letter, counsel argued that several of the duties proposed for the beneficiary "are in addition to and not included in the [*Handbook's*] description" of those typically performed by market research analysts. The AAO agrees. The tasks which counsel argues exceed the scope of typical market research analyst positions fall primarily within those duties described by the petitioner in the undated document attached to its September 7, 2012 RFE response as falling within that twenty percent of time during which the beneficiary would perform the following duties:

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

Assist Senior Advisers in overseeing client expenditures, executing budget [and] budget management – Prepare financial reports for clients' portfolios, including return-on-investment analysis, cash flow analysis, depreciation/appreciation of real property; income projections; [and] expense projections. Preparation of monthly, quarterly and annual Income Statements, Balance Sheets, and *ad hoc* financial reports for executive management; analyze financial reports. Based on the analysis, make recommendations to Executive Management regarding marketing and/or financial changes. Prepare clients' budgets for review and approval by executive management; compare and analyze actual earnings, revenues and expenses to the budget; report to management on budget shortfalls or overruns; [and] adjust budgets, as necessary.

As the petitioner ascribes twenty percent of the beneficiary's time to researching and preparing matters for the petitioner's wealth managers, the AAO will now turn to the *Handbook's* discussion of wealth manager positions. In doing so, however, the AAO notes that the duties described above do not strictly comprise those of a wealth manager, as they are to be performed not in an advisor-to-client role, but mainly in an assistance role to personal financial advisors and to help those wealth managers assess particular clients' situations for appropriate advice to those clients. The AAO will nevertheless assume for the sake of argument that the duties in question would be those of a wealth manager in the interest of providing the petitioner with a comprehensive review of the position.

The *Handbook's* discussion of wealth managers is contained within its entry for the "Personal Financial Advisors" occupational category, which states the following:

Personal financial advisors give financial advice to people. They help with investments, taxes, and insurance decisions.

**Duties.**

Personal financial advisors typically do the following:

- Meet with clients in person to discuss their financial goals
- Explain the types of financial services they provide
- Educate clients and answer questions about investment options and potential risks
- Recommend investments to clients or select investments on their behalf
- Help clients plan for specific circumstances, such as education expenses or retirement

- Monitor clients' accounts and determine if changes are needed to improve account performance or accommodate life changes, such as getting married or having children
- Research investment opportunities

Personal financial advisors assess the financial needs of individuals and help them with investments (such as stocks and bonds), tax laws, and insurance decisions. Advisors help clients plan for short-term and long-term goals, such as education expenses and retirement. They recommend investments to match the clients' goals. They invest clients' money based on the clients' decisions.

Many also provide tax advice or sell insurance.

Although most planners offer advice on a wide range of topics, some specialize in areas such as retirement or risk management (evaluating how willing the investor is to take chances, and adjusting investments accordingly).

Many personal financial advisors spend a lot of time marketing their services, and they meet potential clients by giving seminars or through business and social networking. Networking is the process of meeting and exchanging information with people, or groups of people, who have similar interests.

After they have invested funds for a client, they, as well as the client, get regular reports of the investments. They monitor the client's investments and usually meet with each client at least once a year to update the client on potential investments and to adjust the financial plan because of the client's changed circumstances or because investment options have changed.

Many personal financial advisors are licensed to directly buy and sell financial products, such as stocks, bonds, annuities, and insurance. Depending on the agreement they have with their clients, personal financial advisors may have the clients' permission to make decisions about buying and selling stocks and bonds.

**Private bankers** or **wealth managers** are personal financial advisors who work for people who have a lot of money to invest. These clients are similar to institutional investors (commonly companies or organizations), and they approach investing differently from the general public. Private bankers manage a collection of investments, called a portfolio, for these clients by using the resources of the bank, including teams of financial analysts, accountants, and other professionals. For more information on the duties of these other financial workers, see the profiles on financial analysts and accountants and auditors.

advisors.htm#tab-2 (last visited Nov. 19, 2013).

In relevant part, the *Handbook* states the following with regard to the educational requirements necessary for entrance into this field:

Personal financial advisors typically need a bachelor's degree. Although employers usually do not require a specific field of study for personal financial advisors, a degree in finance, economics, accounting, business, mathematics, or law is good preparation for this occupation. Courses in investments, taxes, estate planning, and risk management are also helpful. Programs in financial planning are becoming more available in colleges and universities.

*Id.* at <http://www.bls.gov/ooh/Business-and-Financial/Personal-financial-advisors.htm#tab-4> (last visited Nov. 19, 2013).

While the *Handbook* indicates that a bachelor's degree is typically required, it also specifically states that "employers usually do not require a specific field of study." The *Handbook*, therefore, does not support a finding that the duties the beneficiary would perform in support of her superior's financial advice to clients would require a bachelor's degree in a specific specialty or its equivalent. Thus, while the AAO agrees with counsel that these duties do differentiate the petitioner's proffered position from typical market research analyst positions, these additional duties do not aid the petitioner in demonstrating that a bachelor's degree in a specific specialty, or the equivalent, is required to perform the duties of this particular position.

The AAO does not agree with the director that the position involves accounting duties and her comments indicating that such is the case are hereby withdrawn. However, even if the position did involve accounting duties, the AAO would still find that the inclusion of such duties would not establish the position as a specialty occupation.

In pertinent part, the *Handbook* states the following with regard to accountants and auditors:

Accountants and auditors prepare and examine financial records. They ensure that financial records are accurate and that taxes are paid properly and on time. Accountants and auditors assess financial operations and work to help ensure that organizations run efficiently. . . .

Accountants and auditors typically do the following:

- Examine financial statements to be sure that they are accurate and comply with laws and regulations
- Compute taxes owed, prepare tax returns, and ensure that taxes are paid properly and on time

- Inspect account books and accounting systems for efficiency and use of accepted accounting procedures
- Organize and maintain financial records
- Assess financial operations and make best-practices recommendations to management
- Suggest ways to reduce costs, enhance revenues, and improve profits

In addition to examining and preparing financial documentation, accountants and auditors must explain their findings. This includes face-to-face meetings with organization managers and individual clients, and preparing written reports.

Many accountants and auditors specialize, depending on the particular organization that they work for. Some organizations specialize in assurance services (improving the quality or context of information for decision makers) or risk management (determining the probability of a misstatement on financial documentation). Other organizations specialize in specific industries, such as healthcare.

\* \* \*

**Management accountants**, also called cost, managerial, industrial, corporate, or private accountants, record and analyze the financial information of the organizations for which they work. The information that management accountants prepare is intended for internal use by business managers, not by the general public.

They often work on budgeting and performance evaluation. They may also help organizations plan the cost of doing business. Some may work with financial managers on asset management, which involves planning and selecting financial investments such as stocks, bonds, and real estate.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Accountants and Auditors," <http://www.bls.gov/ooh/Business-and-Financial/Accountants-and-auditors.htm#tab-2> (last visited Nov. 19, 2013).

With regard to the educational requirements necessary for entry into this occupational classification, the *Handbook* states that "[m]ost accountants and auditors need at least a bachelor's degree in accounting or a related field." *Handbook* at <http://www.bls.gov/ooh/Business-and-Financial/Accountants-and-auditors.htm#tab-4> (last visited Nov. 12, 2013). However, "most" does not indicate that an accountant position normally requires at least a bachelor's degree in a specific specialty or its equivalent for entry into that occupation. The first definition of "most" in *Webster's New Collegiate College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of accountant positions require at least a bachelor's degree in a specific specialty, it could be said that "most" accountant positions

require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." Section 214(i)(1) of the Act.

Furthermore, the *Handbook* includes the following statement:

In some cases, graduates of community colleges, as well as bookkeepers and accounting clerks who meet the education and experience requirements set by their employers, get junior accounting positions and advance to accountant positions by showing their accounting skills on the job.

*Handbook* at <http://www.bls.gov/ooh/Business-and-Financial/Accountants-and-auditors.htm#tab-2> (last visited Nov. 19, 2013). Thus, the *Handbook* does not indicate that a minimum of a bachelor's degree in a specific specialty or its equivalent is normally required for entry into this occupational category. Instead, the *Handbook* indicates that this occupational category accommodates a wide spectrum of educational credentials, and that spectrum includes credentials that fall short of a bachelor's degree in a specific specialty or its equivalent.

As clear from the statements from the *Handbook* excerpted above, the fact that a person may be employed in a position designated as that of an accountant and may apply accounting principles in the course of his or her job is not in itself sufficient to establish the position as one that qualifies as a specialty occupation. Thus, it is incumbent on the petitioner to provide sufficient evidence to establish that the particular position being proffered would involve accounting 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 accounting. To make this determination, the AAO turns to the record for information regarding the duties and nature of the petitioner's business operations.

As indicated above, the AAO does not agree with the director's apparent finding that some of the duties of the proffered position align with those performed by accountants. However, even if it did, the petitioner's failure to establish the substantive nature of the duties that the beneficiary would perform on a day-to-day basis would preclude a finding that any such duties similar to those performed by accountants would involve accounting 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 accounting.

The remaining duties proposed for the beneficiary which, according to counsel, "are in addition to and not included in the [*Handbook's*] description" of those typically performed by market research analysts, fall primarily within those duties described by the petitioner in the undated document attached to its September 7, 2012 RFE response as falling within that twenty percent of time during which the beneficiary would perform the following duties:

Oversee the design and production of printed collateral (brochures and presentations) and online materials (website design, content management, SEO improvement) to build awareness of the firm and recruit clients.

Again, the AAO agrees with counsel that these duties exceed the scope of typical market research analyst positions. However, once again, these duties do not establish that the position requires an individual with a bachelor's degree in a specific specialty, or the equivalent. These duties are similar to some that the *Handbook* identifies as being normally performed by individuals working in positions falling within the "Advertising, Promotions, and Marketing Managers" occupational category.<sup>9</sup> The *Handbook's* entry for this occupational category states, in pertinent part, the following:

**Promotions managers** direct programs that combine advertising with purchasing incentives to increase sales. Often, the programs use direct mail, inserts in newspapers, Internet advertisements, in-store displays, product endorsements, or special events to target customers. Purchasing incentives may include discounts, samples, gifts, rebates, coupons, sweepstakes, and contests.

**Marketing managers** estimate the demand for products and services that an organization and its competitors offer. They identify potential markets for the organization's products.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Advertising, Promotions, and Marketing Managers," <http://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm#tab-2> (last visited Nov. 19, 2013).

However, in relevant part, the *Handbook* states the following with regard to the educational requirements necessary for entrance into this field:

A bachelor's degree is required for most advertising, promotions, and marketing management positions. . . .

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<sup>9</sup> The petitioner's use of the word "oversee" indicates supervisory responsibilities and is the reason the AAO considers these particular duties similar to those of a position falling within the "Advertising, Promotions, and Marketing Managers" occupational category. If this would not be the case and if this set of duties would not involve supervisory responsibilities, the AAO would consider them similar to those of a position falling within the "Desktop Publishers" occupational category and analyze them accordingly. The *Handbook* does not indicate that a bachelor's degree in a specific specialty or its equivalent is normally required for desktop publisher positions. To the contrary, the *Handbook* states that desktop publishers "have a variety of educational backgrounds," including associate's degrees, bachelor's degrees, or "postsecondary non-degree award[s]." U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Desktop Publishers," <http://www.bls.gov/ooh/office-and-administrative-support/desktop-publishers.htm#tab-4> (last visited Nov. 19, 2013).

Most marketing managers have a bachelor's degree. Courses in business law, management, economics, accounting, finance, mathematics, and statistics are advantageous. In addition, completing an internship while in school is highly recommended.

*Id.* at <http://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm#tab-4> (last visited Nov. 19, 2013).

The statements made by the U.S. Department of Labor in the *Handbook* do not support a finding that a bachelor's degree in a specific field of study is required for entry into the Marketing Managers occupational category. To the contrary, although the *Handbook* states that courses in business law, management, economics, accounting, finance, mathematics, and statistics are "advantageous," it does not state that a bachelor's degree from any particular field of study is required. The statement that a certain degree is advantageous is not sufficient to establish that a bachelor's degree in a specific specialty, or the equivalent, is required.

Additionally, even if the *Handbook* did state that most positions in the "Advertising, Promotions, and Marketing Managers" occupational category required a bachelor's degree in a specific specialty, or the equivalent, that statement would still not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(I). Again, the first definition of the word "most" in *Webster's New College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of these positions require at least a bachelor's degree in a specific specialty, or the equivalent, it could be said that "most" of them require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." Section 214(i)(1) of the Act.

Thus, while the AAO agrees with counsel that these duties also differentiate the petitioner's proffered position from typical market research analyst positions, they do not aid the petitioner in demonstrating that a bachelor's degree in a specific specialty, or the equivalent, is required to perform the duties of the position, either, based on the information provided by the *Handbook*.

In summary, the majority of the duties proposed for the beneficiary fall within the "Market Research Analysts" occupational category – the one for which the LCA was certified. The AAO has also addressed the Personal Financial Advisors and the Accountants occupational categories, but not because the evidence of record establishes that the proffered position as comprising a position in either, or both, categories. Likewise, the AAO addressed the "Advertising, Promotions, and Marketing Managers" occupational category because the petitioner ascribed to the proffered position some of type of work that persons in that occupation may perform. In any event, however, the *Handbook* does not indicate that any of these occupational categories require a minimum of a bachelor's degree in a specific specialty, or the equivalent, for entry into those occupations.

On appeal, counsel argues that "absolute reliance on the [*Handbook*] as a legally binding source of occupational data is misplaced." The burden of proof in this proceeding, however, rests solely with the petitioner, and the only alternative authoritative source cited by counsel – DOL's Occupational Information Network (O\*NET OnLine) – also does 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). Section 291 of the Act, 8 U.S.C. § 1361. O\*NET OnLine is not particularly useful in determining whether a baccalaureate degree in a specific specialty, or its equivalent, is a standard entry 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. Furthermore, the Specialized Vocational Preparation (SVP) ratings, which are cited within O\*Net OnLine's Job Zone designations, are meant to indicate only the total number of years of vocational preparation required for a particular position. The SVP ratings do 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 cited by counsel is of little evidentiary value to the issue presented on appeal.

Where, as here, the *Handbook* does not support the proposition that the proffered position satisfies this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise satisfies this criterion by a preponderance of the evidence standard, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that supports a favorable finding with regard to this criterion. 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." Again, 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. In this case, the *Handbook* does not support the proposition that the proffered position satisfies 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), and the record of proceeding does not contain any persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion in this occupational category would be sufficient in and of itself to establish that a bachelor's or higher degree in a specific specialty or its equivalent "is normally the minimum requirement for entry into [this] particular position."

In addition to the fact that the record contains no information from an authoritative source establishing that performance of the duties of the proffered position requires a bachelor's degree in a specific specialty, or the equivalent, the petitioner's own statements establish further that such is not the case. As noted above, the petitioner stated in the undated document attached to its September 7, 2012 RFE response that it would find acceptable a bachelor's degree in business administration, a bachelor's degree in marketing, a bachelor's degree in finance, a bachelor's degree in accounting, or a bachelor's degree in a related field. As was discussed above, the statement that a range of degrees,

including a general-purpose bachelor's degree – i.e., a bachelor's degree in business administration – would adequately prepare an individual to perform the duties of this particular position is tantamount to an admission that the proffered position is not in fact a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.<sup>10</sup>

Finally, the AAO notes again that the petitioner submitted an LCA certified for a job prospect with 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. In conclusion, as the evidence in the record of proceeding does not establish that a baccalaureate or higher degree in a specific specialty or its equivalent 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 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty or its equivalent. Nor are there any submissions from a professional association in the petitioner's industry stating that individuals employed in positions parallel to the proffered position are

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<sup>10</sup> Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. See, e.g., *Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; cf. *Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: otherwise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions.

As evidence of an industry recruiting and hiring standard, the petitioner submitted an excerpt from the website of I [REDACTED] which describes itself in the excerpt as "a firm specializing in all aspects of personal representation for the professional athlete," and stated that "[t]here is no task too large or small for us to undertake." The excerpt provides the names of eight of [REDACTED] employees and indicates that four of these individuals possess a law degree; one possesses a master's degree in business administration; one possesses a master's degree in an unspecified field; one possesses a bachelor's degree in business administration with a concentration in marketing; and one possesses an unspecified "degree" in liberal arts.

This excerpt does not satisfy the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). First, the petitioner has not submitted any evidence to demonstrate that any of the positions described in this excerpt are "parallel" to the position that is the subject of this petition. Nor does the record contain any evidence demonstrating that the petitioner is "similar" to [REDACTED] in size, scope, and scale of operations, business efforts, expenditures, or other fundamental dimensions.

Nor is it clear that [REDACTED] required these individuals, three of whom do not appear to possess a bachelor's or higher degree in a specific specialty or its equivalent, to possess these educational backgrounds as a condition of their employment. Again, the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) calls for a petitioner to establish that a "requirement" of a bachelor's or higher degree in a specific specialty, or the equivalent, is common to the petitioner's industry in positions that are both parallel to the proffered position and located in organizations that are similar to the petitioner. As stated previously, 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.

For all of these reasons, the excerpt from [REDACTED] website does not satisfy the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

As further evidence of an industry recruiting and hiring standard, the petitioner also submitted an excerpt from the website of [REDACTED] which claims expertise in "providing for the unique needs of the affluent." The excerpt provides the names of seven of [REDACTED] employees and, while their degrees were not specified, the AAO presumes from their titles that two of them possess law degrees and four have accounting degrees. The AAO cannot ascertain the educational background of the seventh individual.

This excerpt does not satisfy the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), either. First, the petitioner has not submitted evidence to demonstrate that any of the positions described in this excerpt are "parallel" to the position that is the subject of this

petition.<sup>11</sup> Nor does the record contain any evidence demonstrating that the petitioner is "similar" to [REDACTED] in size, scope, and scale of operations, business efforts, expenditures, or in any other relevant way. Finally, as was the case with [REDACTED] it is not clear whether [REDACTED] required any of these individuals to possess any particular educational background as a condition of employment as required by the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Again, 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.

For all of these reasons, the excerpt from [REDACTED] website does not satisfy the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor do the 18 job vacancy announcements contained in the record of proceeding satisfy the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).<sup>12</sup> First, the petitioner has not submitted any evidence to demonstrate that the positions described in these announcements are "parallel" to the one being proffered here. For example, the AAO notes that work experience is required for sixteen of these eighteen positions and preferred for another. 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, which signifies that the beneficiary is only expected to possess a basic understanding of the occupation. Absent evidence to the contrary, 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 the positions described in these job vacancy announcements. Accordingly, the petitioner has failed to establish that the positions described in these announcements are "parallel" to the one being proffered here.

Second, the petitioner has not submitted evidence to demonstrate that any of these 18 advertisements are from companies "similar" to the petitioner in size, scope, and scale of operations, business efforts, expenditures, or in any other relevant extent. As noted above, the petitioner described itself on the Form I-129 as a nine-employee wealth management firm. However, [REDACTED] is a multinational investment banking firm; [REDACTED] are superregional banking institutions; [REDACTED] is a multinational management consulting, technology services, and outsourcing company; [REDACTED] is a credit union. The record contains no information regarding the business activities of [REDACTED] or the unnamed "sports merchandising company" located in [REDACTED]. The petitioner did not submit any evidence establishing similarity between itself and any of the companies which placed these 18 announcements. Again, simply going on record without supporting documentary evidence

<sup>11</sup> While the excerpt does not discuss the job duties of any of these individuals in detail, a cursory review of their titles – four principals, one chief operating officer, one chief financial officer, and one tax manager – does not lead the AAO to conclude that any of them occupy positions "parallel" to the one proposed in this petition.

<sup>12</sup> The director's August 22, 2013 Notice of Certification indicated that the petitioner submitted 17 job vacancy announcements. While incorrect, it appears to have been a harmless typographical error on the part of the director.

is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

Counsel's argument that "there is nothing in law or regulation stating that 'parallel positions' means 'identical positions' or that 'similar organizations' mean 'identical organizations,'" is acknowledged. Given the issues identified above, however, the AAO finds nonetheless that the petitioner has failed to establish that these job-vacancy announcements pertain to parallel positions in similar organizations.

Furthermore, the petitioner has not established that the positions being advertised in these job-vacancy announcements require a bachelor's degree in a specific specialty or its equivalent. For example, the job-vacancy announcements placed by [REDACTED] the unnamed sports management company located in [REDACTED] indicate that a general-purpose bachelor's degree, such as a bachelor's degree in business or business administration, would adequately prepare an individual to perform the duties of those positions.

As previously discussed, such evidence supports a conclusion opposite of what is being asserted by the petitioner, indicating instead that the proffered position is not in fact a specialty occupation.

In similar fashion, although the job-vacancy announcement placed by [REDACTED] states that an ideal candidate would possess three to five years of work experience, it did not state a requirement for a degree of any kind, let alone a bachelor's degree in a specific specialty, or the equivalent. Although the job-vacancy announcement placed by [REDACTED] states a requirement for a bachelor's degree, it does not require that the degree be in a specific specialty. Instead, it states only a preference for "concentrations" in personal financial planning, investment management, business administration, accounting, finance, or banking. Although the job-vacancy announcement placed by the Product Management Group states a requirement for a bachelor's degree, it does not require that the degree be in a specific specialty. Instead, it states only a preference for a degree in business, accounting, finance, or a degree "with a strong mathematical component." Although the job-vacancy announcement placed by [REDACTED] states a requirement for a bachelor's degree, it does not require that the degree be in a specific specialty. Instead, it states only a preference for a degree in economics, business, or marketing.

Nor does the petitioner submit any evidence regarding how representative these advertisements are of the usual recruiting and hiring practices of the industries in which these advertisers operate. 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*, 22 I&N Dec. at 165.

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 in a specific specialty or its equivalent.

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 the duties of that position. In this regard, the AAO hereby incorporates into this analysis this decision's earlier comments and findings with regard to the relatively abstract and generalized level at which the petitioner describes the proposed duties.

Also, as reflected in the discussion of the first criterion, even as a composite of the market research analysis, financial advising, accounting, and advertising, promotions, and marketing management duties, there is nothing in the *Handbook* that suggests that those duties could only be performed by a person with at least a bachelor's degree in a specific specialty or its equivalent; and the generalized level of the duty descriptions do not provide a substantive basis for a finding that, in the aggregate, the proposed duties would comprise a position so complex or unique that it could only be performed by a person with at least a bachelor's degree in a specific specialty or its equivalent.

The statements of counsel and the petitioner with regard to the claimed complex and unique nature of the proffered position are acknowledged. For example, counsel asserted the following in her July 29, 2013 letter:

[T]he specialization and complexity of the Beneficiary's proposed duties [which collectively constitute the position] are of a higher magnitude than those typically required of a Business Marketing Specialist. The petitioner's business consists of providing wealth management services in the highly specialized field of world-class entertainers, professional athletes and other high-net-worth individuals with unique needs[.]

On appeal, counsel argues that the petitioner's description of the position:

provides context for the level of specialization and complexity inherent in the [position], making it more likely than not that her responsibilities are of a higher level of complexity than those even typically required of a Business Marketing Specialist for a wealth management firm with a more generalized clientele than the petitioner's.

Finally, counsel also submits a document entitled the aforementioned [REDACTED] already addressed in this decision, and counsel argues that "the petitioner's business operations are, by definition, characterized by continuously increasing complexity," – implying that such complexity should be imputed to the position proposed for the beneficiary.

These assertions, however, are undermined by the fact that the petitioner submitted an LCA certified for a job prospect with a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation. 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 analysis of 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 requiring limited, if any, exercise of independent judgment; that the beneficiary's work will be closely supervised and monitored; that she will receive specific instructions on required tasks and expected results; and that her work will be reviewed for accuracy. 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](http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf).

Additionally, given the *Handbook's* indication that typical, run-of-the-mill market research analysis, financial advising, and advertising, promotions, and marketing management positions do not require at least a bachelor's degree in a specific specialty, or the equivalent, for entry into those occupations, it is not credible that a position involving limited, if any, exercise of independent judgment, close supervision and monitoring, receipt of specific instructions on required tasks and expected results, and close review *would* contain such a requirement.<sup>13</sup>

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<sup>13</sup> It is noted that the petitioner would have been required to offer a significantly higher wage to the beneficiary in order to employ her at a Level II (qualified), a Level III (experienced), or a Level IV (fully competent) level. As noted above, the petitioner has offered the beneficiary a wage of \$25 per hour, which satisfied the Level I prevailing wage for a market research analyst in the San-Francisco-San Mateo-Redwood City, California Metropolitan Area at the time the LCA was certified, which was \$24.49 per hour. U.S. Dep't of Labor, Foreign Labor Certification Data Center, Online Wage Library, FLC Quick Search, "Market Research Analysts and Marketing Specialists," <http://www.flcdatabcenter.com/OesQuickResults.aspx?code=13-1161&area=41884&year=12&source=1> (last visited Nov. 19, 2013). However, in order to offer employment to the beneficiary at a Level II (qualified) wage-level, which would involve only "moderately complex tasks that require limited judgment," the petitioner would have been required to raise her salary to at least \$33.44 per hour. The Level III (experienced) prevailing wage was \$42.40 per hour, and the Level IV (fully competent) prevailing wage was \$51.35 per hour. *Id.*

The prevailing wage for a Level I (entry-level) personal financial advisor in the San-Francisco-San Mateo-Redwood City, California Metropolitan Area at the time the LCA was certified was \$25.18 per hour. The Level II (qualified) prevailing wage was \$49 per hour; the Level III (experienced) prevailing wage was \$72.82 per hour; and the Level IV (fully competent) prevailing wage was \$96.64 per hour. U.S. Dep't of Labor, Foreign Labor Certification Data Center, Online Wage Library, FLC Quick Search, "Personal

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.

Consequently, as it has not been shown that the particular position for which this petition was filed is 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, 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 in a specific specialty or its equivalent 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.<sup>14</sup> In the instant case, the record does not

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Financial Advisors," <http://www.flcdatacenter.com/OesQuickResults.aspx?area=41884&code=13-2052&year=12&source=1> (last visited Nov. 19, 2013).

The prevailing wage for Level I (entry-level) advertising and promotions managers in the San-Francisco-San Mateo-Redwood City, California Metropolitan Area at the time the LCA was certified was \$35.01 per hour. The Level II (qualified) prevailing wage was \$50.92 per hour; the Level III (experienced) prevailing wage was \$66.83 per hour; and the Level IV (fully competent) prevailing wage was \$82.74 per hour. U.S. Dep't of Labor, Foreign Labor Certification Data Center, Online Wage Library, FLC Quick Search, "Advertising and Promotions Managers," <http://www.flcdatacenter.com/OesQuickResults.aspx?area=41884&code=11-2011&year=12&source=1> (last visited Nov. 19, 2013).

The prevailing wage for a Level I (entry-level) marketing manager in the San-Francisco-San Mateo-Redwood City, California Metropolitan Area at the time the LCA was certified was \$46.24 per hour. The Level II (qualified) prevailing wage was \$61.93 per hour; the Level III (experienced) prevailing wage was \$77.61 per hour; and the Level IV (fully competent) prevailing wage was \$93.30 per hour. U.S. Dep't of Labor, Foreign Labor Certification Data Center, Online Wage Library, FLC Quick Search, "Marketing Managers," <http://www.flcdatacenter.com/OesQuickResults.aspx?area=41884&code=11-2021&year=12&source=1> (last visited Nov. 19, 2013).

<sup>14</sup> 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.

establish a prior history of recruiting and hiring for the proposed position of only persons with at least a bachelor's degree in a specific specialty or its equivalent.

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 therefore 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 or its equivalent 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 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 evidence of eligibility under this criterion, the petitioner submitted information regarding the education of its other employees and copies of their diplomas. However, as noted by the director, none of these individuals appears to hold the position proposed here and, on appeal, counsel's statements with regard to "a new professional position" seem to concede that this is a newly-created position. In any event, the record contains no evidence regarding any previous hires for the proffered position. While a first-time hiring for a position is certainly not a basis for precluding a position from recognition as a specialty occupation, it is unclear how an employer that has never recruited and hired for the position would be able to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a demonstration that it normally requires at least a bachelor's degree in a specific specialty or its equivalent for the position.

As the record of proceeding does not demonstrate that the petitioner normally requires at least a bachelor's degree in a specific specialty or its equivalent for the proffered position, it does not 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 specific specialty or its equivalent.

As noted earlier, this discussion incorporates and adopts into its analysis this decision's prior comments and findings with regard to the fact that the proposed duties are not presented with sufficient detail to establish the substantive work and associated educational levels of any specialized knowledge that the beneficiary would have to apply in their actual performance.

Both on its own terms and also in comparison with the three higher wage-levels that can be designated in an LCA, by the submission of an LCA certified for a wage-level I, the beneficiary effectively attests that the proposed duties are of relatively low complexity as compared to others within the same occupational category. This fact is materially inconsistent with the level of complexity required by this criterion.

As earlier noted, the *Prevailing Wage Determination Policy Guidance* 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].

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](http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf).

The pertinent guidance from DOL, 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.

*Id.*

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. . . .

*Id.*

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.

*Id.*

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).

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).

Finally, the AAO finds that the case law cited by counsel on appeal fails to satisfy any of the statutory or regulatory criteria outlined above. With regard to the unpublished AAO decisions cited by counsel, it is again noted that when any person makes an application for a "visa or any other document required for entry, or makes an application for admission [ . . . ] the burden of proof shall be upon such person to establish that he is eligible" for such benefit. 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I. & N. Dec. 190 (Reg. Comm'r 1972). Furthermore, any suggestion that USCIS must review unpublished decisions and possibly request and review each case file relevant to those decisions, while being impractical and inefficient, would also be tantamount to a shift in the evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361. Accordingly, neither the director nor the AAO was required to request and/or obtain a copy of the unpublished decisions cited by counsel.

If a petitioner wishes to have unpublished decisions considered by USCIS in its adjudication of a petition, the petitioner is permitted to submit copies of such evidence that it either obtained itself through its own legal research and/or received in response to a Freedom of Information Act request filed in accordance with 6 C.F.R. § 5. Otherwise, "[t]he non-existence or other unavailability of required evidence creates a presumption of ineligibility." 8 C.F.R. § 103.2(b)(2)(i). In the instant case, the petitioner failed to submit a copy of the unpublished decisions. As the record of proceeding does not contain any evidence of the unpublished decisions, there were no underlying facts to be analyzed and, therefore, no prior, substantive determinations could have been made to determine what facts, if any, were analogous to those in this proceeding. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Next, the AAO notes that counsel cites to *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985 (S.D. Ohio 2012), which held that "[t]he knowledge and not the title of the degree is what is important. Diplomas rarely come bearing occupation-specific majors. What is required is an occupation that requires highly specialized knowledge and a prospective employee who has attained the credentialing indicating possession of that knowledge."

The AAO agrees with the aforementioned proposition that "[t]he knowledge and not the title of the degree is what is important." In general, and as previously noted, 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 (or its equivalent)" 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 (or its equivalent)," 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. Section 214(i)(1)(B) of the Act (emphasis added). For the aforementioned reasons, however, the petitioner has failed to meet its burden and establish that the particular position offered in this matter requires a bachelor's or higher degree in a specific specialty, or its equivalent, directly related to its duties in order to perform those duties.

In any event, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*.<sup>15</sup> The AAO also notes that, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising even within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Finally, the AAO notes that, on appeal, counsel also cites to *Tapis Int'l v. INS*, 94 F. Supp. 2d 172 (D. Mass. 2000). In *Tapis Int'l v. INS*, the U.S. district court found that, while the former INS was reasonable in requiring a bachelor's degree in a specific field, it abused its discretion by ignoring the portion of the regulations that allows for the equivalent of a specialized baccalaureate degree. According to the U.S. district court, INS's interpretation was not reasonable because H-1B visas would only be available in fields where a specific degree was offered, ignoring the statutory definition allowing for "various combinations of academic and experience based training." *Id.* at 176. The court elaborated that "[i]n fields where no specifically tailored baccalaureate program exists, the only possible way to achieve something equivalent is by studying a related field (or fields) and then obtaining specialized experience." *Id.* at 177.

The AAO agrees with the district court judge in *Tapis Int'l v. INS*, that in satisfying the specialty occupation requirements, both the Act and the regulations require a bachelor's degree in a specific specialty *or its equivalent*, and that this language indicates that the degree does not have to be a

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<sup>15</sup> It is noted that the district judge's decision in that case appears to have been based largely on the many factual errors made by the service center in its decision denying the petition. The AAO further notes that the service center director's decision was not appealed to the AAO. Based on the district court's findings and description of the record, if that matter had first been appealed through the available administrative process, the AAO may very well have remanded the matter to the service center for a new decision for many of the same reasons articulated by the district court if these errors could not have been remedied by the AAO in its *de novo* review of the matter.

degree in a single specific specialty. Once again, 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 (or its equivalent)" 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 (or its equivalent)," 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. Section 214(i)(1)(B) (emphasis added).

Moreover, the AAO also agrees that, if the requirements to perform the duties and job responsibilities of a proffered position are a combination of a general bachelor's degree and experience such that the standards at both section 214(i)(1)(A) and (B) of the Act have been satisfied, then the proffered position may qualify as a specialty occupation. The AAO does not find, however, that the U.S. district court is stating that any position can qualify as a specialty occupation based solely on the claimed requirements of a petitioner.

Instead, 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. Again, 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 or its equivalent as the minimum for entry into the occupation as required by the Act.

In addition, the district court judge does not state in *Tapis Int'l v. INS* that, simply because there is no specialty degree requirement for entry into a particular position in a given occupational category, USCIS must recognize such a position as a specialty occupation if the beneficiary has the equivalent of a bachelor's degree in that field. In other words, the AAO does not find that *Tapis Int'l v. INS* stands for either (1) that a specialty occupation is determined by the qualifications of the beneficiary being petitioned to perform it; or (2) that a position may qualify as a specialty occupation even when there is no specialty degree requirement, or its equivalent, for entry into a particular position in a given occupational category.

First, USCIS cannot determine if a particular job is a specialty occupation based on the qualifications of the beneficiary. A beneficiary's credentials to perform a particular job are relevant only when the job is first found to qualify as a specialty occupation. USCIS is required instead to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether an alien beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. at 560 (stating that "[t]he facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation]").

Second, in promulgating the H-1B regulations, the former INS made clear that the definition of the term "specialty occupation" could not be expanded "to include those occupations which did not require a bachelor's degree in the specific specialty." 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991). More specifically, in responding to comments that "the definition of specialty occupation was too severe and would exclude certain occupations from classification as specialty occupations," the former INS stated that "[t]he definition of specialty occupation contained in the statute contains this requirement [for a bachelor's degree in the specific specialty or its equivalent]" and, therefore, "may not be amended in the final rule." *Id.*

In any event, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Tapis Int'l v. INS*. The AAO also notes again that, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising even within the same district. See *Matter of K-S-*, 20 I&N Dec. 715. Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

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 director's decision recommending denial of the petition will be affirmed.

## VII. Additional Ground of Ineligibility

Beyond the decision of the director, even if the proffered position were found to be a specialty occupation, it could not be approved as the submitted LCA was not certified for the higher paying occupation. More specifically, when the duties of the proffered position involve more than one occupational category, DOL provides clear guidance for selecting the most relevant Occupation Information Network (O\*NET) occupational code classification. The "Prevailing Wage Determination Policy Guidance" states the following:

In determining the *nature of the job offer*, the first order is to review the requirements of the employer's job offer and determine the appropriate occupational classification. The O\*NET description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification . . . . If the employer's job opportunity has worker requirements described in a combination of O\*NET occupations, the SWA should default directly to the relevant O\*NET-SOC occupational code for the highest paying occupation. For example, if the employer's job offer is for an engineer-pilot, the SWA shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

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](http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf).

Thus, where, as here, the petitioner believed its position was described as a combination of O\*NET occupations, then according to DOL guidance, the petitioner should have chosen the relevant occupational code for the highest paying occupation. Notably, and as discussed above, the occupational category "Marketing Managers" - SOC (ONET/OES) code 11-2021 - has a significantly higher prevailing wage than the occupational category "Market Research Analysts and Marketing Specialists" - SOC (ONET/OES) code 13-1161. Specifically, the prevailing wage for "Marketing Managers" in the area of intended employment was listed as \$46.24 per hour at that time (a difference of \$45,240 per year more than the prevailing wage for "Market Research Analysts and Marketing Specialists" when annualized on a full-time employment basis).

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 LCA. See section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A).

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 the content of 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 has been certified for the higher paying occupational classification, and the petition must be denied for this additional reason.

## VIII. Conclusion

As discussed above, the AAO finds that the petitioner has failed to demonstrate that the proffered position is a specialty occupation. The AAO, therefore, finds that the petitioner has failed to overcome the director's recommended ground for denying this petition. Consequently, the director's decision recommending denial of the petition will be affirmed, and the petition will be denied. The petition will also be denied due to the failure of the petitioner to provide an LCA certified for the higher paying occupation.

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 143, 145 (3d Cir. 2004) (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 director's decision will be affirmed and the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the denial. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The director's decision dated August 22, 2013 is affirmed. The petition is denied.