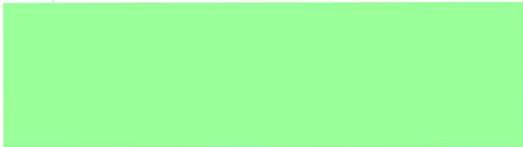


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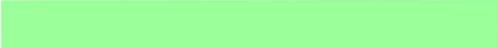
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

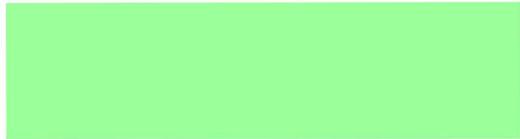


DATE: **NOV 27 2013** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on June 5, 2012. In the Form I-129 visa petition and supporting documentation, the petitioner describes itself as an apparel retail store established in 2002. In order to employ the beneficiary in what it designates as a market research analyst position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on February 15, 2013, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; (5) the Form I-290B and supporting documentation; (6) the AAO's RFE; and (7) the response to the AAO's RFE. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services as a market research analyst to work on a part-time basis (30 hours per week) at a rate of pay of \$16.09 per hour. In a support letter dated May 31, 2012 the petitioner stated that the proffered position involves the following duties:

- Studies current fashion trends to understand consumer apparel preferences
- Forecast consumer buying habits based on these trends.
- Act as a liaison between purchasing and sales team to plan and introduce new line of clothing.
- Collect and analyze data of various demographical and geographical segments to determine future retail locations.
- Prepare and present marketing strategies, especially tailored to specific buyers.
- Develop visual merchandising displays at retail outlets.
- Plan merchandise promotion campaigns and determine most effective course of action.
- Plan related duties as required by the management.

Further, the petitioner indicated that "[d]ue to the nature of the duties performed by the Market Research Analyst, the position requires a minimum [of a] Bachelor's degree or equivalent in Fashion Merchandising, Business Administration, or related field." The petitioner also stated that the beneficiary "meets our requirement given by the fact that in May of 2010, she received a Bachelor of Arts degree in Fashion Merchandising from [REDACTED] California." The petitioner provided a copy of a diploma and academic transcript from [REDACTED]

In addition, the petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification "Market Research Analysts and Marketing Specialists" - SOC (ONET/OES Code) 13-1161, at a Level I (entry level) wage.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on October 2, 2012. The director outlined the evidence to be submitted. The AAO notes that the director specifically requested that the petitioner submit probative evidence to establish that the proffered position qualifies as a specialty occupation. The director requested the petitioner to submit a detailed description of the proffered position, including the percentage of time to be spent on each duty.

On December 28, 2012, the petitioner responded to the director's RFE by providing a letter and additional evidence, including printouts of several online job postings and a letter from another company in same industry.

In the December 27, 2012 letter, submitted in response to the RFE, the petitioner provided a revised description of the proffered position, along with the percentage of time that the beneficiary will spend performing each duty. Specifically, the petitioner stated that the beneficiary will perform the following duties:¹

1. Research and Gather Market Condition Data Within Our Industry

The Beneficiary's specified duties for the instant Market Research Analyst position will involve systematic and methodical gathering, recording, and organization of pertinent data regarding which will allow for the ascertaining and analysis of pertinent elements of market demand and buyer trends for our company's current attire products in addition to its potential new products. The Beneficiary must plan, organize and institute proper market research tools and methodologies, identifying industry preferences, general product pricing schemes, market trends, and emerging industry demands in an effort to effectively market and distribute company products to desired market groups. Furthermore, the Beneficiary will study, evaluate and

¹ It must be noted for the record that in the letter, the petitioner mistakenly and repeatedly referenced the beneficiary in the masculine pronoun case. The record provides no explanation for this inconsistency. Thus, the AAO must question the accuracy of the letter and whether the information provided is correctly attributed to this particular position and beneficiary.

research the industry's market demands, fashion industry standards, material variations, competitive pricing structures, peer marketing plans, and numerous other factors by which dictate the ebb and flow of the volatile garment and fashion industries. She will also examine and research fashion trend progressions and market variables in the apparel and fashion industry in order to prognosticate future trends within the garment manufacture and distribution in line with our expansive aspirations.

In order to intimately comprehend the complex and seemingly arbitrary fashion market, the Beneficiary must first garner as much industry related data as possible from garment manufacturers, retailers, competitors, consumers, and industry experts. As such, the Beneficiary must establish and implement reliable data gathering methodologies such as surveys, opinion polls or questionnaires. The duty of data compilation will combine traditional survey questionnaires with technological media advances to comprehensively and efficiently gather the required data. The Beneficiary will oversee the more traditional survey methods such as mail, strategic questionnaire distribution, and personal face to face interviews. Furthermore, according to his knowledge of consumer demands will pen probative survey questions to be dispersed in strategic targeted locations. Of particular importance, the Beneficiary must obtain cogent data on various relevant fashion and garment markets in Southern California, and subsequently other regions to which [the petitioner] could potentially expand. She will also be responsible for garnering commercially available marketing data for certain respective geographical areas in addition to detailed demographic preference reports.

The aforementioned duties are complex and specialized because this Market Research Analyst position will be burdened with the comprehensive collection, organization, and interpretation of mass quantities of data, controllable and uncontrollable marketing variables, merchandising considerations, apparel industry conditions and trends, advancing technologies in the industry, consumer preferences and responses, and otherwise prepare data for his future analysis. This is a complex process whose successful performance requires at a minimum Bachelor's degree or equivalent in Business Administration, Marketing, Merchandising, or related Field. These duties will comprise of approximately 20% of Beneficiary's workweek.

2. Analyze Data to Identify Market Opportunities and Marketing/Sales Approaches for Products

Subsequent to cogent market data being collected, the Beneficiary will be responsible to review, organize, analyze, and report market statistics for use by our company's sales, product development, and marketing teams to incorporate into the company's business strategies for its current clothing distribution operations. Specifically, Beneficiary will be applying advanced principles of economics, marketing, merchandising, and relevant statistical breakdowns in relation to market conditions in the targeted regions. Additionally, she will utilize specific market

statistics in order to project sales revenues for specific regions, formulate optimal pricing structures for each studied market, and identify regional demands for specified company products by which we will more effectively and profitably meet market demands.

Based on the collected data, the Beneficiary will analyze and interpret market data to devise strategies to be discussed with upper management for consideration as it pertains to Fashion Q's sales, marketing, and distribution. As the fashion and garment industry is highly sensitive to current market conditions, it is imperative to acutely observe fashion trends and consumer preferences as they relate to our target markets. We will reply upon Beneficiary's analysis to decide how far it needs to expand particular marketing campaigns and sales efforts into a particular or region. Additionally, the Beneficiary will analyze specified demands to recommend production, distribution, and manufacturing rates to company decision makers. This would deviate from the "traditional" unspecified mass production and distribution of finished products, risking overproduction and surplus inventory. To this end, she will evaluate the collected data to assess the brand name recognition and consumer satisfaction, and assess the future volume of sales for targeted consumer groups.

Furthermore, the Beneficiary will discover and recommend the most efficient and cost-effective marketing methods, i.e., online advertising, print advert[ing], tradeshow. The beneficiary will present to her superiors the aforesaid recommendations based on her research efforts, and generate and distribute research evaluation reports for management's review. She will also ascertain specific marketing strategies targeting potential buyer groups to raise volume of sales and expand company's clientele base.

These tasks are complex and specialized because the Market Research Analyst does not merely gather information, but must analyze and interpret large quantities of business, market, and operational information, surmise corresponding marketing strategies, identify potentially lucrative new target markets, relate the information to company merchandising, and make recommendations to the management based on his analysis. This is a complex process whose successful performance requires at the very least a Bachelor's degree or equivalent in Business Administration, Marketing, Merchandising, or a related field. These duties will comprise of approximately 40% of Beneficiary's workweek.

3. Analyze Market Data for the Marketing and Sales of New Company Products

As stated previously, [the petitioner] desires to continually expand its clothing offering line to include the latest in innovative new fashion lines to capture increased market share. Our company has been designing, manufacturing, and distributing the highest quality women's attire for the past decade and based on our successful ventures, we wish[sic] to develop, design, and thereby expand our product offerings to include a vast array of clothing genres, addressing larger fashion industry

demands. We believe that through the vehicle of research and analysis of a competent Market Research Analyst, we can accurately prognosticate fashion trends, market direction, merchandizing, and consumer appeal within identified target markets, prior to the start of a new annual fashion season.

Beneficiary's detailed analysis will be crucial to successful marketing strategies targeting profitable regions according to market trends, industry statistics, and competitor reports. Also, the Beneficiary must utilize her business projection and prognostication skills to suggest potential new product lines and their target markets based upon her acuity in interpreting the research data which she collected, isolating and understanding fashion business trends. These research results will assist in product development of any new decorative products produced by our company, aligning them with emerging demands and current fashion trends. Additionally, the Beneficiary must carefully consider pricing dichotomies, stylistic trends, marketing techniques and patterns, and the statistical effectiveness of said techniques.

Subsequent to ample data research and analysis, Beneficiary will be responsible to effectively delineate and portray fashion industry's trends, development, and recommend new product lines and merchandising avenues to company management. In addition to the aforementioned surveys, questionnaires, commercially available data, and internet search tools at the Beneficiary's disposal, to effectively gauge the economic climate of the industry, she must engage potential customer bases and other industry professionals by ways of conversations, interviews, meetings, and attending industry trade shows. Through these means, beneficiary must obtain valuable information necessary for the market analysis, marketing methodologies, and product formulation strategies. The complexity and required application of business and marketing principles necessitate that a potential candidate for this Market Research Analyst position [requires] at the very least a bachelor's degree or equivalent in Business Administration, Marketing, Merchandising, or a related field. These duties will comprise approximately 30% of beneficiary's workweek.

4. Advising to Company Executives and Report Preparation

After the research, organization, and analysis of market data mentioned above, the Beneficiary will attend marketing, merchandising, and business planning meetings led by President, Mr. [REDACTED] to review, discuss, and recommend potential business expansion and marketing strategies garnered from the compiled research and data. Beneficiary will engage in productive and intelligent discussions with President [REDACTED] and other employees regarding the general marketing direction and structure of the company and to recommend substantive changes or strategic alterations of marketing and sales directives. Referencing [her] work product, she will collaborate and correspond with President [REDACTED] in order to discuss and brainstorm to reach an attractive and proactive marketing direction for our company's current and future products. These discussions will allow the President to question Beneficiary's recommendations and conclusions and allow for critical input and

suggestions to our marketing, sales, and future product lines. She will determine and advise the management potential target markets, subsequent merchandising techniques, evaluating and prognosticating future business returns, and advise management regarding: marketing plans for new products, pricing/customer satisfaction plans, and market reception, and success of the company's products and strategies. Finally, in consideration of all the aforementioned data, it will be Beneficiary's responsibility to create and prepare comprehensive market data reports. She will prepare monthly and quarterly market research evaluation reports regarding the performance figures of current marketing plans, consumption figures, and market reception for the President [REDACTED] review. For these duties, Beneficiary will spend approximately 10% of work week in this capacity.

The director reviewed the information provided in response to the RFE. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The director denied the petition on February 15, 2013. Counsel subsequently filed the instant appeal of the denial of the H-1B petition.

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

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

Upon review of the record of proceeding, the AAO notes that the petitioner has provided inconsistent information regarding the minimum requirements for the proffered position. In the May 31, 2012 letter of support, the petitioner stated that the proffered position requires "a minimum [of a] Bachelor's degree or equivalent in Fashion Merchandising, Business Administration, or related field." However, in the December 27, 2012 letter, submitted in response to the director's RFE, the petitioner stated that the position requires a "bachelor's degree in Business Administration, Marketing, Merchandising, or a related field." In addition, the petitioner provided a letter from [REDACTED] who stated that the position requires "at the very least a bachelor's degree in

Business Administration, Merchandising, Marketing, or a related field." No explanation for the variances was provided.²

Moreover, the petitioner states that a bachelor's degree in business administration is acceptable for the proffered position. USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. 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 147.³ Again, the petitioner in this matter claims that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree, i.e., a bachelor's degree in business administration. This assertion is tantamount to an admission that the proffered position is not in fact a specialty occupation. The director's decision must therefore be affirmed and the petition denied on this basis alone.

On appeal, counsel cites to *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985 (S.D. Ohio 2012), for the proposition 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, 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

² The record of proceeding contains inconsistent information as to the academic requirements of the proffered position. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92 (BIA 1988).

³ 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.

Id.

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).

Further, counsel also cites to *Tapis Int'l v. INS*, 94 F. Supp. 2d 172 (D. Mass. 2000) to claim that the District court "held against the Service's interpretation and analysis of the Service, holding that such an interpretation would result in such precarious effects as to prevent any H-1B position from satisfying the specialty occupation requirement when a specific degree is unavailable in a certain field." However, the AAO notes that in *Tapis Int'l v. INS*, the U.S. district court found that while the former Immigration and Naturalization Service (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 then 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." *Tapis Int'l v. INS*, 94 F. Supp. 2d 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. In this case, the issue is not whether the beneficiary's experience is equivalent of a specialized baccalaureate degree.

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*⁴ or *Tapis Int'l v. INS*. 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.

Further, upon review of the record of proceeding, the AAO notes that the enclosed LCA does not appear to correspond to the claimed duties and requirements of the proffered position. Consequently, as will be discussed below, the petitioner has failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed.

⁴ 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.

More specifically, the petitioner provided an LCA in support of the instant petition that indicates the occupational classification for the position is "Market Research Analysts and Marketing Specialists" at a Level I (entry level) wage. Wage levels should be determined only after selecting the most relevant O*NET code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.⁵

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.⁶ DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received as indicated by the job description.

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

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

⁵ For additional information on wage levels, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

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

See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

In the instant case, the petitioner repeatedly claims that the nature of the proffered position involves complex, unique and/or specialized tasks. In the December 27, 2012 letter, submitted in response to the RFE, the petitioner states that it is in a "critical business juncture" for potential business expansion and that "complex Market Research Analyst position is a necessary acquisition for sound business expansion." The petitioner further claims that the duties of the proffered position are "complex and specialized because this Market Research Analyst position will be burdened with the comprehensive collection, organization, and interpretation of mass quantities of data, controllable and uncontrollable marketing variables, merchandising considerations, apparel industry conditions and trends, advancing technologies in the industry, consumer preferences and responses, and otherwise prepare data for [her] future analysis."

In addition, the petitioner asserts that it "will rely upon [the] Beneficiary's analysis to decide how far it needs to expand particular marketing campaigns and sales efforts into a particular region." The petitioner also emphasizes that the "tasks are complex and specialized because the Market Research Analyst does not merely gather information, but must analyze and interpret large quantities of business, market, and operational information, surmise corresponding marketing strategies, identify potentially lucrative new target markets, relate the information to company merchandising, and make recommendations to the management based on [her] analysis." Moreover, the petitioner states that the beneficiary's "detailed analysis will be crucial to successful marketing strategies targeting profitable regions" and that the "research results will assist in product development of any new decorative products produced by our company, aligning them with emerging demands and current fashion trends." The petitioner further references the "complexity and required application of business and marketing principles" that are necessary for the position.

Upon review, the AAO finds that complexity of the position and the level of independent judgment required to perform the duties of the proffered position appear to surpass the expectations of a Level I position as described above, where the employee works under close supervision, performing routine tasks that require only a basic understanding of the occupation and limited exercise of judgment. In addition, rather than the beneficiary's work being "monitored and reviewed for accuracy," as would be appropriate for a Level I position, the petitioner is relying on the accuracy of the beneficiary's work product to make business decisions about the direction and expansion of the company. Here, the represented level of expertise required to perform the duties of the proffered position appears to be at odds with a Level I position, i.e., a position that requires "only a basic understanding of the occupation," commensurate with that expected of a "worker in training" or an individual participating in an "internship."

Thus, upon review of the assertions made by the petitioner, the AAO must question the level of complexity, independent judgment and understanding actually required for the proffered position as the LCA is certified for a Level I entry-level position. This characterization of the position and the claimed duties and responsibilities as described by the petitioner conflict with the wage-rate element

of the LCA selected by the petitioner, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, the selected wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

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

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

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

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

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

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

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

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

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

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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

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

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

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

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

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

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

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

represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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

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

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The AAO recognizes DOL's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁷ As previously mentioned, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Market Research Analysts and Marketing Specialists."

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

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

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

Education

⁷ For additional information regarding market research analyst positions, *see* U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., Market Research Analysts, on the Internet at <http://www.bls.gov/ooh/Business-and-Financial/Market-research-analysts.htm#tab-1> (last visited November 25, 2013). The AAO hereby incorporates into the record of proceeding the excerpt from the *Handbook* regarding the occupational category "Market Research Analysts."

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

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

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Market Research Analysts, on the Internet at <http://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm#tab-4> (last visited November 25, 2013).

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

The *Handbook* does not state that a baccalaureate or higher degree in a specific specialty, or its equivalent is normally the minimum requirement for entry into the occupation. This passage of the *Handbook* reports that market research analysts have degrees and backgrounds in a wide-variety of disparate fields. The *Handbook* states that employees typically need a bachelor's degree in market research or a related field, but the *Handbook* continues by indicating that many market research analysts have degrees in fields such as statistics, math, or computer science. According to the *Handbook*, other market research analysts have a background in fields such as business administration, one of the social sciences, or communications. The *Handbook* notes that various courses are essential to this occupation, including statistics, research methods, and marketing. The *Handbook* states that courses in communications and social sciences (such as economics, psychology, and sociology) are also important.

In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields, such as philosophy and engineering,

would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties.⁸ Section 214(i)(1)(B) of the Act (emphasis added).

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

In response to the director's RFE, the petitioner provided an O*NET Summary Report for the occupational category "Market Research Analysts and Marketing Specialists" to support the assertion that the proffered position qualifies as a specialty occupation. The AAO reviewed the report but finds that the petitioner's reliance on the report is misplaced. That is, O*NET assigns this occupation a Job Zone Four rating, which groups it among occupations that are described as follows: "[m]ost of these occupations require a four-year bachelor's degree, but *some do not* (emphasis added)." O*NET does not report that for those occupations with an academic degree requirement, that such a degree must be in a *specific specialty* directly related to the occupation. As previously discussed, 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 duties and responsibilities of the position. Further, "most" is not indicative that a position normally requires at least a bachelor's degree in a specific specialty, or its equivalent, (the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1)), or that a position is so specialized and complex as to require knowledge usually associated with attainment of a baccalaureate or higher degree in a specific specialty (the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4)).⁹ Notably, O*NET indicates that some of these occupations do not require a four-year bachelor's degree.

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

⁹ The first definition of "most" in *Webster's New Collegiate College Dictionary* 731 (Third Edition, Hough

In addition, the petitioner asserts that O*NET "classifies Market Research Analyst positions as Zone 4, which equates to SVP [Specific Vocational Preparation] 7 and above, indicating that considerable preparation is needed for such a position. The AAO reviewed the O*NET OnLine information entitled "O*NET OnLine Help: Specific Vocational Preparation (SVP)," which provides the following regarding SVP levels:

Specific Vocational Preparation, as defined in Appendix C of the *Dictionary of Occupational Titles*, is the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation.

This training may be acquired in a school, work, military, institutional, or vocational environment. It does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs.

Specific vocational training includes training given in any of the following circumstances:

1. Vocational education (high school; commercial or shop training; technical school; art school; and that part of college training which is organized around a specific vocational objective);
2. Apprenticeship training (for apprenticeable jobs only);
3. In-plant training (organized classroom study provided by an employer);
4. On-the-job training (serving as learner or trainee on the job under the instruction of a qualified worker);
5. Essential experience in other jobs (serving in less responsible jobs which lead to the higher grade job or serving in other jobs which qualify).

The following is an explanation of the various levels of specific vocational preparation:

Level Time

Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of such positions require a four-year bachelor's degree, it could be said that "most" of the 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, which as previously noted has been designated on the LCA as a Level I (entry) position. 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." § 214(i)(1) of the Act.

1. Short demonstration only
2. Anything beyond short demonstration up to and including 1 month
3. Over 1 month up to and including 3 months
4. Over 3 months up to and including 6 months
5. Over 6 months up to and including 1 year
6. Over 1 year up to and including 2 years
7. Over 2 years up to and including 4 years
8. Over 4 years up to and including 10 years
9. Over 10 years

Note: The levels of this scale are mutually exclusive and do not overlap.

Upon review of the above noted information, the AAO observes that an SVP rating of 7 and above does not indicate that at least a four-year bachelor's degree is required for an occupational category that has been assigned such a rating or, more importantly, that such a degree must be in a specific specialty directly related to the occupation. Rather, the SVP rating simply indicates that the occupation requires over 2 years up to and including 4 years of training of the wide variety of forms of preparation described above, including experiential training. Therefore, despite the petitioner's assertions to the contrary, the O*NET information is not probative of the proffered position qualifying as a specialty occupation.

The fact that a person may be employed in a position designated as that of a market research analyst and may be involved in using some market research skills and knowledge to help an enterprise achieve its goals 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. It is incumbent on the petitioner to provide sufficient evidence to establish that the particular position that it proffers would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. As previously noted, 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." 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. 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

As previously stated, USCIS does not simply rely on a position's title to determine whether a particular position qualifies as a specialty occupation. Rather, USCIS considers the duties of a proffered position, the nature of the petitioning entity's business operations, and all other relevant factors to make its determination. Again, the critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding, particularly in light of the Level I wage designation on the LCA, do not indicate that the position is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO will review the record of proceeding regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

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

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

In the Form I-129 and supporting documentation, the petitioner stated that it is an apparel retail store established in 2002, and has 43 employees. The petitioner stated its gross annual income as \$4 million and its net annual income as \$92,467. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 448120 – "Womens Clothing Stores."¹⁰ The U.S. Department of Commerce, Census Bureau website describes this NAICS code as follows:

¹⁰ NAICS is used to classify business establishments according to type of economic activity, and each establishment is classified to an industry according to the primary business activity taking place there. See U.S. Dep't of Commerce, U.S. Census Bureau, NAICS, on the Internet at <http://www.census.gov/eos/www/naics/> (last visited November 25, 2013).

This industry comprises establishments primarily engaged in retailing a general line of new womens, misses' and juniors' clothing, including maternity wear. These establishments may provide basic alterations, such as hemming, taking in or letting out seams, or lengthening or shortening sleeves.

See U.S. Dep't of Commerce, U.S Census Bureau, 2007 NAICS Definition, 448120 – Womens Clothing Stores on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited November 25, 2013).

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

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner submitted copies of job advertisements in response to the RFE. The AAO notes that the petitioner did not provide any independent evidence of how representative the job postings are of the particular advertising employers' recruiting history for the type of job advertised. As the advertisements are only solicitations for hire, they are not evidence of the actual hiring practices of these employers.

Upon review of the documents, the AAO finds that they do not establish that a requirement for a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry in similar organizations for parallel positions to the proffered position.

For example, the petitioner has submitted advertisements for organizations that do not appear to be similar to the petitioner. More specifically, the advertisements include positions with [REDACTED] (a company in the manufacturing industry), [REDACTED] (a company in the healthcare services industry), [REDACTED] (a company in the consumer packaged goods manufacturing industry), and [REDACTED] (a company in the computer/IT services industry). Without further information, the advertisements appear to be for organizations that are not similar to the petitioner and the petitioner has not provided any probative evidence to suggest otherwise. The petitioner failed to supplement the record of proceeding to establish that the advertising organizations are similar to it. That is, the petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organizations.

Furthermore, the petitioner has not established that the advertisements are for parallel positions. For example, the position with Wine Worldwide, Inc. requires a "Master's degree in marketing or mgmt. concentration + 1yr. wine industry research analysis exp. or Bachelor's degree in marketing

or mgmt. concentration + 5yrs. general business mgmt. &/or market research analysis exp." Further, the position with [REDACTED] requires a degree and "4+years' experience researching and launching new products." Moreover, the position with [REDACTED] requires an "MBA OR its equiv (i.e. BA + 5 yrs related exp)." In addition, the position with [REDACTED] requires a degree and a "minimum of three to five years relevant Market Research experience." As previously discussed, the petitioner designated the proffered position on the LCA through the wage level as a Level I (entry level) position. The advertised positions appear to be for more senior positions than the proffered position. More importantly, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.

Additionally, many of the postings indicate that a general-purpose degree such as a degree in business administration is acceptable. As previously mentioned, 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. Moreover, the AAO observes that the postings state that a range of disparate fields are acceptable. Again, since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

Furthermore, the petitioner fails to establish the relevancy of the provided examples to the issue here.¹¹ That is, the petitioner fails to demonstrate what inferences, if any, can be drawn from these advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.¹²

¹¹ As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed.

¹² According to the *Handbook's* detailed statistics on market research analysts, there were approximately 282,700 persons employed as market research analysts and marketing research specialists in 2010. *Handbook*, 2012-13 ed., available at <http://www.bls.gov/ooh/Business-and-Financial/Market-research-analysts.htm#tab-6> (last accessed November 25, 2013). Based on the size of this relevant study population, the petitioner fails to demonstrate what inferences, if any, can be drawn from the job postings with regard to the common educational requirements for entry into parallel positions in similar organizations. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

In addition to the job advertisements, the petitioner submitted a letter in support of the instant petition from [REDACTED] who is the executive secretary at [REDACTED]. However, contrary to the purpose for which the affidavit was submitted, it does not establish the proffered position qualifies as a specialty occupation.

In the letter, dated December 2, 2012, Mr. [REDACTED] claims that his company is "a respected women's apparel retail enterprise devoted to providing the highest quality clothing products to demanding consumers in the competitive Los Angeles fashion market." Mr. [REDACTED] also indicated that his "company is a prolific designer apparel retailer, operating several strategically located stores in the Southern California region." Mr. [REDACTED] further claimed "[w]ith similar number of employees and analogous business marketing strategies both our companies have attained a successful business model, yet neither will be able to fulfill our business potential without fully analyzing and marketing to the demanding and selective clientele of our industry."

Mr. [REDACTED] asserts that "marketing considerations of the particularized fashion industry are extremely fickle and complex, wrought with numerous considerations such as target markets, consumer demographics, marketing resources/avenues, and current market trends." He claims that "it is the industry's and our own traditional standard that the attainment of a Bachelor's degree would adequately prepare the candidate to successfully execute the complex job tasks handled by a Market Research Analyst."

It is noted that Mr. [REDACTED] claims that his company "has previously hired Market Research Analysts who were required to possess at the very least a bachelor's degree in Business Administration, Merchandising, Marketing, or a related field." However, Mr. [REDACTED] did not provide the total number of people currently or in the past that have been employed to serve in a market research analyst position with the company. Moreover, he did not indicate when the company was established. Mr. [REDACTED] indicated that his company "hired a H-1B specialty Market Research Analyst" in 2009 and, in support of his assertion, he submitted a copy of this employee's H-1B approval notice, diploma and academic transcript. Nevertheless, upon review, it cannot be determined how representative his claim is regarding one individual of the company's normal hiring practices.

Further, while Mr. [REDACTED] provided a few general statements regarding the duties of this market research analyst position, Mr. [REDACTED] failed to provide the specific job duties and day-to-day responsibilities of the positions that his claims are the same as the proffered position. That is, he did not provide information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, aside from the

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

job title and a few general statements regarding the duties, it is unclear whether the duties and responsibilities of this individual is the same or parallel to the proffered position.

Mr. [REDACTED] claims that he "believe[s] [himself] to be qualified to render this opinion about career prerequisites of a Market Research Analyst for the garment retail context as [he] [has] been involved in this industry for over a decade." He states that he has "worked [with] several capable Market Research Analysts and can readily attest to their importance." However, Mr. [REDACTED] did not identify the specific elements of his knowledge and experience that he may have applied in reaching his conclusions here regarding industry standards. He did not indicate that he relied on any authoritative sources to support his assertions. His affidavit does not cite specific instances in which his past opinions have been accepted or recognized as authoritative on this particular issue. Mr. [REDACTED] did not include the results of outside formal surveys, research, statistics, or any other objective quantifying information to substantiate his opinions. Notably, his opinions are not supported by independent, objective evidence demonstrating the manner in which he reached such conclusions. Mr. [REDACTED] asserts a general industry educational standard without referencing any supporting authority or any empirical basis for the pronouncement.

In summary, and for each and all of the reasons discussed above, the AAO concludes that the affidavit rendered by Mr. [REDACTED] is not probative evidence to establish the proffered position as a specialty occupation. The conclusions reached by Mr. [REDACTED] lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which he reached such conclusions. There is an inadequate factual foundation established to support the opinion. As such, neither the findings nor the ultimate conclusions are worthy of any deference, and the opinion letter is not probative evidence towards satisfying any criterion of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

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

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

The AAO acknowledges that the petitioner and its counsel may believe that the proffered position qualifies as specialty occupation under this criterion of the regulations. In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted various documents, including evidence regarding its business operations. For example, the petitioner submitted articles of incorporation, 2010 and 2011 U.S. Income Tax Returns for an S corporation, business license tax certificate, lease, photos of the petitioner's stores, advertisements for the stores, reviews from Yelp, 2011 and 2012 Employer's Quarterly Federal Tax Returns, samples of a previous employee's market research product, and an organization chart. In addition, the petitioner submitted an opinion letter from Mr. [REDACTED] discussed at length above. The AAO reviewed the record of proceeding in its entirety. However, upon review of the record, the AAO finds that the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of market research analyst.

A review of the record of proceeding indicates that the petitioner has failed to credibly demonstrate that the duties the beneficiary will be responsible for or perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty, or its equivalent. Additionally, the AAO finds that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent.

On appeal, counsel stated that the director "neglected [to] mention the five (5) pages within the Response devoted to describing the complexity and unique marketing considerations of their expanding garment and apparel distribution enterprise which in turn created the need for a demanding and rigorous Market Research position." Counsel claimed that the petitioner "sufficiently portrayed its business complexity, describing its business background, state of current business operations, plans for expansion, and demanding marketing needs to accommodate its continual business growth."

However, the AAO incorporates by reference and reiterates its earlier discussion that the LCA indicates that the position is a low-level, entry position relative to others within the same occupation. Based upon the Level I wage rate, the beneficiary is only required to have a basic understanding of the occupation. Moreover, the wage rate indicates that the beneficiary will perform routine tasks that require limited, if any, exercise of independent judgment; her work will be closely supervised and monitored; she will receive specific instructions on required tasks and expected results; and her work will be reviewed for accuracy.

Without further evidence, it is not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."¹³

¹³ For additional information regarding wage levels as defined by DOL, see U.S. Dep't of Labor, Emp't &

The petitioner failed to establish how the beneficiary's responsibilities and day-to-day duties are so complex or unique that the position can be performed only by an individual with a bachelor's degree in a specific specialty, or its equivalent. Thus, based upon the record of proceeding, including the LCA, it does not appear that the proffered position is so complex or unique that it can only be performed by an individual who has completed a baccalaureate program in a specific discipline that directly relates to the proffered position. Specifically, the petitioner fails to demonstrate how the duties of the position as described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them.

For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it may believe are so complex and unique. While a few related courses may be beneficial, or even required, in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position. The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions in the same occupation that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

The AAO observes that the petitioner has indicated that the beneficiary's educational background will assist her in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner and counsel do not sufficiently explain or clarify at any time in the record which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. Upon review of the record of proceeding, the petitioner has failed to establish the proffered position as satisfying this prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. To this end, the AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

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

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

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

The petitioner stated in the Form I-129 petition that it has 43 employees and was established in 2002 (approximately ten years prior to the filing of the H-1B petition). The petitioner claimed that it "has definitely instituted a past practice of hiring persons with a baccalaureate degree in a business administration, marketing, merchandising, or a related specialty to perform the duties of our Market Research Analyst." The petitioner indicated that "our former Market Research Analyst Mr. [REDACTED] had obtained a Bachelor's degree in a business related field in line with our strict minimum educational requirement." However, the petitioner did not submit documentary evidence

of Mr. Chung's employment with the petitioner such as W-2 forms or pay stubs, and his credentials such as a copy of his diploma and academic transcript. 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)).

Moreover, the AAO observes that although counsel provided a general statement that the petitioner employed Mr. Chung to serve as a market research analyst, the petitioner failed to provide the job duties and day-to-day responsibilities of the market research analyst position. Further, the petitioner did not provide any information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, it is unclear whether the duties and responsibilities of this individual are the same or similar to the duties of the proffered position.

Upon review of the record, the petitioner has not provided sufficient evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

The AAO acknowledges that the petitioner and counsel may believe that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. Moreover, the AAO reviewed the documentation submitted by the petitioner regarding the proffered position and its business operations (including an articles of incorporation, 2010 and 2011 U.S. Income Tax Returns for an S corporation, business license tax certificate, lease, photos of the petitioner's stores, advertisements for the stores, reviews from Yelp, 2011 and 2012 Employer's Quarterly Federal Tax Returns, samples of a previous employee's market research product, and an organization chart), and the opinion letter from Mr. [REDACTED] but finds that they fail to establish that the proffered position qualifies as a specialty occupation under this criterion of the regulations. More specifically, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position.

Here, the AAO reiterates its earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four assignable levels). That is, the Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category of "Market Research Analysts," and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, DOL indicates that a Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation." Further, DOL indicates that a Level I wage is appropriate for an internship or a worker-in-training position. Without further evidence, it is not credible that

the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, as previously mentioned, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

The petitioner has submitted inadequate probative evidence to satisfy this criterion of the regulations. Thus, the petitioner has not established that the duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The AAO, therefore, concludes that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the proffered position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.

For the reasons related in the preceding discussion, the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

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 appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.