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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 29 2013 OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:
[REDACTED]

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 Director of the California Service Center denied the nonimmigrant visa petition and certified the decision to the Administrative Appeals Office (AAO). The AAO reviewed the record of proceeding in its entirety and finds that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will be affirmed and the petition will be denied.

The petitioner submitted a Form I-129 (Petition for a Nonimmigrant Worker) to the California Service Center on June 15, 2012. In the Form I-129 visa petition, the petitioner describes itself as an international airline providing passenger and cargo services, with 20 employees, that was established in 1995. 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 May 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. Thereafter, the director certified the decision to the AAO for review. In response to the director's certification, counsel submitted a brief to the AAO as permitted by 8 C.F.R. § 103.4(a)(2). Counsel 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 petitioner's response to the RFE; (4) the director's denial letter; (5) the Notice of Certification; and (6) counsel's submission to the AAO. 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's decision that the record of proceeding does not establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. Accordingly, the director's decision will not be disturbed. The decision certified to the AAO will be affirmed, and the petition will be denied.

Furthermore, later in the decision, the AAO will also address several additional, independent grounds, not identified by the director's decision, that the AAO finds also preclude approval of this petition. Thus, the petition cannot be approved for these reasons as well.¹

I. The Prior H-1B Petition

As a preliminary matter, the AAO notes that the petitioner previously filed a Form I-129 for H-1B classification for the beneficiary to work as an assistant sales manager on a part-time basis (20 hours per week) at a rate of pay of \$26.19 per hour.² In a support letter dated March 30, 2009, the

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

² The prior H-1B petition was filed on April 1, 2009 (receipt number [REDACTED]), with requested validity dates of October 1, 2009 to September 26, 2012 (approximately three years).

petitioner provided, in part, the following information regarding the assistant sales manager position:

[The beneficiary] will be required to understand and employ various mathematical models that investigate relationships between overbooking strategies and revenue. For example, [the beneficiary] will need to formulate "static" models (on the assumption that passenger behavior is predominantly time-independent) that use a binominal random variable approach to model consumer behavior. Static models will consider among other factors "bump thresholds," linear and non-linear compensation plans, and time-dependent compensation plans. [The beneficiary] will also need to formulate "dynamic" models that employ [redacted] processes for continuous time-dependence on ticket purchasing/cancelling information. [The beneficiary] will be required to consider these models in view of post-September 11 market influences and the general state of economy-both here and in China. These very sophisticated business models and strategies are critical to the company in that they optimize each flight by reducing or eliminating unfilled seats and results in cost savings of millions of dollars each year.

The petitioner stated that the position "needs to be filled by someone with at least a Master[']s in Business Administration, a Doctorate in Statics/Probability or Applied Math, or in exceptional circumstances a Baccalaureate in Economics/Finance plus five years to ten years of experience."

In addition, and as required, the petitioner submitted a Labor Condition Application (LCA) in support of that H-1B petition. The AAO notes that the petitioner designated the assistant sales manager position under the occupational classification of "Sales Managers" SOC (ONET/OES) code 11-2022 at a Level I (entry level) wage on the LCA.³ The petitioner also provided

³ The "Prevailing Wage Determination Policy Guidance" issued by the U.S. Department of Labor (DOL) provides a description of the wage levels. A Level I wage rate is described by DOL as follows:

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

See 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.

The AAO will briefly note that the petitioner's description and requirements as stated in the record of proceeding for the assistant sales manager position do not appear to be consistent with its designation of the position at a Level I wage rate. That is, the information provided on the LCA does not correspond to the level of work and requirements that the petitioner ascribed to the position and to the wage-level corresponding to such a level of work and requirements in accordance with the pertinent LCA regulations.

documentation regarding its business operations, along with evidence regarding the beneficiary's academic and professional credentials. The director approved the H-1B petition.

Upon review of the submission, the AAO observes that the petitioner's description, *supra*, of the assistant sales manager position is recited virtually verbatim from an article entitled "Probabilistically Optimized Airline Overbooking Strategies, or 'Anyone Willing to Take a Later Flight?'" See Kevin Z. Leder, Saverio E. Spagnolie, & Stefan M. Wild, *Probabilistically Optimized Airline Overbooking Strategies, or 'Anyone Willing to Take a Later Flight?!*, 23.3 Undergraduate Mathematics and Its Applications (UMAP) J., 317, 317-338 (2002), and the petitioner did not properly cite or credit the information to the authors of the article.

In any event, it appears that the impact of the petitioner's statements was to attribute to it concepts regarding its business operations and the offered position that actually were not its own, in order to fortify the petition. While it is understandable that the petitioner and its prior counsel wanted to present the strongest case possible, the issue is that they submitted information that was not properly cited on an element material to the petitioner's eligibility for the benefit sought under the immigration laws of the United States. Had the petitioner and its former counsel been more forthcoming, the petition might not have been approved.⁴ Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

II. The Instant H-1B Petition

A. Factual and Procedural History

Thereafter, the petitioner submitted the instant Form I-129 petition on behalf of the beneficiary.⁵ In this matter, the petitioner stated that it seeks the beneficiary's services as a market research analyst to work on a part-time basis at a rate of pay of \$16.09 per hour.⁶ Thus, the beneficiary's salary will

Thus, the petitioner failed to establish the nature of the proffered position and in what capacity the beneficiary would actually be employed.

⁴ The director shall send to the petitioner a notice of intent to revoke the petition if the director finds that the statement of facts contained in the petition was inaccurate or the approval of the petition violated 8 C.F.R. § 214.2(h) or involved gross error. See 8 C.F.R. § 214.2(h)(11)(iii)(A)(2) and (5).

⁵ The petitioner submitted the instant H-1B petition on June 15, 2012, indicating (on page 2 of the Form I-129) that there had been a change in the previously approved employment. The requested dates of employment are from September 26, 2012 to September 25, 2014 (two years).

⁶ The AAO observes that the petitioner provided inconsistent information regarding the number of hours that the beneficiary will be employed and the salary that she will be paid in the market research analyst position. More specifically, on the Form I-129 petition, the petitioner claims that the beneficiary will be employed twenty-three hours per week at a rate of pay of \$26,734 per year (which corresponds to approximately \$22.35 per hour). In a letter of support dated June 4, 2012, however, the petitioner states that the beneficiary will be employed thirty-two hours per week at a rate of pay of \$16.09 per hour. On the LCA, the petitioner also

decrease by more than \$10 per hour (a decrease of approximately 38%) in the new position as a market research analyst compared to her prior position with the petitioner as an assistant sales manager.

In a letter dated June 4, 2012, the petitioner indicated that the instant petition is filed "to extend H-1B classification for [the beneficiary] . . . and to change her position." In a letter dated June 9, 2012, counsel states, "The beneficiary in this matter qualifies as an H-1B nonimmigrant by virtue of the fact that he [sic] is a member of the professions."⁷ Counsel adds that the beneficiary "will be performing professional services on a temporary basis, & qualifies as a person of distinguished merit and ability as defined in Section 101(a)(15)(H)(i) Matter of General Atomic Company, Int. 2827 (Comm. 1980)."⁸

The petitioner provided the following information regarding the duties of its market research analyst position:

As a Market Research Analyst, [the beneficiary's] job duties will include, communicating with executives for this company both in Los Angeles and China to determine and understand the ultimate objectives of the market research. To formulate marketing and analysis plans and acquire approval from supervisor. [The beneficiary] will conduct in-depth data analysis using traditional and advanced methods of market research to determine objectives. She will author reports

reported the rate of pay as \$16.09 per hour. The petitioner did not provide an explanation for the discrepancies.

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. 591-92.

⁷ In the June 9, 2012 letter, counsel references the beneficiary in the masculine pronoun case. The record provides no explanation for this discrepancy. Further, counsel's letter states that a Form I-539 (Application to Extend/Change Nonimmigrant Status), presumably for a dependent family member, is included in the submission. However, the referenced application was not provided to USCIS. Thus, upon review, it is questionable whether the information provided in counsel's letter is correctly attributed to this particular beneficiary and position.

⁸ Counsel states that the beneficiary "qualifies as a person of distinguished merit and ability." To clarify, the AAO notes that the term "distinguished merit and ability" was defined in the regulations as "one who is a member of the professions . . . or who is prominent in his or her field." See 8 C.F.R. § 214.2(h)(4) (1991). The *Immigration Act of 1990* ("IMMACT 90") deleted the term "distinguished merit and ability" from the general H-1B description and replaced it with the requirement that the position be a "specialty occupation." Pub. L. No. 101-649, 104 Stat. 4978, 5020. The implementation of this change occurred on April 1, 1992. The *Miscellaneous and Technical Immigration and Naturalization Amendments of 1991* ("MTINA"), which was enacted on December 2, 1991, modified the H-1B definition to include fashion models of distinguished merit and ability. Pub. L. No. 102-232, 105 Stat. 1733. While the term "distinguished merit and ability" is still used with regard to fashion models, it must be noted that the term has not been applicable to the general H-1B classification ("specialty occupations") for over 20 years.

containing actionable recommendations, as well as make presentations to executives both in Los Angeles and China.

As a preliminary matter, the AAO notes that this general job description fails to adequately convey the substantive work that the beneficiary will perform within the petitioner's business operations. In establishing a position as a specialty occupation, the petitioner must describe the specific duties and responsibilities to be performed by the beneficiary in the context of the petitioner's business operations, demonstrate a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition.

Such generalized information does not in itself establish a correlation between any dimension of the proffered position and a need for a particular level of education, or educational equivalency, in a body of highly specialized knowledge in a specific specialty. Therefore, it is not evident that the proposed duties as described, and the position that they comprise, merit recognition of the proffered position as a specialty occupation. To the extent that they are described, the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the performance of the proffered position for the entire period requested, so as to persuasively support the claim that the position's day-to-day job responsibilities and duties would require the theoretical and practical application of a particular educational level of highly specialized knowledge in a specific specialty directly related to those duties and responsibilities.

Furthermore, the petitioner did not provide any information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform these functions and tasks. Thus, the petitioner failed to specify which tasks were major functions of the proffered position, and it did not establish the frequency with which each of the duties would be performed (e.g., regularly, periodically or at irregular intervals). As a result, the petitioner did not establish the primary and essential functions of the proffered position.

Moreover, the petitioner did not state at the time of the petition was filed that the proffered position has any particular academic requirements (or any other requirements). Rather, the petitioner claimed "[w]e have chosen [the beneficiary] for this position because of [her] solid educational background."⁹ The petitioner does not claim that the proffered position requires the theoretical and practical application of a body of highly specialized knowledge or the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as the minimum requirement for entry into the occupation, as required by the Act. *See* section 214(i)(1) of the Act.

With the Form I-129 petition, the petitioner submitted a copy of the beneficiary's diploma and transcript. The documentation indicates that the beneficiary was granted a Master of Business Administration, with a major in business administration, from the [REDACTED] in 2008.

The petitioner also submitted an LCA in support of the instant petition that designated the proffered

⁹ 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, or its equivalent. *See* section 214(i)(1) of the Act.

position under the occupational category "Market Research Analysts and Marketing Specialists" – SOC (ONET/OES) code 13-1161. The petitioner designated the proffered position as a Level I (entry) position.

In addition, the petitioner provided documentation regarding its business operations.¹⁰ Further, the petitioner provided Form W-2, Wage and Tax Statements, issued to the beneficiary, along with the beneficiary's 2010 and 2011 tax returns.¹¹ The beneficiary's job title on both of the tax returns is listed as "Office Worker."

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on December 20, 2012. In the request, the petitioner was asked to provide additional evidence to establish that the proffered position qualifies as a specialty occupation. The notice included a request to provide a more detailed description of the work to be performed by the beneficiary for the entire period requested, including the specific job duties, the percentage of time to be spent on each duty, level of responsibility, hours per week of work, etc. The director outlined the evidence to be submitted.

¹⁰ It appears that the petitioner and its counsel have provided inconsistent information regarding its corporate structure. In a letter of support dated June 4, 2012, the petitioner states that its headquarters are located in China and that it has international sales and ticketing offices in various cities, including Los Angeles, California. With the H-1B petition, the petitioner submitted documentation from the State of California, indicating that the petitioner is registered as a foreign corporation, and that (in 1997) it complied with the state requirements to qualify to transact intrastate business within the state. The petitioner also submitted unsigned 2010 and 2011 tax returns (U.S. Income Tax Return of a Foreign Corporation - Form 1120-F), which indicate that the corporation is not a subsidiary in a parent-subsidiary group. Further, the petitioner provided a 2011 annual report, which indicates that the company and its subsidiaries make up a "Group," which has overseas offices in various cities, including Los Angeles.

In a letter dated February 13, 2013, counsel states that "the [p]etitioner is the largest commercial airlines in China. Further, they have branch offices around the world. The [b]ranch office in Los Angeles is the headquarters for all of North and South America." Counsel continues by stating that "the [p]etitioner [is] planning to exp[a]nd to the New York market." The petitioner submitted an organizational chart, which includes an entry entitled "US Branch" and an entry entitled "Los Angeles Office Headquarters."

In response to the director's certification, however, counsel submitted a letter dated September 17, 2003 [presumably, 2013], which refers to the petitioner and its "parent" company. Specifically, counsel states that "[t]he [p]etitioner and its parent company spent a large sum of money on advertising" Counsel continues by stating that "[t]he [p]etitioner and its parent company currently employ over 40 market research analysts"

¹¹ On the previously filed Form I-129 (on page 13), the petitioner stated that the beneficiary's rate of pay per year would be \$27,237.60. Notably, the Form W-2 issued to the beneficiary by the petitioner indicates that she was only paid \$23,865.38 in 2011, approximately \$3,370 less than the wage attested on the H-1B petition. No explanation for the variance was provided by the petitioner. It is noted that the director shall also send to the petitioner a notice of intent to revoke the petition if the director finds that the petitioner violated the terms and conditions of the approved petition, e.g., by failing to pay the beneficiary the wage attested on the approved petition. See 8 C.F.R. § 214.2(h)(11)(iii)(A)(3).

Counsel for the petitioner responded to the RFE and provided a brief and additional evidence in support of the H-1B petition. Specifically, counsel provided a document which he refers to as "a more detailed Job Description." It must be noted that the document does not provide the job title of the position. Further, the document is not on the petitioner's letterhead and has not been signed or endorsed by the petitioner. Moreover, the document is not dated or titled. The record of proceeding does not indicate the source of the duties or academic requirements stated in the document. Nevertheless, the director reviewed the document, which states the following:

Working hours: 10:00am-6pm Monday-Thursday

Job Duties

1. Market research (70%)

[The petitioner] is expanding its Americas Market and is planning to join 12 Southern American Countries' off-line Market. The job requires application to do a lot of research on these Southern American Markets, such as population of Chinese and Asia; Asia overseas companies; potential passenger from other carrier; how are other carriers doing in the market; what are the major routes that the passengers travel in that country; current market share and etc.

And capable to manage massive sales, demographic data, including collection, classification. it requires the ability to identify true and false data. using data and fact to complete market research report and build financial models market analysis plans and financial models directly forwarded to head quarter sales, distribution and revenue management team for discussions and approvals. (The report needs to be in Chinese.)

There are two ways to joining off-line markets in Southern America. One is joining directly and the other way is joining with third party [REDACTED] Different countries has different major third party to join with and with different rate. Application needs to research and analyze to use which third party which includes consideration of rate; experience; if representing other competitive carrier; customer service and etc.

[The petitioner] is also planning to be on-line in New York Market (launch its own flight). Do research on NY market. Finding which airport (JFK or EWR or LGA) is suitable for [the petitioner] launch its own flight, potential passenger, current market share and etc.

This job requires a Master degree and has experience in Airline Industry and also need to know how to make Marketing analysis model.

2. Communicate and do market presentation and report of findings with HQ (10%)

3. Market plans for off-line or on-line launch (10%)

Find out the best location to have the event for presenting [the petitioner].
Consult with third party [REDACTED] for the plan.

4. Work with Sales department to advice workable promotion plan. (10%)

(Errors in the original.) The AAO observes that for the first time, the director was provided with the claimed requirements for the position. That is, the document states that "[t]his job requires a Master degree and has experience in Airline industry and also need to know how to make Marketing analysis model."¹² Thus, according to this job description, a master's degree in any discipline is acceptable for the position, as long as a candidate has experience in the airline industry and knowledge of how to make a marketing analysis model.

In the brief dated February 13, 2013, counsel stated, "We take issue that this job does not require a specialized bachelor's degree in marketing." The AAO observes that the petitioner did not state in the initial petition or in response to the RFE that the proffered position requires at least a bachelor's degree in marketing.¹³ Furthermore, although a beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation, the AAO observes that the beneficiary does not possess a degree in marketing. Thus, if the proffered position requires "a specialized bachelor's degree in marketing" (as suggested by counsel, but not confirmed by the petitioner), then the beneficiary is not qualified to serve in the proffered position.

The RFE response also included an organizational chart, printed on the petitioner's letterhead. The chart depicts the beneficiary as serving in the marketing and sales department, although her job title was not provided. The hierarchy of the chart indicates that the manager position (a position above the beneficiary) is "vacated." However, a note at the bottom of the chart states, "Assistant General Manager, [REDACTED] is and will direct the beneficiary."¹⁴ The AAO observes that the spelling of

¹² In the initial H-1B submission, the petitioner states, "We have chosen [the beneficiary] for this position because of [her] solid educational background." The petitioner did not state that any particular academic credentials, experience and/or knowledge are required to perform the duties of the proffered position. In response to the RFE, the job description states that education, experience and knowledge are required for the position, specifically, (1) a master's degree; (2) experience in the airline industry; and (3) knowledge to "make a marketing analysis model."

A petitioner cannot materially change the requirements for a position. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

¹³ Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

¹⁴ Notably, the corporate account manager, the beneficiary, and several associates are identified on the organizational chart. [REDACTED] however, is not identified on the organizational chart. No

the last name ([REDACTED] for this individual (in the note at the bottom of the organizational chart) differs from the spelling of the name as it appears throughout the record of proceeding [REDACTED]. Furthermore, other documents in the record indicate that [REDACTED] serves as "Manager, Human Resources" (on a letter signed by [REDACTED] on June 4, 2012) or as "Assistant General Manager, Human Resources" (as stated on the LCA, which was signed by [REDACTED] two days later, on June 6, 2012).¹⁵ No explanation for the misspelling of the name and the variation in the job title was provided by the petitioner or counsel.¹⁶ The documentation indicates that the proffered position of market research analyst will be directed by a human resources manager, and that the role of this human resources manager is not designated in the organizational chart under the marketing and sales department (or elsewhere).

In addition, the response to the RFE included several documents in support of the petition. Specifically, the submission included: (1) a printout from DOL's *Occupational Outlook Handbook* ("*Handbook*"), 2002-2003 Edition;¹⁷ (2) an excerpt from the Dictionary of Occupational Titles (DOT); and (3) a summary page from the *Handbook*, 2012-2013 edition, regarding the occupational category "Market Research Analysts."

Additionally, the RFE response included four job postings. Counsel states that "[a]ll of this [sic] companies require a bachelor's degree or higher in Marketing or directly related fields, such as economics." The AAO observes that the petitioner has not indicated that the proffered position requires a *bachelor's* degree in *marketing or economics*, and, further, the beneficiary does not possess a degree in marketing or economics.

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, or its equivalent. The director denied the petition on May 15, 2013. Subsequently, on September 3, 2013, the director certified the decision to the AAO for review.

explanation was provided by the petitioner or counsel.

¹⁵ The alteration in the spelling of the name and the job title call into question the accuracy of the information provided and who actually prepared the organizational chart. The chart is not signed or endorsed by the petitioner's representative.

¹⁶ Moreover, the AAO reviewed the quarterly wage reports provided by the petitioner. The wage reports do not indicate that the petitioner employed anyone with the name [REDACTED]. The wage reports list an individual named [REDACTED] and an individual named [REDACTED]. The petitioner and counsel, however, did not provide any documentation to establish that [REDACTED] is the same individual as [REDACTED]. The wage reports do not include anyone with the last name [REDACTED].

¹⁷ The *Handbook* has been published biennially, in even-numbered years starting in 1966, through the current 2012-2013 edition.

In response to the director's certification, counsel submitted a brief to the AAO.¹⁸ The submission included an undated letter from the petitioner stating that "[the petitioner] has more than 40 people who work in [the] Marketing and Sales Department as a market research analyst. [The petitioner] require[s a] bachelor[']s and higher degree for this position."

B. The Petitioner Does Not Require A Bachelor's or Higher Degree in a Specific Specialty (or Its Equivalent)

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. The AAO will first discuss some findings that are material to this decision's application of the H-1B statutory and regulatory framework to the proffered position as described in the record of proceeding.

When determining whether a position is a specialty occupation, the AAO must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. To ascertain the intent of a petitioner, USCIS looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the 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."

For H-1B approval, the petitioner must demonstrate a legitimate need for an employee exists and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. It is incumbent upon the petitioner to demonstrate it has sufficient work to require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent, to perform duties at a level that requires the theoretical and practical application of a body of highly specialized knowledge for the requested validity dates. 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)). USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the

¹⁸ Counsel requests that the AAO "remand this matter to the District Director because it [is] not a case for certification." The AAO declines counsel's request to remand the case, and notes that the director may certify a decision to the AAO when a case involves an unusually complex or novel issue of law or fact. 8 C.F.R. § 103.4(a)(1). Legal or factual issues that may arise in a decision and warrant certification include, but are not limited to: issues of first impression; conflicting legal authority; issues of significant public interest; federal litigation; questions of foreign law; novel policy issues; and complicated factual situations. See Policy Memorandum, USCIS Office of the Director, *Certification of Decisions to the Administrative Appeals Office*, PM-602-0087 (July 2, 2013). Here, the petitioner has filed a complaint in the United States District Court for the Central District of California. As the case involves federal litigation, the director's decision to certify the case to the AAO was permitted by USCIS policy, and the AAO properly has jurisdiction over the matter.

petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

Here, the petitioner has provided inconsistent information regarding the proffered position. In the initial H-1B submission, the petitioner did not provide any requirements for the proffered position. Thereafter, the response to the RFE included a document referenced by counsel as "a more detailed Job Description," which indicates that a master's degree (no specific specialty) is required for the position, along with experience in the airline industry and knowledge of "how to make [a] marketing analysis model."¹⁹ In response to the director's certification, the petitioner submitted an undated letter claiming that it requires a "bachelor's and higher degree" (no specific specialty) for the market research analyst position. In this letter, the petitioner did not claim that it requires any particular experience and knowledge for the position. No explanation for the variance in the requirements was provided by the petitioner.

Moreover, the petitioner's assertion that a general-purpose degree or a degree in any discipline is a sufficient minimum requirement for entry into the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly to the position in question. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). There must be a close correlation between the required specialized studies and the position; thus, the mere requirement of a degree, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988) (stating that "[t]he mere requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility"). Thus, while a general-purpose degree or a degree in any discipline 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.

Accordingly, without more, the petitioner's statements (i.e., "[t]his job requires a Master degree" and "[the petitioner] require[s] [a] bachelor and higher degree for this position") fail to establish eligibility for the benefit sought under the applicable statutory and regulatory provisions. The petitioner's statements that a degree is required, without further requiring that (1) the degree be in

¹⁹ Furthermore, in response to the RFE, counsel states, "We take issue that this job does not require a specialized bachelor's degree in marketing." Counsel's statement is not consistent with other information in the record of proceeding with regard to the petitioner's stated requirements for its market research analyst position. The AAO incorporates by reference its previous discussion that, contrary to counsel's claim, the petitioner did not state at any time in the record that the proffered position requires at least a bachelor's degree in marketing. Furthermore, the petitioner has not provided probative evidence to establish that the beneficiary possess a degree in marketing.

any specific specialty or (2) the degree be equivalent to a degree in a specific specialty when combined with additional education, training, and/or experience, 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.

In response to the director's certification, counsel states that the "Service's assumption that one specific degree is required in order for [an] occupation to be a 'specialty occupation' is too narrow an interpretation of the relevant statute for an H-1B." 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." Counsel also asserts that the "facts of the above case are right on point with this matter, except that the beneficiary in *Residen[tial] Finance Co. et al* had a Bachelor's degree."²⁰

The AAO agrees with the aforementioned proposition that "[t]he knowledge and not the title of the degree is what is important." However, in this matter and as just discussed, there are discrepancies in the record of proceeding regarding the requirements for the proffered position.²¹ Further, the petitioner has indicated that a general-purpose degree or a degree in any discipline is sufficient for the proffered position. Additionally, aside from the job title of the proffered position, 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*.²² Accordingly, counsel's reliance on this United States district court's decision is misplaced.

The fact that a person may be employed in a position designated by an employer as that of a market research analyst and may apply some related principles in the course of his or her job is not in itself sufficient to establish the position as one that qualifies as a specialty occupation. Thus, it is incumbent

²⁰ It must be noted 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.

²¹ To reiterate, the petitioner did not initially indicate any requirements for the proffered position. Thereafter, a job description was submitted in response to the RFE, which states that the position requires a master's degree, without further specification, along with experience in the airline industry and the "know how to make [a] marketing analysis model." In response to the director's certification, the petitioner now asserts that a "bachelor's and higher degree" (no specific specialty) is required for the proffered position.

²² 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 the 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.

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. When any person makes an application for a "visa or any other document required for entry, or makes an application for admission [. . .] the burden of proof shall be upon such person to establish that he is eligible" for such relief. Section 291 of the Act, 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I. & N. Dec. 190.

C. The LCA Filed in the Instant Matter Would Not Correspond to a Higher-Level and More Complex Position

The AAO observes that in the instant case, there are additional discrepancies in the record of proceeding, which undermine the petitioner's credibility with regard to the services the beneficiary will perform, as well as the nature and requirements of the proffered position. This particular aspect is exemplified by the discrepancy between what the petitioner claims about the requirements and level of responsibility inherent in the proffered position set against the contrary information conveyed by the petitioner to DOL in the LCA submitted in support of the petition.

As previously stated, 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" – SOC (ONET/OES) code 13-1161. In the LCA, the petitioner designated the proffered position as a Level I (entry) position, with a prevailing wage of \$16.09 per hour. The prevailing wage source is listed in the LCA as the OES (Occupational Employment Statistics) OFLC (Office of Foreign Labor Certification) Online Data Center.²³ The LCA was certified on May 22, 2012, and signed by the petitioner on June 6, 2012. By completing and submitting the LCA, and by signing the LCA, the petitioner attested that the information contained in the LCA was true and accurate.

Based upon a review of the record of proceeding, the AAO finds the wage level for the proffered position questionable. Wage levels should be determined only after selecting the most relevant Occupational Information Network (O*NET) code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.²⁴

²³ The Occupational Employment Statistics (OES) program produces employment and wage estimates for over 800 occupations. *See* Bureau of Labor Statistics, U.S. Department of Labor, on the Internet at <http://www.bls.gov/oes/>. The OES All Industries Database is available at the Foreign Labor Certification (OFLC) Data Center, which includes the Online Wage Library for prevailing wage determinations and the disclosure databases for the temporary and permanent programs. The Online Wage Library is accessible at <http://www.flcdatacenter.com/>.

²⁴ 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.

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.²⁵ 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.

As previously mentioned, the "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. A Level I wage rate is defined by DOL as follows:

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

See 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.

The AAO observes that although the petitioner designated the proffered position as a Level I entry-level position, the response to the RFE included a document stating that the position requires (1) a master's degree; (2) experience in the airline industry; and (3) knowledge of how to make a marketing analysis model. Further, the documentation indicates that the beneficiary will complete market research reports, build financial models, and prepare market analysis plans, which will be provided to the sales, distribution and revenue management team at the petitioner's headquarters, and that such reports "need to be in Chinese."²⁶ The claimed level of education, experience,

²⁵ 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.

²⁶ It must be noted that a language requirement other than English in a petitioner's job offer generally is considered a special skill for all occupations, with the exception of "Foreign Language Teachers and

knowledge and special skills required to perform the duties of the proffered position as stated in the RFE is at odds with the wage-rate selected by the petitioner on the LCA.

Moreover, throughout the record of proceeding, the petitioner and its counsel claim that the proffered position involves complex, unique and/or specialized duties. In addition and as noted above, the organizational chart provided in response to the RFE does not indicate that the beneficiary would be closely supervised by any higher-level market research analyst or marketing manager. Further, in a letter dated June 4, 2012, the petitioner states that it "need[s] to hire a skilled individual in the position of Market Research Analyst." The petitioner asserts that the beneficiary will "determine and understand the ultimate objectives of the market research." According to the petitioner, the beneficiary's job duties will include "author[ing] reports containing actionable recommendations, as well as mak[ing] presentations to executives in Los Angeles and China." However, the petitioner's designation of the proffered position at a Level I wage-rate indicates that the beneficiary will be expected to "perform routine tasks that require limited, if any, exercise of judgment" and that she will work "under close supervision."

Additionally, in a letter dated February 13, 2013, counsel states that the proffered position involves "marketing research of a very skilled nature." In a brief dated September 17, 2013 [the AAO assumes counsel meant 2013], counsel claims that "[a] market research analyst employed by the Petitioner must have an understanding of the latest developments in marketing strategy." Counsel further emphasizes the "complex nature of the marketing strategy being developed by the Petitioner" and indicates that the beneficiary must have an understanding of complex marketing strateg[ies]." Counsel continues by stating that the petitioner "requires marketing reports of a highly specialized and complex nature." However, here, the petitioner has classified the proffered position at a Level I wage, which is appropriate for a position requiring only "a basic understanding of the occupation" who will "receive specific instructions on required tasks and results expected" at a level expected of a "worker in training" or an individual performing an "internship."

Counsel also asserts that as "the petitioner and its parent company spent a large sum of money on advertising in a very competitive market, [it] is essential that the [p]etitioner [has] a marketing strategy that meets the complex needs of a major airline." The petitioner and counsel emphasize that the petitioner is expanding its business and its operations in the United States (specifically into the New York market) and South America and claim that the petitioner's growth requires it to hire a "skilled individual" who will "conduct in-depth data analysis using traditional and advanced methods of market research to determine objectives." Further, the petitioner states that the beneficiary will be responsible for "communicating with executives" and "mak[ing] presentations to executives," as well as "author[ing] reports containing actionable recommendations." In response to the RFE, the petitioner and counsel indicate that the beneficiary will "complete market research report[s] and build financial models[,] market analysis plans and financial models [which will be] directly forwarded to [the] head quarters [sic] sales, distribution and revenue management team for discussions and approvals."

The petitioner therefore appears to claim that it will be relying heavily on the beneficiary's work

Instructors," "Interpreters," and "Caption Writers." In the instant case, the petitioner has not established that its foreign language requirement has been reflected in the wage-level for the proffered position.

product to make critical decisions regarding the company's expansion of its business and operations. Such reliance on the beneficiary's work appears to surpass the expectations of a Level I position, as described above, where the employee works under close supervision, performing routine tasks that require only a basic understanding of the occupation and limited exercise of judgment. In the instant case, rather than the beneficiary's work being "monitored and reviewed for accuracy," it appears that the petitioner claims that it will be relying on the accuracy of the beneficiary's work product to make major business decisions about the direction of the company.

Thus, upon review of the assertions regarding the proffered position, the AAO must question the stated requirements for the proffered position, as well as the level of complexity, independent judgment and understanding that are actually needed 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, responsibilities and requirements as described in the record of proceeding 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 same occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; 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. Furthermore, a Level I designation is appropriate for a position as a research fellow, a worker in training, or an internship.

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the LCA. See section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A); *Patel v. Boghra*, 369 Fed. Appx. 722, 723 (7th Cir. 2010). The LCA serves as the critical mechanism for enforcing section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). See 65 Fed. Reg. 80110, 80110-80111 (indicating that the wage protections in the Act seek "to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers" and that this "process of protecting U.S. workers begins with [the filing of an LCA] with [DOL]").

The prevailing wage of \$16.09 per hour on the LCA corresponds to a Level I position for the occupational category of "Market Research Analysts and Marketing Specialists" for Los Angeles County (Los Angeles, California).²⁷ Notably, if the proffered position had been designated at a higher level, the prevailing wage at that time would have been \$23.37 per hour for a Level II position, \$30.64 per hour for a Level III position, and \$37.92 per hour for a Level IV position.

²⁷ For additional information regarding the prevailing wage for "Market Research Analysts and Marketing Specialists" in Los Angeles, California, see the All Industries Database for 7/2011 - 6/2012 at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatcenter.com/OesQuickResults.aspx?area=31084&code=13-1161&year=12&source=1> (last visited November 29, 2013).

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct wage level in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different wage level at a lower prevailing wage than the one that it claims it is offering to the beneficiary. Therefore, if the proffered position were found to qualify as a specialty occupation on the basis that it was a higher-level and more complex position, as claimed elsewhere in the petition, the petition could still not be approved as the petitioner has failed to establish that it would pay the wage required for that level of work as required under the Act.

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. As previously mentioned, 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.

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, provided the proffered position was in fact found to be a higher-level and more complex position (which requires special skills) as asserted by the petitioner and counsel elsewhere in the petition, the petitioner would have failed to submit a valid LCA that corresponds to the claimed duties and requirements of the proffered position; that is,

specifically, the LCA submitted in support of the petition would then fail to correspond 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 section 212(n)(1)(A) of the Act and the pertinent LCA regulations.

The statements regarding the requirements and 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 proceeding, the petitioner failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed.

As such, a review of the enclosed LCA indicates that the information provided therein 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, which if accepted as accurate would result in the beneficiary being paid a salary below that required by law. As a result, even if it were determined that the proffered position were a higher-level and more complex position as described and claimed elsewhere in the petition in support of the petitioner's assertions that this position qualifies as a specialty occupation, the petition could still not be approved for this additional reason.²⁸

D. The Director's Basis for Denial of the H-1B Petition

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, the AAO agrees with the director and finds that the evidence fails to establish that the position as described more likely than not constitutes a specialty occupation. It should be noted that, for efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the duties and requirements of the proffered position into each basis discussed below for affirming the director's decision.

For an H-1B petition to be granted, the petitioner must provide in part 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

²⁸ Fundamentally, it appears that (1) the petitioner previously claimed to DOL that the proffered position is a Level I, entry-level position to obtain a lower prevailing wage; and (2) the petitioner is now claiming to USCIS that the position is a higher-level and more complex position (which requires special skills) in order to support its claim that the position qualifies as a specialty occupation. The petitioner cannot have it both ways. Either the position is a more senior and complex position that involves special skills (based on a comparison of the petitioner's job requirements to the standard occupational requirements) and thereby necessitates a higher required wage, or it is an entry-level position for which the lower wage offered to the beneficiary in this petition is acceptable. To permit otherwise would be directly contrary to the U.S. worker protection provisions contained in section 212(n)(1)(A) of the Act and its implementing regulations.

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 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.

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

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. As previously mentioned, the specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the particular 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 or its equivalent as the minimum for entry into the occupation, as required by the Act.

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

The 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.²⁹ As previously discussed, the petitioner asserts that the proffered position falls under the occupational category "Market Research Analysts."

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

²⁹ All of the AAO's references are to the 2012-2013 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>. The AAO hereby incorporates the excerpt of the *Handbook* regarding the duties and requirements of the occupational category "Market Research Analysts" into the record of proceeding.

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

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 29, 2013).

When reviewing the *Handbook*, the AAO must again note that the petitioner designated the proffered position as a Level I (entry level) position on the LCA. This designation is indicative of a comparatively low, entry-level position relative to others within the same occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that she would be closely supervised; that her work would be closely monitored and reviewed for accuracy; and that she would receive specific instructions on required tasks and expected results. Based upon the petitioner's designation of the proffered position as a Level I position, it does not appear that the beneficiary will be expected to serve in a senior or leadership role or in a top research or technical research 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 this occupation. Here, although the *Handbook* indicates that most positions in this occupation need at least a bachelor's degree, this statement does not support the view that any position designated by an employer as a market research analyst position qualifies as a specialty occupation.³⁰ Further, the occupation

³⁰ The first definition of "most" in the *Webster's New College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of the jobs falling under this occupational category need at least a bachelor's degree, it could be said that "most" of these positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" of the 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 discussed, has been designated as a Level I position on the LCA, suggesting that it is a relatively low-level, entry position.

accommodates a spectrum of academic credentials for market research analyst positions. That is, the *Handbook* indicates that degrees in a wide-variety of disparate fields and backgrounds are acceptable for entry into the occupation. This passage of the *Handbook* reports 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.³¹

In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum requirement of a bachelor's of higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in 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).³²

Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." Section 214(i)(1) of the Act.

³¹ In a complaint dated June 5, 2013, counsel states, "The OOH [*Handbook*] requires a degree in marketing. The [director] cited an out of date version of the OOH." In a brief dated September 17, 2003 [the AAO assumes counsel meant September 17, 2013], counsel claims that the director did not cite "the latest addition [sic] of the OOH." Counsel claims that the most recent edition of the *Handbook* is the 2011-2012 edition. The AAO notes, however, that counsel is mistaken. As previously mentioned, the *Handbook* is published biennially, in even-numbered years. The AAO takes administrative notice that the current version of the *Handbook* is the 2012-2013 edition. Further, the director's RFE specifically states that the references in the notice are to the 2012-2013 edition. Moreover, contrary to counsel's assertion, the quotations in the director's decision are also from the 2012-2013 edition of the *Handbook*.

³² 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.

In addition to recognizing degrees in disparate fields, i.e., social science and computer science as acceptable for entry into this field, the *Handbook* also states that "others have a background in business administration." Again, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147. As noted *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. Cf. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558. Therefore, the *Handbook's* recognition that a general, non-specialty "background" in business administration is sufficient for entry into the occupation strongly suggests that a bachelor's degree in a specific specialty is not normally the minimum requirement for entry into this occupation. Accordingly, as the *Handbook* does not indicate that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation, it does not support the particular position proffered here as qualifying as a specialty occupation.

In response to the RFE, counsel claims that his "office has done numerous H-1B [petitions] for Market Research Analyst [positions] and they have always been found to be a specialty occupation." Counsel makes a general claim regarding H-1B petitions that he has prepared, but he fails to provide any specific information to support his statement, such as the names of the employers and employees, information regarding the employers, the dates that the petitions were submitted, the number of such petitions, the requirements and duties of the positions, etc. More importantly, however, copies of these allegedly approved petitions were not included in the record. If a petitioner wishes to have unpublished service center or AAO decisions considered by USCIS in its adjudication of a petition, the petitioner is permitted to submit copies of such evidence that it either obtained itself and/or received in response to a Freedom of Information Act request filed in accordance with 6 C.F.R. Part 5.

Again, the petitioner in this case failed to submit copies of the petitions and their respective approval notices. As the record of proceeding before the AAO does not contain any evidence of the allegedly approved petitions, there were no underlying facts to be analyzed and, therefore, no prior, substantive determinations could have been made to determine what facts, if any, were analogous to those in this proceeding.

As previously mentioned, when any person makes an application for a "visa or any other document required for entry, or makes an application for admission [. . .] the burden of proof shall be upon such person to establish that he is eligible" for such relief. Section 291 of the Act; see also *Matter of Treasure Craft of California*, 14 I. & N. Dec. 190. Furthermore, any suggestion that USCIS must review unpublished decisions and possibly request and review each case file relevant to those decisions, while being impractical and inefficient, would also be tantamount to a shift in the evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act. Accordingly, even if counsel had provided sufficient information to identify these prior H-1B petition filings, neither the director nor the AAO was required to request and/or

obtain a copy of the allegedly approved petitions referenced by counsel.

Nevertheless, even if this evidence had been submitted and even if it had been determined that the facts in those cases were analogous to those in this proceeding, those decisions are not binding on USCIS. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Moreover, if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

In addition, counsel claims that the information provided in the Dictionary of Occupational Titles (DOT) supports the assertion that the proffered position qualifies as a specialty occupation. As a preliminary matter, the AAO notes that the DOT has been superseded by the O*NET. For instance, the DOL website states the following regarding DOT (emphasis in the original):

The Dictionary of Occupational Titles (DOT) was created by the Employment and Training Administration, and was last updated in 1991. It is included on the Office of Administrative Law Judges (OALJ) web site because it was a standard reference in several types of cases adjudicated by the OALJ, especially in older labor-related immigration cases. **The DOT, however, has been replaced by the O*NET.**

See U.S. Dep't of Labor, Off. of Admin. L. Judges, *Dictionary of Occupational Titles Fourth Edition*, (rev. 1991), available at <http://www.oalj.dol.gov/libdot.htm> (last visited November 29, 2013). The chronological element of this resource materially diminishes its evidentiary value as an indication of current practices in the industry, and the petitioner has failed to establish how this material is relevant to the instant proceeding. That is, the petitioner and counsel have failed to establish the DOT's relevancy here to establish the current educational requirements for entry into the occupation.

Nevertheless, the AAO reviewed the information that the DOT provides regarding market research analysts. Specifically, the DOT provides the following (emphasis added):

CODE: 050.067-014
TITLE(s): MARKET-RESEARCH ANALYST I (profess. & kin.)

Researches market conditions in local, regional, or national area to determine potential sales of product or service: Establishes research methodology and designs format for data gathering, such as surveys, opinion polls, or questionnaires. Examines and analyzes statistical data to forecast future marketing trends. Gathers data on competitors and analyzes prices, sales, and methods of marketing and distribution. Collects data on customer preferences and buying habits. Prepares reports and graphic illustrations of findings.

GOE: 11.06.03 STRENGTH: S GED: R5 M5 L5 SVP: 7 DLU: 77

The AAO reviewed the information regarding the occupational category "Market Research Analysts" but does not find that it supports counsel's assertion that the proffered position qualifies as a specialty occupation. This conclusion is apparent upon reading Section II of the DOT's Appendix C, Components of the Definition Trailer, which addresses the Specialized Vocational Preparation (SVP) rating system.³³ The section reads:

II. SPECIFIC VOCATIONAL PREPARATION (SVP)

Specific Vocational Preparation is defined as 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:

- a. 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);
- b. Apprenticeship training (for apprenticeable jobs only);
- c. In-plant training (organized classroom study provided by an employer);
- d. On-the-job training (serving as learner or trainee on the job under the instruction of a qualified worker);

³³ The DOT's Appendix C, Components of the Definition Trailer, can be found at the following Internet website: http://www.occupationalinfo.org/appendxc_1.html#II.

e. 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
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, the AAO observes that the DOT indicates that the occupational category "Market Research Analyst I" has been assigned an SVP code of 7. An SVP rating of 7 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 "[o]ver 2 years up to and including 4 years" of training in a school, work, military, institutional, or vocational environment. Therefore, the information is not probative of the proffered position qualifying as a specialty occupation.

Counsel also claims that the DOT indicates that "the position of Market Research Analyst is a **PROFESSIONAL** job . . . [and] to be classified as a professional job, the job must require a bachelor's degree (emphasis in the original)." However, it must be noted that a specialty occupation is defined for purposes of the H-1B nonimmigrant category as an occupation that requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area, not a "professional" as now defined at 8 C.F.R. § 204.5(l)(2) or "profession" as that term is currently defined at section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), and 8 C.F.R. § 204.5(k)(2) for purposes of employment-based immigration classification leading to permanent residence in the United States.

Furthermore, as discussed *supra*, the information provided in the DOT does not corroborate counsel's assertion. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. 506.

Based upon a complete review of the record of proceeding, the AAO finds that in the instant case, the record of proceeding does not establish that the proffered position falls under an occupational

category for which the *Handbook*, or other authoritative source, indicates that normally the minimum requirement for entry into the particular position proffered here is at least a bachelor's degree in a specific specialty, or its equivalent. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding by the petitioner also do not indicate that this particular 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 a standard, 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. The record of proceeding also does not contain any evidence from an industry professional association to indicate that a degree is a minimum entry requirement. Further, the petitioner did not submit letters or affidavits from firms or individuals in the industry in support of the claim that the proffered position qualifies under this criterion of the regulations.

In support of the petitioner's assertion that the proffered position qualifies as a specialty occupation position, the record of proceeding contains several job announcements. Upon review of this evidence, however, the AAO finds that the petitioner's reliance on the job announcements is misplaced.

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, postings submitted by a petitioner are 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 and counsel to claim that the organizations are similar and in the same industry without providing a legitimate basis for such an assertion. *Matter of Soffici*, 22 I&N Dec. 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

In the Form I-129, the petitioner states that it is an international airline providing passenger and cargo services, with 20 employees, that was established in 1995. On the Form I-129, the petitioner designated its business operations under the North American Industry Classification System (NAICS) code 561593.³⁴ The U.S. Department of Commerce, Census Bureau website, however, states that 561593 is not a valid NAICS code. See U.S. Dep't of Commerce, U.S. Census Bureau, 2012 NAICS Definition, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited November 29, 2013). The petitioner did not provide an explanation with regard to the NAICS code provided.

The AAO reviewed the job advertisements submitted by the petitioner. Notably, the petitioner and counsel did not provide any independent evidence of how representative these job advertisements are of the particular advertising employer's recruiting history for the type of job advertised. Further, as they are only solicitations for hire, they are not evidence of what qualifications were ultimately required for the positions. Moreover, 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, is common to the petitioner's industry in similar organizations for parallel positions to the proffered position.

Specifically, the advertisements include positions with [REDACTED] (for which the industry is listed as "automotive and parts mfg."); [REDACTED] (a wholesale trade/import-export company); and [REDACTED] ("a Fortune 200 company that owns the premier tobacco companies in the United States, including [REDACTED]"). 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. Further, the petitioner provided an advertisement for [REDACTED] which does not contain any information regarding the company's industry and business operations. Consequently, the record lacks sufficient information regarding the advertising employer to conduct a legitimate comparison of the organization to the petitioner. In the instant case, the petitioner failed to supplement the record of proceeding to establish that the employers 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, some of the job postings contain only a brief description of the advertised positions. For instance, the advertisement for [REDACTED] states that the incumbent will "[r]esearch market & plan marketing for truck parts & equipment; prepare research reports." The advertisement for [REDACTED] states that the position is "responsible for designing and completing several basic research projects." Further, the job posting for [REDACTED] states that the duties of the position are to "[r]esearch market conditions to determine potential sale of the company products." No further information regarding the tasks and responsibilities was provided. Thus, the advertisements do not contain sufficient information regarding the day-to-day duties, complexity of the job duties, supervisory duties (if any),

³⁴ According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity, and each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last visited November 29, 2013).

independent judgment required, or the amount of supervision received within the context of the advertising employers' business operations to make a legitimate comparison of the advertised positions to the proffered position.

Additionally, contrary to the purpose for which the advertisements were submitted, the petitioner submitted a job posting, which does not indicate that a bachelor's degree in a directly related specific specialty is required. That is, [REDACTED] will accept a bachelor's degree in any discipline for its advertised position. The AAO here reiterates that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a specific specialty that is directly related to the specialty occupation claimed in the petition.

Further, some of the employers [REDACTED] indicate that a general-purpose degree, i.e., a degree in business administration is acceptable. As previously mentioned, although a general-purpose bachelor's degree may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.³⁵

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, as the evidence does not establish that similar organizations in the same industry routinely require at least a bachelor's degree in a specific specialty, or its equivalent, for parallel positions, not every deficit of every job posting has been addressed.³⁶

³⁵ 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.

³⁶ According to the *Handbook's* detailed statistics on market research analysts, there were approximately 282,700 persons employed in these positions in 2010. *Handbook*, 2012-13 ed., available at <http://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm#tab-1> (last visited November 29, 2013). USCIS "must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). As just discussed, the petitioner has failed to establish the relevance of the job advertisements submitted to the position proffered in this case. Even if their relevance had been established, the petitioner still fails to demonstrate what inferences, if any, can be drawn from these four job postings with regard to determining the common educational requirements

Thus, based upon a complete review of the record of proceeding, the petitioner has not established 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. 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 the proffered 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.

In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted various documents regarding its business operations, including: (1) its articles of incorporation and certificate of registration; (2) lease agreement; (3) financial documents, such as tax returns and wage reports; (4) annual report; (5) printouts from its website; (6) an organization chart; (7) samples of marketing reports; and (8) information regarding the proffered position.

As previously mentioned, the AAO examines each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence. The evidence submitted, however, fails to establish that the petitioner's proffered position qualifies for the requested classification under the applicable statutory and regulatory provisions. It is not the volume of documentation that establishes eligibility for the benefit sought, but rather the relevance, probative value, and credibility of the documentation – both individually and within the context of the totality of the evidence. *Matter of Chawathe*, 25 I&N Dec. 375-376.

Upon review of the evidence, the AAO notes (as discussed previously) that the petitioner itself does not require at least a baccalaureate degree in a specific specialty, or its equivalent. In addition, the petitioner failed to demonstrate exactly what the beneficiary will do on a day-to-day basis such that the complexity or uniqueness of this particular position relative to other market research analysts can even be determined. That is, the petitioner has failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position. For instance, the petitioner has not established why a few related courses or industry experience alone is insufficient preparation for the proffered position.

Counsel asserts that the petitioner "and its parent company spent a large sum of money on advertising on a very competitive market, thus it is essential that the [p]etitioner have a marketing strategy that meets the complex needs of a major airline." While the petitioner submitted various

for entry into parallel positions in similar organizations in the same industry. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995).

As such, even if the job announcements supported the finding that market research analyst positions for organizations similar to the petitioner required a bachelor's or higher degree in a specific specialty, or its equivalent, it cannot be found that such a limited number of postings could credibly outweigh the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

documents relating to its operations, the AAO notes that the petitioner failed to establish how the documents relate to the beneficiary's day-to-day responsibilities and how such documents demonstrate that its particular position is so complex or unique that it can only be performed only be an individual with a baccalaureate (or higher degree) in a specific specialty, or its equivalent.

For instance, the petitioner submitted samples of marketing reports allegedly prepared by the petitioner's marketing department. Specifically, the record contains documents entitled: (1) "[The Petitioner] market analysis and development"; and (2) Market Analysis." However, the referenced documents are not on company letterhead and are not endorsed by the petitioner. Further, they are undated and the author(s) of the documents are not identified. The reports do not indicate the specific purpose for which they were prepared. While the first document includes "management suggestions," the second document does not identify the intended audience for the report and fails to establish that this report was prepared for or by the petitioner's marketing department. That is, the record of proceeding lacks evidence supporting a conclusion that the data, evaluation and analysis of the reports were prepared by or for the petitioning organization. Further, there is no indication that the beneficiary was involved in the preparation of the reports. The documents do not contain the beneficiary's name or any other information connecting her to the documents. Accordingly, without further information, the evidence regarding the reports is of limited probative value.

Overall, the record lacks sufficient probative evidence to distinguish the proffered position as more complex or unique from other market research analyst positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent. The job descriptions in the record do not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. Moreover, the petitioner failed to provide documentary evidence to establish that the duties performed by the beneficiary involve any particular level of complexity or uniqueness relative to other market research analysts. 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 of the position. While a few related courses may be beneficial, or in some cases even required, to perform 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 evidence of record does not establish that this position is significantly different from other positions such that it refutes the *Handbook's* information that there is a spectrum of preferred degrees acceptable for such positions, including degrees not in a specific specialty. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than other market research analyst positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, the LCA indicates a wage level based upon the occupational classification "Market Research Analysts and Marketing Specialists" at a Level I (entry level) wage. The petitioner designated the position as a Level I position (the lowest of four assignable wage levels), which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the

occupation." Without further evidence, it is not credible that the duties of the petitioner's proffered position are complex or unique relative to other market research analysts, 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. A Level IV position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."³⁷

The AAO observes that the petitioner has indicated that the beneficiary is "ideally qualified to undertake the offered position by virtue of her academic background." In this context, the evidence submitted suggests that the petitioner seeks to underemploy the beneficiary in a position for which she may be overqualified. Again, the test to establish a position as a specialty occupation is not the 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, or its equivalent. The petitioner does not explain or clarify at any time in the record which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. Upon review of the record of proceeding, the AAO finds that the petitioner has failed to establish the proffered position as satisfying the second prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires at least 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 satisfy 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. In the instant case, the record does not establish 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 will not 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 a 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 created only to 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

³⁷ 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.

occupation. See § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

The petitioner states in the Form I-129 petition that it has 20 employees in the United States and that it was established in 1995 (approximately 17 years prior to the H-1B submission). The petitioner did not provide the total number of people it has employed to serve in the proffered position of market research analyst.

In response to the director's certification, the petitioner provided an undated letter from its vice president. The vice president states that the company "has more than 40 people who work in [the] Marketing and Sales Department as a market research analyst."³⁸ It appears that the vice president is referring to the number of people employed by the petitioner or its claimed "parent" company (as stated by counsel) overseas.³⁹ The vice president continues by asserting that the company requires a "bachelor[s] and higher degree for this position." The vice president, however, does not state that the degree must be in a specific specialty directly related to the duties of the position. Thus, from the vice president's statement, it appears that a general-purpose degree or a degree in any discipline is acceptable for the position of market research analyst.

Further, while the petitioner provided a general statement that it employs individuals to serve as market research analysts, the petitioner failed to provide the job duties and day-to-day responsibilities of the positions that it claims are the same as the proffered position. The petitioner did not provide any information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, aside from a job title, it is unclear whether the duties and responsibilities of these individuals were the same or similar to those 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.

In the brief submitted in response to certification, counsel claims that the petitioner "is currently planning to move into the South American market," and asserts that this "requires marketing reports of a highly specialized and complex nature." Upon review of the record of the proceeding, the AAO notes that the petitioner has not provided sufficient probative evidence to satisfy this criterion

³⁸ The petitioner provided a list of 32 names. No explanation was provided regarding the other 8+ individuals.

³⁹ Moreover, the petitioner did not provide any probative evidence regarding the individuals' academic backgrounds and qualifications for their positions (e.g., transcripts, diplomas, and resumes) and documentation to establish their employment with the petitioner, such as pay statements or payroll records.

of the regulations. In the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than market research analyst positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent.

Further, the AAO also reiterates its earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four assignable levels). That is, the designation of the market research analyst position at a Level I is indicative of a low, entry-level position relative to others within the same occupational category 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." Moreover, DOL guidance states that a job offer for a research fellow, a worker in training, or an internship would be an indication that a Level I wage should be considered.

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 of \$37.92 per hour, a difference of over \$21.00 per hour. 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."

Upon review of the record of proceeding, the AAO finds that the petitioner has submitted inadequate probative evidence to establish that the nature of the specific duties is 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, or its equivalent. The AAO, therefore, concludes that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petitioner has submitted insufficient evidence to satisfy 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. Accordingly, the director's decision must be affirmed and the petition denied on this basis.

E. The Beneficiary's Qualifications

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.

F. U.S. Government Export License

Finally, the AAO will briefly address another issue, which was not addressed in the director's decision. Specifically, the petitioner did not properly complete the Form I-129. That is, the instructions for the Form I-129 state, "The petitioner must indicate whether or not a license is

required on **page 5, Part 6** of Form I-129 (emphasis in original)." The instructions further state, "If you do not completely fill out the form . . . you will not establish eligibility and we may deny your petition."⁴⁰ Completion of Part 6 of the form is required in order for the petitioner to certify that it has reviewed the Export Administration Regulations and the International Traffic in Arms Regulations, and determined whether it will require a U.S. Government export license to release controlled technology or technical data to the beneficiary.⁴¹ By signing the Form I-129, the employer certifies under penalty of perjury that the information provided on the form is true and correct.

In the instant case, the petitioner failed to complete Part 6 of the Form I-129 and, thus it did not comply with the Form I-129 instructions (which, as noted above, are incorporated into the regulations pursuant to 8 C.F.R. § 103.2(a)(1)). The petitioner did not provide a valid reason for failing to provide the compulsory attestation. Accordingly, the petition was not properly filed. Without this required information, the petition cannot be approved for this additional reason.

III. Conclusion

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

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

The petition must be denied 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; *see e.g., Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

⁴⁰ The regulation at 8 C.F.R. § 103.2(a)(1) states, in pertinent part, the following:

Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 CFR chapter 1 to the contrary, and such instructions are incorporated into the regulations requiring its submission.

⁴¹ The Export Administration Regulations (EAR) (15 C.F.R. § 770-774) and the International Traffic in Arms Regulations (ITAR) (22 C.F.R. § 120-130) require U.S. persons, including companies, to seek and receive authorization from the U.S. government before releasing controlled technology or technical data to foreign persons in the United States. U.S. companies must seek and receive a license from the U.S. Government before releasing controlled technology or technical data to nonimmigrant workers employed as H-1B beneficiaries.

(b)(6)

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ORDER: The director's decision is affirmed. The petition is denied.