



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **SEP 25 2013**

OFFICE: VERMONT 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:

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,

*Michael T. Kelly*  
for  
Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on a combined motion to reopen and reconsider. The motion will be dismissed. The petition will remain denied.

On the Form I-129 visa petition, the petitioner describes itself as a marketing consulting services company<sup>1</sup> established in 2006. In order to employ the beneficiary in what it designates as an “ethnic markets coordinator” position,<sup>2</sup> 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 law, facts, and procedural history of this case were fully discussed in the AAO’s prior decision and it will only repeat certain laws and facts as necessary. The petitioner filed the instant petition on October 11, 2011. On December 20, 2011 the director denied the petition, concluding that the petitioner failed to demonstrate: (1) that the proffered position qualifies for classification as a specialty occupation; and (2) that the beneficiary is qualified to perform the duties of a specialty occupation. Counsel filed a timely appeal, which the AAO dismissed on January 3, 2013. In its decision dismissing the appeal, the AAO affirmed both grounds of the director’s decision denying the petition.

Counsel filed the instant matter on February 1, 2013. The submissions constituting this joint motion include the following: (1) the Form I-290B, Notice of Appeal or Motion; (2) the Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative; (3) a cover letter from counsel, dated January 31, 2013, which identifies the documents submitted on motion; (4) counsel’s brief in support of the motion; (5) an evaluation of the beneficiary’s educational credentials, dated January 25, 2013 (after the AAO’s decision to dismiss the appeal), that the petitioner obtained from a firm named [REDACTED] (b) an [REDACTED] memorandum, dated April 4, 2012 and addressed to the Director of U.S. Citizenship and Immigration Services (USCIS), in which [REDACTED] presents its arguments in support of its contention that AAO and USCIS Service Centers adjudications were incorrectly interpreting the H-1B regulatory terms “Specialty Occupation” and “Body of Highly Specialized Knowledge”; (7) a copy of the AAO’s decision dismissing the appeal; and (9) information printed from the USCIS website regarding the proper filing address for appeals and motions.

As will be discussed below, the AAO finds that the submissions on motion do not meet the requirements of a motion to reopen or a motion to reconsider. The regulation at 8 C.F.R.

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<sup>1</sup> The petitioner provided a North American Industry Classification System (NAICS) Code of 541613, “Marketing Consulting Services.” U.S. Dep’t of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, “541613 Marketing Consulting Services,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (accessed Sep. 10, 2013).

<sup>2</sup> The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for the SOC (O\*NET/OES) Code 27-3031, the associated Occupational Classification of “Public Relations Specialists,” and a Level I (entry-level) prevailing wage rate.

§ 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Accordingly, both components of this joint motion (that is, the motion to reopen and the motion to reconsider) will be dismissed in accordance with that regulation.

### I. The Submissions Do Not Meet the Requirements of a Motion to Reopen

The AAO will first address the issue of whether counsel's submissions meet the requirements of a motion to reopen described at 8 C.F.R. § 103.5(a)(2).

The regulation at 8 C.F.R. § 103.5(a)(2) states that a motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.<sup>3</sup> Generally, the evidence sought to be reviewed as presenting new facts must be material, previously unavailable, and not discoverable earlier in the proceeding. Cf. 8 C.F.R. § 1003.23(b)(3).<sup>4</sup> However, the supporting evidence submitted by counsel on motion does not satisfy this requirement.

As noted above, the AAO issued its decision dismissing the appeal on January 3, 2013. The AAO notes that the aforementioned [redacted] memorandum was issued on April 4, 2012, a date after the authorized period for submitting matters on appeal had expired. However, the AAO finds that neither the arguments presented in the document, the document's citations and references, nor any item addressed in the document constitutes "new facts to be provided in the reopened proceeding,"

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<sup>3</sup> The provision at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, the following:

*Requirements for motion to reopen.* A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence . . . .

This regulation is supplemented by the instructions on the Form I-290B, by operation of the rule at 8 C.F.R. § 103.2(a)(1) that all submissions must comply with the instructions that appear on any form prescribed for those submissions. With regard to motions to reopen, Part 3 of the Form I-290B submitted by counsel states the following:

**Motion to Reopen:** The motion must state new facts and must be supported by affidavits and/or documentary evidence.

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

[E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission.

<sup>4</sup> Moreover, the word "new" is defined as "1. Having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence> . . . ." *Webster's II New College Dictionary* 736 (Houghton Mifflin 2001). Based upon the plain meaning of the word "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.

as required by the provision at 8 C.F.R. § 103.5(a)(2). Likewise, the AAO finds that, while the educational credentials evaluation submitted by counsel on motion was dated after the AAO issued its decision dismissing the appeal, this educational-credentials opinion which is the reason for the document's submission is not based upon – and the content of the document does not identify – any “new facts” that would be provided if the proceeding were reopened. While this lack of “new facts” to justify reopening is decisive and requires dismissal of the motion, the AAO also notes that there had been no earlier constraints upon the petitioner obtaining educational evaluations or presenting the types of arguments made in the [REDACTED] document.

Nor does counsel's brief constitute new evidence in and of itself, as the unsupported statements of counsel on appeal or in a motion are not evidence and therefore are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Accordingly, as the motion states no new facts to be provided if the proceeding were reopened, and, as naturally follows, presents no supporting affidavits of other documentary evidence, as required by the regulation at 8 C.F.R. § 103.5(a)(2), the motion-to-reopen component of this joint motion must be dismissed.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a “heavy burden.” *INS v. Abudu*, 485 U.S. at 110. Counsel's submission does not meet this burden.

For all of these reasons, the submissions do not meet the requirements for a motion to reopen.

## II. The Submissions Do Not Meet the Requirements of a Motion to Reconsider

A motion to reconsider must state the reasons for reconsideration and be supported by citations to pertinent statutes, regulations, and/or precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. See 8 C.F.R. § 103.5(a)(3) (requirements for a motion to reconsider) and the instructions for motions to reconsider at Part 3 of the Form I-290B.<sup>5</sup>

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<sup>5</sup> The regulation at 8 C.F.R. § 103.5(a)(3) states the following:

*Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Again, this regulation is supplemented by the instructions on the Form I-290B, by operation of the rule at 8 C.F.R. § 103.2(a)(1) that all submissions must comply with the instructions that appear on any form

The submissions on motion do not satisfy the requirements of a motion to reconsider because they do not establish that the AAO's January 3, 2013 decision was incorrect based upon the evidence of record at the time the AAO issued the decision.

As a preliminary matter, the AAO will here first state its determination that, in its adjudication of the motion to reconsider, the AAO will consider neither the educational evaluation nor the memorandum submitted on motion. A motion to reconsider a decision on a petition must, by regulation, establish that the contested decision was incorrect based on the evidence of record at the time of that decision. However, neither of the aforementioned documents had been submitted into the record upon which that was before the AAO when it made its decision. See 8 C.F.R. § 103.5(a)(3).

#### A. Specialty Occupation

Counsel notes that, in its decision dismissing the appeal, the AAO stated that “[b]y virtue of their number and differences, the proposed duties appear specialized and complex.” However, contrary to counsel’s suggestion, that statement is not an acknowledgement that the proffered position or its constituent duties are so specialized, complex, and/or unique as to require at least a bachelor’s degree, or the equivalent, in a specific specialty, as would be necessary to establish a position as a specialty occupation as it is defined at 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii). So, too, there is no inconsistency between the AAO acknowledging some complexity and specialization in a position but not finding that the evidence of record establishes that the position is a specialty occupation.

Next, the AAO finds that counsel mischaracterizes the AAO’s decision in asserting that it was based, at least partially, upon the proposition that a position cannot qualify as a specialty occupation unless a degree in only one field or specialty will equip a person to serve therein. Rather, as is self-evident in the decision’s language, the AAO correctly determined that the *Occupational Outlook Handbook* described such a wide range of disparate degrees held by persons in the pertinent occupational category as to not be indicative of a position that requires a degree in a specific specialty. In pertinent part, the AAO’s decision on the appeal states:

Here, although the *Handbook* states that public relations specialists “typically need a bachelor’s degree,” the *Handbook*, significantly for our purposes here, does not state that this group of workers typically needs a bachelor’s degree in any specific specialty. Further, the *Handbook* affirmatively indicates that there is no one academic major or closely-related group of academic majors that is normally required for entry into the Public Relations Specialists occupational group. In this

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prescribed for those submissions. With regard to motions for reconsideration, Part 3 of the Form I-290B submitted by counsel states the following:

**Motion to Reconsider:** The motion must be supported by citations to appropriate statutes, regulations, or precedent decisions.

regard, the AAO notes that the *Handbook* states that employers “usually,” but not exclusively, want candidates “who have studied,” but not necessarily have attained degrees in, “public relations, journalism, communications, English, or business.” Thus, the *Handbook* recognizes that bachelor’s degrees in a wide variety of fields of study, including – but not limited to – public relations, journalism, communications, English, and business, are sufficient for entry into the occupation. Accordingly, as the *Handbook* indicates that working as a public relations specialist does not normally require at least a bachelor’s degree or the equivalent in a specific specialty or its equivalent for entry into the occupation, it does not support the proffered position as satisfying the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On motion counsel argues as follows:

AAO rejects the evidence that has been submitted from the employer, the Department of Labor, the Public Relations Society of America [PRSA], and the marketplace that this position requires the attainment of a Bachelor’s Degree or its equivalent in a specific specialty as a minimum for entry into the occupation in the United States.

The AAO disagrees. As discussed in the AAO’s decision dismissing the appeal, the information from the *Handbook* indicates precisely the opposite – that a bachelor’s degree in a specific specialty, or the equivalent, is *not* required. As was also discussed in that decision, O\*Net OnLine and the position’s SVP rating do not establish that a bachelor’s degree in a specific specialty, or the equivalent, is required, either, and the same is true of the information from the PRSA.

With regard to the information from the “marketplace” referenced by counsel, which the AAO presumes refers to the job vacancy announcements, the AAO noted in its prior decision that the seven job vacancy announcements submitted by counsel do not satisfy the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) for several reasons. The AAO first noted that the petitioner had not submitted any evidence to demonstrate that the positions being advertised in these vacancy announcements are “parallel” to the position proffered here. Second, the AAO noted that the petitioner had submitted no evidence to demonstrating that any of these advertisements is from a company “similar” to the petitioner, in that it had submitted no evidence to establish that any of these advertisers are similar to the petitioner in size, scope, scale of operations, business efforts, expenditures, or other fundamental dimensions. Third, the AAO noted that the petitioner had not established that the job-vacancy announcements require a bachelor’s degree, or the equivalent, in a specific specialty. Fourth, the AAO noted that the petitioner failed to submit any evidence regarding how representative these advertisements are of the industry’s usual recruiting and hiring practices with regard to the position advertised.

Accordingly, the AAO found that the petitioner had failed to satisfy the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not establish a requirement for at least a bachelor’s degree in a specific specialty as common to the petitioner’s industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

On motion, counsel states the following:

It is certainly true that [the petitioner] is not the size of Disney or Heineken. It is also true that the job descriptions from firms of that stature and size are very close to the job description for [the proffered position]. The fact that [the petitioner] is seeking to develop in a niche of the market that other firms in its industry are not pursuing is not evidence that employers consider this a position requiring less than a Bachelor's Degree.<sup>6</sup> Other companies, bigger than [the petitioner], see the advantage of ethnic markets coordinators, ethnic marketing managers, managers of multicultural marketing, trade marketing manager (multicultural) [sic], and however else the position is labeled, and see this work as a "specialty occupation."

However, counsel's argument addresses neither: (1) the regulatory language at the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2); nor (2) the AAO's specific comments with regard to the particular job vacancy announcements submitted by counsel do not satisfy that regulation.

First, it is worth repeating the specific language contained within the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2): "[t]he degree requirement is common to the industry in parallel positions among similar organizations." For purposes of this prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), it is simply not relevant whether non-similar organizations "see the advantage" of hiring for a certain position. As stated by the regulation, in order to satisfy this prong of the regulation the petitioner must establish a requirement for at least a bachelor's degree in a specific specialty as common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner. The petitioner has not done so.

Second, counsel does not address the AAO's findings made in its January 3, 2013 decision with regard to *why* the particular job vacancy announcements he submitted failed to establish: (1) that the positions being advertised in these vacancy announcements are "parallel" to the position proffered here; (2) that any of these vacancy announcements is from a company "similar" to the petitioner; (3) that these vacancy announcements specify a requirement for a bachelor's degree, or the equivalent, in a specific specialty; and (4) how representative these advertisements are of the industry's usual recruiting and hiring practices with regard to the position advertised. Nor does counsel address the AAO's comments regarding the relative probative value of these seven consciously-selected job vacancy announcements, considering the *Handbook's* statement that there were 258,100 persons employed in the United States as public relations specialists in 2010.

In its January 3, 2013 decision dismissing the appeal, the AAO stated the following with regard to

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<sup>6</sup> Counsel is reminded that a requirement for a bachelor's degree alone is insufficient. USCIS consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147 (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position").

the LCA submitted by the petitioner in support of the petition:

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

On motion, counsel states the following with regard to Level I wage rates:

[The] AAO diminishes the position and the beneficiary arguing that the wage level on the LCA is only Level I. While it is true that Level I is entry level for prevailing wage purposes, that is not relevant to this analysis . . . Certainly the AAO doesn't contend that Level I wages are anathema to a "specialty occupation" any more that it would contend that Level 4 wages [paid] to a taxi cab driver makes that position a "specialty occupation."

On motion, the AAO finds that its decision on appeal was not based upon a view that a petitioner's submission of an LCA certified for a Level I wage-level LCA precludes classification of a proffered position as a specialty occupation. Each petition filing is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). However, the AAO finds it a reasonable exercise of its adjudicative responsibilities to consider the LCA's wage-level and the job implications of that wage level that can be derived from DOL's guidance on LCA wage levels as factors to be weighed in the context of the *Handbook's* information regarding the relevant occupational group and as part of the totality of the evidence bearing upon the specialty occupation issue. In this regard, the AAO notes in particular that the *Handbook* does not indicate that typical public relations specialist positions require a bachelor's degree, or the equivalent, in a specific specialty. If, as the *Handbook* indicates, public relations specialist positions do not comprise an occupational classification or group for which a bachelor's or higher degree, or the equivalent, in a specific specialty, is normally a minimum requirement for entry, then the fact that, as here, the petitioner submitted an LCA that had been certified only for a Level I wage level is an evidentiary factor that weighs against the credibility of the petitioner's claim that the beneficiary would be performing specialty occupation work. After all, as the DOL's guidance indicates, a Level I wage-level designation is only appropriate for a position for which the incumbent need only possess a basic understanding of the occupation, which requires that the incumbent perform only routine tasks requiring limited, if any, exercise of judgment, which subjects the incumbent's work to close supervision and monitoring for accuracy, and with regard to which the incumbent will receive specific instructions on required tasks and expected results.<sup>7</sup> Therefore, this particular claim on motion does not merit reconsideration of the AAO's decision to deny the appeal.

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<sup>7</sup> See *Prevailing Wage Determination Policy Guidance*, available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

In its January 3, 2013 decision dismissing the appeal, the AAO stated the following with regard to 8 C.F.R. § 214.2(h)(4)(iii)(A)(3):

In its December 1, 2011 letter, the petitioner conceded that this is the first time the petitioner has filed an H-1B specialty-occupation petition for the instant position. Although the fact that a proffered position is a newly-created one is not in itself generally a basis for precluding a position from recognition as a specialty occupation, certainly an employer that has never recruited and hired for the position cannot satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a demonstration that it normally requires a bachelor's degree, or the equivalent, in a specific specialty for the position.

On motion, counsel offers the following rebuttal:

Because this would be the first Ethnic Markets Coordinator that [the petitioner has] hired, [the] AAO concludes that it is not the norm at [the petitioner's business], dismissing test 3 of 8 C.F.R. § 214.2(h)(4)(iii)(A). Carried to a logical conclusion, a new position could never satisfy this test – an illogical conclusion.

Again, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) specifically requires a demonstration that “[t]he employer normally requires a degree or its equivalent for the position.” On a macro level, counsel does not explain how an employer which has never before hired or recruited for a position can demonstrate that it normally requires a bachelor's degree, or the equivalent, in a specific specialty, for that position. Nor, with regard to this specific case, does he explain, or submit evidence to establish, that the petitioner normally requires a bachelor's degree, or the equivalent, in a specific specialty, for this position.

Because the petitioner has not demonstrated a history of recruiting and hiring only individuals with a bachelor's degree, or the equivalent, in a specific specialty for the proffered position, the AAO affirms its prior determination that the petitioner failed to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). Also, this argument on motion to reconsider bears no merit because the petitioner did not provide any by citations to appropriate statutes, regulations, or precedent decisions that would support the petitioner's argument here.

Next, the AAO again finds that the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires the petitioner to establish that the nature of the proffered position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

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

In its January 3, 2013 decision dismissing the appeal, the AAO stated the following:

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

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

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

**Level II** (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O\*NET Job Zones.

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

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

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

**Level III** (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the

occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O\*NET Job Zones would be indicators that a Level III wage should be considered.

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

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

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

Here the AAO again incorporates its earlier discussion and analysis regarding the implications of the petitioner's submission of an LCA certified for the lowest assignable wage-level. By virtue of this submission the petitioner effectively attested that the proffered position is a low-level, entry position relative to others within the occupation, and that, as clear by comparison with DOL's instructive comments about the next higher level (Level II), the proffered position did not even involve "moderately complex tasks that require limited judgment" (the level of complexity noted for the next higher wage-level, Level II). The AAO also finds that, separate and apart from the petitioner's submission of an LCA with a wage-level I designation, the petitioner has also failed to provide sufficiently detailed documentary evidence to establish that the nature of the specific duties that would be performed if this petition were approved is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

Again, counsel states the following on motion with regard to Level I wage rates:

[The] AAO diminishes the position and the beneficiary arguing that the wage level on the LCA is only Level I. While it is true that Level I is entry level for prevailing

wage purposes, that is not relevant to this analysis . . . Certainly the AAO doesn't contend that Level I wages are anathema to a "specialty occupation" any more that it would contend that Level 4 wages [paid] to a taxi cab driver makes that position a "specialty occupation."

Once again, the AAO does not claim that an assignment of a Level I wage-level on an LCA precludes classification of a proffered position as a specialty occupation. However, the AAO nonetheless affirms its prior reasoning with regard to 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) as well as its ultimate finding with regard to that regulation that:

By virtue of this submission the petitioner effectively attested that the proffered position is a low-level, entry position relative to others within the occupation, and that, as clear by comparison with DOL's instructive comments about the next higher level (Level II), the proffered position did not even involve "moderately complex tasks that require limited judgment" (the level of complexity noted for the next higher wage-level, Level II).

It is simply not credible that the proffered position, whose duties do not even involve "moderately complex tasks that require limited judgment," satisfies 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires the petitioner to establish that the nature of the proffered position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

The AAO will now address why the caselaw cited by counsel on motion do not establish any error in the AAO's January 3, 2013 decision.

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

The AAO agrees with the district court judge in *Tapis Int'l v. INS*, that in satisfying the specialty occupation requirements, both the Act and the regulations require a bachelor's degree in a specific specialty *or its equivalent*, and that this language indicates that the degree does not have to be a degree in a single specific specialty. In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially

be the same. Since there must be a close correlation between the required “body of highly specialized knowledge” and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be “in *the* specific specialty,” unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) (emphasis added).

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

Instead, USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in a specific specialty as the minimum for entry into the occupation as required by the Act.

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

First, USCIS cannot determine if a particular job is a specialty occupation based on the qualifications of the beneficiary. A beneficiary’s credentials to perform a particular job are relevant only when the job is first found to qualify as a specialty occupation. USCIS is required instead to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether an alien beneficiary is qualified for the position at the time the nonimmigrant visa petition is filed. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm’r 1988) (“The facts of a beneficiary’s background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].”).

Second, in promulgating the H-1B regulations, former INS made clear that the definition of the term “specialty occupation” could not be expanded “to include those occupations which did not require a bachelor’s degree in the specific specialty.” 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991). More

specifically, in responding to comments that “the definition of specialty occupation was too severe and would exclude certain occupations from classification as specialty occupations,” the former INS stated that “[t]he definition of specialty occupation contained in the statute contains this requirement [for a bachelor's degree in the specific specialty or its equivalent]” and, therefore, “may not be amended in the final rule.” *Id.*

In any event, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Tapis Int'l v. INS*. The AAO also notes 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.

Counsel also cites *All Aboard Worldwide Couriers v. Attorney General*, 8 F.Supp. 2d 379 (S.D.N.Y. 1998), and states the following:

In [*All Aboard Worldwide Couriers*], the Court upheld a challenge to a denied H-1B visa for a public relations consultant. . . .

Counsel is incorrect. The court in *All Aboard Worldwide Couriers* did not uphold a challenge to a denied H-1B petition. To the contrary, the judge in that case affirmed the decision by the legacy INS to deny an H-1B petition, stating the following:

Plaintiffs' argument that the INS clearly abused its discretion in denying the visa petition to Virk, especially given that Virk previously had been afforded this status by the Service for a job as a public relations consultant for a television broadcast company, is unavailing.

\* \* \*

Because the facts, viewed in the light most favorable to plaintiffs, do not create any possibility of abuse of discretion on the part of the defendant INS in denying an H-1B visa to plaintiff Virk for her to work at plaintiff All Aboard, defendants' summary judgment motion is GRANTED.

*Id.* at 381, 382.

Finally, 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 no[t] the title of the degree is what is important. Diplomas rarely come bearing occupation-specific majors. What is required is an occupation that requires highly specialized knowledge and a prospective employee who has attained the credentialing indicating possession of that knowledge.”

The AAO agrees with the aforementioned proposition that “[t]he knowledge and not the title of the degree is what is important.” Again, in general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor’s or higher degree in more than one specialty is recognized as satisfying the “degree in the specific specialty” requirement of section 214(i)(1)(B) of the Act. In such a case, the required “body of highly specialized knowledge” would essentially be the same. Since there must be a close correlation between the required “body of highly specialized knowledge” and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be “in *the* specific specialty,” unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added). For the aforementioned reasons, however, the petitioner has failed to meet its burden and establish that the particular position offered in this matter requires a bachelor's or higher degree in a specific specialty, or its equivalent, directly related to its duties in order to perform those duties.

In any event, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*.<sup>8</sup> The AAO also notes again that, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising even within the same district. See *Matter of K-S-*, 20 I&N Dec. at 715. Although the reasoning underlying a district judge’s decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

For all of these reasons, the AAO affirms its January 3, 2013 determination that the proffered position is not a specialty occupation.

## **B. Beneficiary Qualifications**

On motion, in an attempt to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(C)(2), counsel submits an evaluation of the beneficiary’s educational credentials prepared by the [REDACTED] on January 25, 2013. According to this evaluation, the beneficiary’s foreign education is equivalent to a bachelor’s degree in hospitality management awarded by an accredited college or university in the United States. However, as noted at the outset of this decision’s discussion of the motion-to-reconsider component of this joint motion, that evaluation falls outside of a motion to reconsider because it was not part of the evidence of record before the AAO when it made its decision to dismiss the appeal.

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<sup>8</sup> It is noted that the district judge’s decision in that case appears to have been based largely on the many factual errors made by the service center in its decision denying the petition. The AAO further notes that the service center director’s decision was not appealed to the AAO. Based on the district court’s findings and description of the record, if that matter had first been appealed through the available administrative process, the AAO may very well have remanded the matter to the service center for a new decision for many of the same reasons articulated by the district court if these errors could not have been remedied by the AAO in its *de novo* review of the matter.

Accordingly, the AAO affirms its January 3, 2013 determination that the petitioner failed to establish that the beneficiary qualifies to perform the duties of a specialty occupation.

### III. Conclusion

Finally, the motion shall be dismissed for failing to meet another applicable filing requirement. The regulation at 8 C.F.R. § 103.5(a)(1)(iii)(C) requires that motions be “[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding.” In this matter, the motion does not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). Again, the regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, because the instant motion did not meet the applicable filing requirement listed at 8 C.F.R. § 103.5(a)(1)(iii)(C), it must also be dismissed for this reason.

As set forth above, the submissions constituting this joint motion do not meet the requirements of a motion to reopen described at 8 C.F.R. § 103.5(a)(2) or the requirements of a motion to reconsider described at 8 C.F.R. § 103.5(a)(3).

The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. As counsel’s submission meets the requirements of neither a motion to reopen nor a motion to reconsider, it must be dismissed in accordance with 8 C.F.R. § 103.5(a)(4).

It should also be noted for the record that, unless USCIS directs otherwise, the filing of a motion to reopen or reconsider does not stay the execution of any decision in a case or extend a previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

In visa petition proceedings, it is the petitioner’s burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met. Accordingly, the motion will be dismissed, the proceedings will not be reopened or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

**ORDER:** The motion is dismissed.