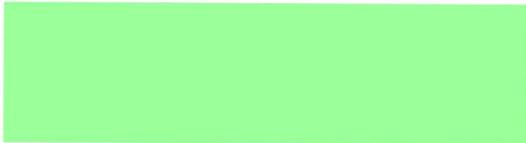


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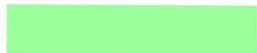


U.S. Citizenship  
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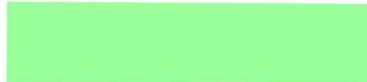


DATE: JUL 03 2014

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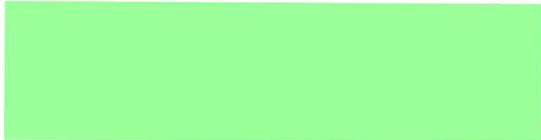


IN RE: Petitioner:  
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

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

Ron Rosenberg  
Chief, Administrative Appeals Office

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

## I. INTRODUCTION

On the Form I-129 visa petition, the petitioner describes itself as a 20-employee "distribution management of plastic products" business<sup>1</sup> established in 1987. In order to employ the beneficiary in what it designates as a full-time marketing research analyst position at a salary of \$40,000 per year,<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 director denied the petition, concluding that the evidence of record does not demonstrate that the proffered position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B and supporting documentation.

Upon review of the entire record of proceeding, we find that the evidence of record does not overcome the director's ground for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

Beyond the decision of the director, we find additionally that the petitioner provided as the supporting Labor Condition Application (LCA) for this petition an LCA which does not correspond to the petition, in that the LCA was certified for a wage level below that which is compatible with the levels of responsibility, judgment, and independence the petitioner claimed for the proffered position through its descriptions of its constituent duties.<sup>3</sup> This aspect of the petition undermines the credibility of the

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<sup>1</sup> The petitioner provided a North American Industry Classification System (NAICS) Code of 424610, "Plastics Materials and Basic Forms and Shapes Merchant Wholesalers." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "424610 Plastics Materials and Basic Forms and Shapes Merchant Wholesalers," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited July 2, 2014).

<sup>2</sup> The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for use with a job prospect within the "Market Research Analysts and Marketing Specialists" occupational classification, SOC (O\*NET/OES) Code 13-1161, and a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels.

<sup>3</sup> We conduct appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and we identified this issue in the course of that review.

petition as a whole and any claim as to the proffered position or the duties comprising it as being particularly complex, unique, and/or specialized.

## II. STANDARD OF REVIEW

In the exercise of its administrative review in this matter, as in all matters that come within its purview, the AAO follows the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010), unless the law specifically provides that a different standard applies. In pertinent part, that decision states the following:

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

\* \* \*

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

\* \* \*

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

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

*Id.* at 375-76.

Again, the AAO conducts its review of service center decisions on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d at 145. In doing so, the AAO applies the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon its review of the present matter pursuant to that standard, however, the AAO finds that the evidence in the record of proceeding does not support counsel's contentions that the evidence of record requires that the petition at issue be approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, the AAO finds that the director's determination that the evidence of record does not establish that the proffered position is a

specialty occupation was correct. Upon its review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, the AAO finds that the evidence of record does not establish that the claim of a proffer of a specialty occupation position is "more likely than not" or "probably" true. In other words, as the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads the AAO to believe that the petitioner's claim that the proffered position qualifies as a specialty occupation is "more likely than not" or "probably" true.

Nor, as indicated by our supplemental finding made on appeal regarding the LCA, does the evidence of record lead us to believe that the petitioner's implicit claim that the LCA corresponds to the petition is "more likely than not" or "probably" true.

### III. LAW

As noted, the director's sole basis for denying this petition was her determination that the proffered position is not a specialty occupation. To meet its burden of proof in establishing the proffered position as a specialty occupation, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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

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

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

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

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

- (1) A baccalaureate or higher degree (or its equivalent) is normally the minimum requirement for entry into the particular position;

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

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

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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<sup>4</sup> For all of these reasons, counsel's arguments that the bachelor's degree or equivalent need not be in a specific specialty are not persuasive. See also

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

#### IV. ANALYSIS

We will now address the director's finding that the proffered position is not a specialty occupation. Based upon a complete review of the record of proceeding, we agree with the director and find that the evidence fails to establish that the position as described constitutes a specialty occupation.

##### A. The Proffered Position and its Constituent Duties

In an undated document, the petitioner stated that the duties of the proffered position would include the following tasks:

##### **Marketing and Business Plan Development**

(These duties will compromise 30% of Ms. [REDACTED] time or 12 hours of work a week)

Ms. [REDACTED] will be responsible for developing and implementing marketing as well as assessment plans that will help enhance our market presence, create new clients, and increase our overall profit margin. She will be also tasked with consulting and supporting senior management in developing short and long term business plans. Specifically Ms. [REDACTED] will:

- Develop marketing goals and criteria as well as defining target markets and demographics[.]
- Work closely alongside management to develop targeted marketing strategies to positively position [REDACTED] properties.
- Responsible for planning, designing, and conducting intensive research on promising new markets in order to develop business strategies for the expansion of [REDACTED] business into new international markets.
- Conduct in-depth research on specific segments of the automotive industry, evaluate the business potentials, and recommend methods of importing and distributing the parent company's products in the U.S.

- Develop cost/quality/delivery profiles on potential U.S. buyers, conducting research into the competitive environment, the start-up capital costs, and other market factors to be considered in the assessment of the industry segment.
- Regularly prepare reports to the management on the strength of these markets for the company's products in general and, upon request from management, for specific customers or market segments.

### **Data Analysis**

(These duties will comprise 30% of Ms. [REDACTED] time or 12 hours of work a week)

Once Ms. [REDACTED] has gathers [sic] the necessary data through customized research filters, methods and schemas, she will take this information and utilizing complex financial and statistical models create forecasts for a myriad of factors which affect our business. This task requires an intricate knowledge of statistical analysis techniques. Specifically, Ms. [REDACTED] will:

- Utilize proprietary and third party tools including, business intelligence tools, web analytics platforms, and ad-serving technologies to report and analyze product, pricing and revenue data.
- Support of primary research initiatives for the company, including research design, statistical analysis, vendor management, report writing and presentations.
- Conduct a variety of secondary research and analytics/reporting, including competitive/industry monitoring activities, and management of ongoing reporting activities.
- Study product trends, utilizing relevant industry journals and attending trade shows, manufacturing, and merchandising markets.
- Identify and track purchasing patterns, analyze these patterns using statistical models, and produce reports and bulletins for senior management.
- Make recommendations about the marketing and management factors to be considered when judgments are necessary to determine [REDACTED] ability to compete in our target markets.

### **Research Current Market Condition**

(These duties will comprise 20% of Ms. [REDACTED] time or 8 hours of work a week)

Ms. [REDACTED] will assess the effects and significance of current market conditions and trends in the industries [REDACTED] serves to develop marketing plans that take advantage of identified business opportunities. She will:

- Monitor the impact of market factors, including developments and shifts in economic and technological environments, in order to develop demand forecasts for our products in relevant industries.
- Assess the market potential of each of our parent company's product lines and evaluating the effectiveness of our current marketing strategies.
- Analyze and forecast key enabling and inhibiting factors affecting our market performance throughout our target markets.
- Keep management informed on the myriad factors that affect the company's competitive position or the profitability of a product line.

### **Revising Marketing and Business Plans**

(These duties will comprise 20% of Ms. [REDACTED] time or 8 hours of work a week)

- Undertake special studies requested by the management on technical requirements, managerial systems, cost factors, marketing trends, and productions innovations, including marketing strategies for the company's products, commissioning and coordinating feasibility studies, surveys, research, and analytical studies as required, developing and recommending marketing plans and programs, both short- and long-range, to ensure the profit growth and expansion of the company's sales in the U.S.
- Review and evaluate existing business plans relating to the company's products and further assure that market intelligence is received and analyzed so that market opportunities may be capitalized on as they occur and the effects of competitive activity may be minimized by developing and recommending pricing strategies for the company.
- Constantly monitor the activities, business operating philosophies, successes and failures, and marketing strengths of the competition. Carefully track and analyze competitor activities in order to better understand the market in the U.S. and the approaches used to market parallel or competing products.

In its March 15, 2013 H-1B cover letter, the petitioner stated that the duties of the proffered position would include the following tasks:

- **Researching Current Market Conditions and Developing Marketing Plans for Product Lines:** The position of Market Research Analyst will involve monitoring the impact of market factors, including developments and shifts in economic and technological environments, in order to develop demand forecasts for our products in relevant industries. Ms. [REDACTED] will be responsible for assessing the market potential of each of our parent company's product lines and evaluating the effectiveness of our current marketing strategies. The Market Research Analyst must constantly monitor changes in the market in order to develop the most accurate demand forecasts. She will analyze and forecast key enabling and inhibiting factors affecting our market performance throughout our target markets. Through analytical reports and compilations, Ms. [REDACTED] will keep management informed on the myriad factors that affect the company's competitive position or the profitability of a product line.
- **Identifying Product Trends in the Market:** The Market Research Analyst will study product trends, utilizing relevant industry journals and attending trade shows, manufacturing, and merchandising markets. She will identify and track purchasing patterns, analyze these patterns using statistical models, and produce reports and bulletins on her conclusions for senior management. Based upon her analyses, she will make recommendations about the marketing and management factors to be considered when judgments are necessary to determine [REDACTED] ability to compete in our target markets.
- **Targeting New Markets:** The Market Research Analyst will be responsible for planning, designing, and conducting intensive research on promising new markets in order to develop business strategies for the expansion of [REDACTED] business into new international markets. In addition to data collected from business and consumer trend publications, she will track volume reports and analyze and interpret other relevant factors, including the business volume of industry competitors in target markets. Ms. [REDACTED] will regularly prepare reports to the management on the strength of these markets for the company's products in general and, upon request from management, for specific customers or market segments.

In its June 18, 2013 response to the director's RFE, the petitioner stated that the duties of the proffered position would include the following tasks:

She will be responsible for researching and analyzing attitudinal and behavioral insights to allow [REDACTED] to increase its market share, competitiveness and ultimately profitability. Compiling and using survey-based attitudinal information, web analytics-based behavioral information, and independent articles and other materials Ms. [REDACTED] will create relevant and actionable marketing narratives for [REDACTED]. She will also monitor, measure, and improve the effectiveness of [REDACTED] marketing efforts across our full range of product categories. Based on her research and analyses, Ms. [REDACTED] will assist in the creation of specific business plans and strategies to increase the company's marketing success and profit margins.

The position of Market Research Analyst and [REDACTED] primarily encompasses the following job responsibilities: 1) Researching current market conditions; 2) Data Analysis; 3) Marketing and Business Plan Development; and 4) Revising Marketing and Business Plans.

The June 18, 2013 letter then listed the duties as mentioned in the undated letter above verbatim.

B. The LCA Submitted by the Petitioner in Support of the Petition

Before addressing the director's determination that the proffered position is not a specialty occupation, we will first address the supplemental finding we have made on appeal, which independently precludes approval of this petition: our finding that the LCA submitted by the petitioner in support of this petition does not correspond to the petition and does not establish that the petitioner will pay the beneficiary an adequate salary.

The LCA submitted by the petitioner in support of the instant position was certified for use with a job prospect within the "Market Research Analysts and Marketing" occupational classification, SOC (O\*NET/OES) Code 13-1161, and a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels. Wage levels should be determined only after selecting the most relevant O\*NET code classification. A prevailing wage determination is then made by selecting one of four wage levels for an occupation based upon 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.<sup>5</sup>

Prevailing wage determinations start at Level I (entry) and progress to a wage that is commensurate with that of 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.<sup>6</sup> The U.S.

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<sup>5</sup> 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](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf) (last visited July 2, 2014).

<sup>6</sup> 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.

Department of Labor (DOL) emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received as indicated by the job description.

The *Prevailing Wage Determination Policy Guidance* issued by DOL 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.

The petitioner has classified the proffered position at a Level I wage, which is only appropriate for a position requiring only "a basic understanding of the occupation" expected of a "worker in training" or an individual performing an "internship." That designation indicates further that the beneficiary will only be expected to "perform routine tasks that require limited, if any, exercise of judgment." However, we find that many of the duties described by counsel and the petitioner exceed this threshold. For example, the record contains numerous assertions regarding the complexity of the duties that the beneficiary would perform, and in his November 13, 2013 letter, counsel argues as follows:

The position is complex because the context in which it arises is complex...The duties of the position are also specialized and complex...To gather and to quantify data from automobile, car parts, and its own parts supplier industry *in real time* for management decision making is specialized enough. To wrap this reporting into a single set of data is plainly complex...

Counsel also referenced the "out-sized responsibilities of the unit" in which the beneficiary would perform her duties.

These stated duties and related claims indicate that the beneficiary will be required to exercise extensive independent judgment in the proffered position, which conflicts with the Level I wage-rate designation.

We therefore question the level of complexity, independent judgment and understanding actually required for the proffered position, as the LCA was certified for a Level I entry-level position. This characterization of the position and the claimed duties and responsibilities as described by the petitioner conflict with the wage-rate element of the LCA selected by the petitioner, which, as

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

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. See section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A); *Patel v. Boghra*, 369 Fed.Appx. 722, 723 (7<sup>th</sup> 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 petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct wage level in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different wage level at a lower prevailing wage than the one that it claims it is offering to the beneficiary. Therefore, the petitioner has failed to establish that it would pay an adequate salary for the beneficiary's work, as required under the Act, if the petition were granted for a higher-level and more complex position as claimed elsewhere in the petition.

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. 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. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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

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

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

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) 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.<sup>7</sup>

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

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

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, provided the proffered position was in fact found to be a higher-level and more complex position as claimed 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 with section 212(n)(1)(A) of the Act and the pertinent LCA regulations.

The statements regarding the claimed level of complexity, independent judgment and understanding required for the proffered position are materially inconsistent with the certification of the LCA for a Level I, entry-level position. This conflict undermines the overall credibility of the petition. We

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<sup>7</sup> *See also* 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991) ("An approved labor condition application is not a factor in determining whether a position is a specialty occupation").

find that, fully considered in the context of the entire record of proceedings, the petitioner failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed.

As such, a review of the LCA submitted by the petitioner 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 higher level work and responsibilities, which if accepted as accurate would result in the beneficiary being offered a salary below that required by law. Thus, even if it were determined that the petitioner had overcome the director's ground for denying this petition (which it has not), the petition could still not be approved.

C. The Letter from [REDACTED] Submitted as Expert Testimony

The AAO will next discuss why it accords no probative value to the letter submitted on appeal from Professor [REDACTED] of [REDACTED] School of Business and Economics.

In his June 4, 2013 letter, Professor [REDACTED] (1) describes the credentials that he asserts qualify him to discuss the nature of the proffered position, (2) lists the duties proposed for the beneficiary, and states "The Market Research Analyst position at [REDACTED] is so complex and specialized that it can only be performed by an individual with at least a Master of Business Administration Degree," and (3) claims an industry standard for hiring individuals with a master of business administration degree for positions similar to the one proposed here and "it should be construed as being a specialty occupation in nature."

Upon review, we find that Professor [REDACTED]'s letter does not constitute probative evidence of the proffered position satisfying any criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A).

We do not question the accuracy of the resume that Professor [REDACTED] submitted with his letter, and accordingly we have considered all of the information provided therein. Likewise, we have considered his academic standing, background and degrees.

However, even the combined content of the aforementioned letter and the accompanying resume does not provide a sufficiently detailed factual foundation to convey and substantiate whatever level of expertise it is that Professor [REDACTED] claims with regard to assessing the educational needs of the particular position in question. Professor [REDACTED] states that over the course of time, he has become familiar with the qualifications required to attain the position of Market Research Analyst.

Professor [REDACTED] refers to the DOL's Occupational Information Network (O\*NET OnLine) and U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* in support of his assertions. However, as will be discussed later in this decision, those two resources do not establish that the position is a specialty occupation.

Professor [REDACTED] cites to two career source websites in asserting that upper-level jobs in the field require at least a bachelor's degree with extensive experience or an advanced degree. These sites do

not establish that a position with the duties described by the petitioner would meet the definition of a specialty occupation.

Professor [REDACTED] also refers to three online job advertisements in his assertion that parallel market research analyst positions in similar organization routinely recruit and employ individuals with at least Master of Business Administration Degree. The first position is with an intelligence company, the second one from a staffing company and the third one is from a healthcare corporation. However, the evidence of record does not establish that these employers are similar to the petitioner in size, scope, and scale of operations, business efforts, expenditures, or in any other relevant respects. All of the advertisements indicate that at least three years of experience is required. The petitioner has therefore not established that these positions are similar to the proffered position.<sup>8</sup> Nor does the petitioner submit any evidence regarding how representative these advertisements are of the industry's usual recruiting and hiring practices with regard to the positions advertised.<sup>9</sup>

Professor [REDACTED] does not provide any other information with regard to studies, treatises, statistical surveys, authoritative industry sources, or any other relevant and authoritative sources of which he may have specialized knowledge that would merit deference or special weight to the particular opinion that he offers in this case. Thus, we accord little to no weight to his position, degrees, academic history, or teaching duties as endowing him with specialized knowledge relevant to the particular matters upon which he here provides his opinion, namely, the educational requirements for the particular position proffered in this petition.

Nor is the letter accompanied by, and it does not expressly state the full content of, whatever documentation and/or oral transmissions upon which it may have been based. For instance, Professor [REDACTED] does not indicate whether he visited the petitioner's business premises or communicated with anyone affiliated with the petitioner as to what the performance of the general list of duties he cited would actually require. Nor does Professor [REDACTED] articulate whatever familiarity he may have obtained regarding the particular content of the work product that the petitioner would require of the beneficiary. In short, while there is no standard formula or "bright line" rule for

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<sup>8</sup> As noted above, by the wage-level in the LCA that it submitted, the petitioner presented the proffered position as a comparatively low, entry-level position relative to others within its occupation and signified that the beneficiary is only expected to possess a basic understanding of the occupation. It is therefore difficult to envision how these attributes assigned to the proffered position by the petitioner by virtue of its wage-level designation on the LCA would be parallel to the positions described in these job vacancy announcements. Nor is it clear that all of the advertisers require a bachelor's degree in a specific specialty or the equivalent.

<sup>9</sup> 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. at 376. 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 few job postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the same industry. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995).

producing a persuasive opinion regarding the educational requirements of a particular position, a person purporting to provide an expert evaluation of a particular position should establish greater knowledge of the particular position in question than Professor [REDACTED] has done here.

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

As noted earlier, the LCA submitted by the petitioner in support of the instant position was certified for use with a job prospect within the "Market Research Analysts and Marketing Specialists" occupational category, SOC (O\*NET/OES) Code 13-1161, and a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels. Again, the above-discussed *Prevailing Wage Determination Policy Guidance* issued by DOL states the following with regard to Level I wage rates:

**Level I** (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.<sup>10</sup>

The proposed duties' level of complexity, uniqueness, and specialization, as well as the level of independent judgment and occupational understanding required to perform them, are questionable, as the petitioner submitted an LCA certified for a Level I, entry-level position. The LCA's wage-level indicates that the proffered position is actually a low-level, entry position relative to others within the same occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to possess a basic understanding of the occupation; that she will be expected to perform routine tasks requiring limited, if any, exercise of 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.

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<sup>10</sup> 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](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf) (last visited July 2, 2014).

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

The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988).

For all of these reasons, we find that Professor [REDACTED] letter is not probative evidence towards satisfying any criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). For the sake of economy, the AAO hereby incorporates the above discussion and findings into its analysis of each of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

#### D. Review of the Director's September 16, 2013 Decision

We will now discuss the application of each supplemental, alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

We will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which is satisfied by establishing that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of the petition.

As discussed, we recognize DOL's *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.<sup>11</sup>

As noted above, the LCA that the petitioner submitted in support of this petition was certified for a job offer falling within the "Market Research Analysts" occupational category. The *Handbook* states the following with regard to the duties of positions falling within the "Market Research Analysts" occupational category:

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

#### **Duties**

Market research analysts typically do the following:

- Monitor and forecast marketing and sales trends
- Measure the effectiveness of marketing programs and strategies

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<sup>11</sup> The *Handbook*, which is available in printed form, may also be accessed on the Internet at <http://www.bls.gov/oco/>. Our references to the *Handbook* are to the 2014 – 2015 edition available online.

- Devise and evaluate methods for collecting data, such as surveys, questionnaires, and opinion polls
- Gather data about consumers, competitors, and market conditions
- Analyze data using statistical software
- Convert complex data and findings into understandable tables, graphs, and written reports
- Prepare reports and present results to clients and management

Market research analysts perform research and gather data to help a company market its products or services. They gather data on consumer demographics, preferences, needs, and buying habits. They collect data and information using a variety of methods, such as interviews, questionnaires, focus groups, market analysis surveys, public opinion polls, and literature reviews.

Analysts help determine a company's position in the marketplace by researching their competitors and analyzing their prices, sales, and marketing methods. Using this information, they may determine potential markets, product demand, and pricing. Their knowledge of the targeted consumer enables them to develop advertising brochures and commercials, sales plans, and product promotions.

Market research analysts evaluate data using statistical techniques and software. They must interpret what the data means for their client, and they may forecast future trends. They often make charts, graphs, and other visual aids to present the results of their research.

Workers who design and conduct surveys are known as survey researchers.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Market Research Analysts," <http://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm#tab-2> (last visited July 2, 2014).

The *Handbook* states the following with regard to the educational requirements necessary for entrance into positions within this occupational category:

Most market research analysts need at least a bachelor's degree. Top research positions often require a master's degree. Strong math and analytical skills are essential.

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, and computer

science. Others have backgrounds in business administration, 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.

Some 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 and marketing, and/or earn a Master of Business Administration (MBA). A master's degree is often required for leadership positions or positions that perform more technical research.

Most market research analysts can benefit from internships or work experience in business, marketing, or sales. Work experience in other positions that require analyzing data, writing reports, or surveying or collecting data can also be helpful in finding a market research position.

Certification is voluntary, but analysts may pursue certification to demonstrate a level of professional competency. The Marketing Research Association offers the Professional Researcher Certification (PRC) for market research analysts. Candidates qualify based on experience and knowledge; they must pass an exam, be a member of a professional organization, and have at least 3 years working in opinion and marketing research.

**Analytical skills.** Market research analysts must be able to understand large amounts of data and information.

**Communication skills.** Market research analysts need strong communication skills when gathering information, interpreting data, and presenting results to clients.

**Critical-thinking skills.** Market research analysts must assess all available information to determine what marketing strategy would work best for a company.

**Detail oriented.** Market research analysts must be detail oriented because they often do precise data analysis.

*Id.* at <http://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm#tab-4> (last visited June 25, 2014).

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

philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties.<sup>12</sup> Section 214(i)(1)(B) of the Act (emphasis added).

Here, the *Handbook* states that "[t]op research positions often require a master's degree. Strong math and analytical skills are essential. 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, and computer science. Others have backgrounds in business administration, the social sciences, or communications."

The *Handbook's* statement that "[m]ost market research analysts need at least a bachelor's degree" is acknowledged. However, these findings do not indicate that a bachelor's degree *in a specific specialty*, or the equivalent, is normally required for entry into positions in this occupational category. With regard to the *Handbook's* statement that "most" market research analysts need at least a bachelor's degree, it is noted that the first definition of "most" in *Webster's New College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of market research analysts positions require at least a bachelor's degree, it could be said that "most" market research analysts positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." Section 214(i)(1) of the Act.

Moreover, the *Handbook* states that "many have degrees in fields such as statistics, math, and computer science. Others have backgrounds in business administration, the social sciences, or communications." As mentioned, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the petitioner

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<sup>12</sup> Whether read with the statutory "the" or the regulatory "a," both readings denote a singular "specialty." Section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Still, the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. As just stated, this also includes even seemingly disparate specialties provided the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

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).

Here, although the *Handbook* indicates that a bachelor's or higher degree is "typically" required, it also indicates that baccalaureate degrees in various fields are acceptable for entry into the occupation. In addition to recognizing degrees in disparate fields, i.e., social science and computer science as acceptable for entry into this field, the *Handbook* also states that "others have a background in business administration." Although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147. Therefore, the *Handbook's* recognition that a general, non-specialty "background" in business administration is sufficient for entry into the occupation strongly suggests that a bachelor's degree *in a specific specialty* is not a normal, minimum entry requirement for this occupation. Accordingly, as the *Handbook* indicates that working as a market research analyst does not normally require at least a bachelor's degree in a specific specialty or its equivalent for entry into the occupation, it does not support the proffered position as satisfying the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Accordingly, as the *Handbook* indicates that entry into the Market Research Analysts occupational category does not normally require at least a bachelor's degree or the equivalent in a specific specialty or its equivalent, it does not support the proffered position as being a specialty occupation.

The materials from DOL's Occupational Information Network (O\*NET OnLine) do not establish that the proffered position satisfies the first criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A), either. O\*NET OnLine is not particularly useful in determining whether a baccalaureate degree in a specific specialty, or its equivalent, is a requirement for a given position, as O\*NET OnLine's Job Zone designations make no mention of the specific field of study from which a degree must come. As was noted previously, we interpret 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. The Specialized Vocational Preparation (SVP) rating is meant to indicate only the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. For all of these reasons, the O\*NET OnLine information is of little evidentiary value to the issue presented on appeal.

Nor does the record of proceeding contain any persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion within any of these occupational categories is sufficient in and of itself to establish the proffered position as, in the words of this criterion, a "particular position" for which "[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry."

Finally, it is noted again that the petitioner submitted an LCA certified for a job prospect with a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation, which signifies that the beneficiary is only expected to possess a basic understanding of the occupation.

As the evidence in the record of proceeding does not establish that at least a baccalaureate degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position that is the subject of this petition, the petitioner has not satisfied the criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common (1) to the petitioner's industry; and (2) for positions within that industry that are both: (a) parallel to the proffered position, and (b) located in organizations that are similar to the petitioner.

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

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent.

The petitioner has submitted three advertisements. The first position is with an intelligence company, the second one from a staffing company and the third one from a healthcare corporation. The petitioner has not submitted any documentary evidence to establish that these employers are in the petitioner's industry or otherwise "similar" to the petitioner in size, scope, and scale of operations, business efforts, expenditures, or to any other relevant extent. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Again, the language of this prong limits the range of relevant evidence to the petition-pertinent industry's practices (stating "[t]he degree requirement" as one that would be "common to the industry" as well as "in parallel positions among similar organizations." All of the advertisements reflect that at least three years of experience is required for the positions. The petitioner has therefore not established that these positions are "parallel" to the proffered position.<sup>13</sup> Nor does the petitioner submit any evidence regarding how

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<sup>13</sup> As noted above, by the wage-level in the LCA that it submitted, the petitioner presented the proffered position as a comparatively low, entry-level position relative to others within its occupation and signified that the beneficiary is only expected to possess a basic understanding of the occupation. It is therefore difficult to envision how these attributes assigned to the proffered position by the petitioner by virtue of its wage-level

representative these advertisements are of the industry's usual recruiting and hiring practices with regard to the positions advertised.<sup>14</sup>

Also, there are no submissions from professional associations, individuals (other than the one from Professor [REDACTED] discussed above), or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions.

Therefore, the petitioner has not satisfied the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not establish a requirement for at least a bachelor's degree in a specific specialty or its equivalent that is common (1) to the petitioner's industry and (2) for positions in that industry that are both (a) parallel to the proffered position and (b) located in organizations that are similar to the petitioner.

Next, the AAO finds that the evidence of record does not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree."

In this particular case, the evidence of record does not credibly demonstrate that the duties the beneficiary will perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty or its equivalent.

The record of proceeding does not contain evidence establishing relative complexity or uniqueness as aspects of the proffered position, let alone that the position is so complex or unique as to require the theoretical and practical application of a body of highly specialized knowledge such that a person with a bachelor's or higher degree in a specific specialty or its equivalent is required to perform the duties of that position. Rather, the AAO finds, that, as reflected in this decision's earlier quotation of duty descriptions from the record of proceeding, the evidence of record does not distinguish the proffered position from other positions falling within the "Market Research Analysts" occupational category, which, the *Handbook* indicates, do not necessarily require a person with at least a bachelor's degree in a specific specialty or its equivalent to enter those positions.

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designation on the LCA would be parallel to the positions described in these job vacancy announcements. Nor is it clear that all of the advertisers require a bachelor's degree in a specific specialty or the equivalent.

<sup>14</sup> 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*, at 376. 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 few job postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the same industry. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995).

The statements of counsel with regard to the claimed complex and unique nature of the proffered position are acknowledged. However, those assertions are undermined by the fact that the petitioner submitted an LCA certified for a job prospect with a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation. We incorporate here by reference and reiterate our earlier discussion regarding the LCA and its indication that the petitioner would be paying a wage-rate that is only appropriate for a low-level, entry position relative to others within the occupation, as this factor is inconsistent with the analysis of the relative complexity and uniqueness required to satisfy this criterion. Based upon the wage rate selected by the petitioner, the beneficiary is only required to have a basic understanding of the occupation. Moreover, that wage rate indicates that the beneficiary will perform routine tasks requiring limited, if any, exercise of independent judgment; that the beneficiary's work will be closely supervised and monitored; that she will receive specific instructions on required tasks and expected results; and that her work will be reviewed for accuracy.

Accordingly, given the *Handbook's* indication that typical positions located within the "Market Research Analysts" occupational category do not require at least a bachelor's degree in a specific specialty, or the equivalent, for entry, it is not credible that a position involving limited, if any, exercise of independent judgment, close supervision and monitoring, receipt of specific instructions on required tasks and expected results, and close review *would* contain such a requirement.

The evidence of record therefore fails to establish how the beneficiary's responsibilities and day-to-day duties comprise a position so complex or unique that the position can be performed only by an individual with at least a bachelor's degree in a specific specialty or its equivalent.

Consequently, as it has not been shown that the particular position for which this petition was filed is so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty or its equivalent, the evidence of record does not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO turns next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty or its equivalent for the position.

The AAO's review of the record of proceeding under this criterion necessarily includes whatever evidence the petitioner has submitted with regard to its past recruiting and hiring practices and employees who previously held the position in question.

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. Additionally, the record must establish that a petitioner's

imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the proffered position.<sup>15</sup>

Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. See *Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position would not meet the statutory or regulatory definition of a specialty occupation. See section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

The director's May 7, 2013 RFE specifically requested the petitioner to document its past recruiting and hiring history with regard to the proffered position. The third section of the RFE includes the following specific requests for such documentation:

- Position Announcement: To support the petitioner's contention that the position is a "specialty occupation," provide copies of the petitioner's present and past job vacancy announcements. The petitioner may also provide classified advertisements soliciting for the current position, showing that the petitioner requires its applicants to have a minimum of a baccalaureate or higher degree or its equivalent in a specific specialty.
- Past Employment Practices: Provide evidence to establish that the petitioner has a past practice of hiring persons with a baccalaureate degree, or higher[,] in a specific specialty, to perform the duties of the proffered position. Indicate the number of persons employed in similar positions. Further, submit documentation to establish how many of those persons have a baccalaureate degree or higher and the particular field of study in which the degree was attained. Documentation should include copies of transcripts and pay records or Quarterly Wage Reports for the employees claimed to hold a baccalaureate degree in the specific field of study.

Although the director provided the petitioner with the opportunity to establish a history of recruiting and hiring only individuals for this position with a bachelor's degree in a specific specialty, or the equivalent, the petitioner submitted no such evidence. While a first-time hiring for a position is certainly not a basis for precluding a position from recognition as a specialty occupation, it is unclear how an employer that has never recruited and hired for the position would be able to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a demonstration that it normally requires at least a bachelor's degree in a specific specialty or its equivalent for the position. The

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<sup>15</sup> Any such assertion would be undermined in this particular case by the fact that the petitioner indicated in the LCA that its proffered position is a comparatively low, entry-level position relative to others within the same occupation.

record includes the petitioner's business plan, pictures from the internet, menus and government documents. These documents do not establish that the petitioner normally requires at least a bachelor's degree in a specific specialty or its equivalent for the proffered position.

As the record of proceeding does not demonstrate that the petitioner normally requires at least a bachelor's degree in a specific specialty or its equivalent for the proffered position, it does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

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

In reviewing the record of proceeding under this criterion, we reiterate our earlier discussion regarding the *Handbook's* entries for positions falling within the "Market Research Analysts" occupational category. Again, the *Handbook* does not indicate that a bachelor's degree in a specific specialty, or the equivalent, is a standard, minimum requirement to perform the duties of such positions (to the contrary, it indicates precisely the opposite). With regard to the specific duties of the position proffered here, the AAO finds that the record of proceeding lacks sufficient, credible evidence establishing that they are so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a bachelor's degree in a specific specialty, or the equivalent.

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

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

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](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf) (last visited July 2, 2014).

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

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

*Id.*

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

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

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

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

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

*Id.*

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

**Level IV** (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification,

and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

*Id.*

Here we again incorporate our earlier discussion and analysis regarding the implications of the petitioner's submission of an LCA certified for the lowest assignable wage-level. As already noted, by virtue of this submission, the petitioner effectively attested to DOL that the proffered position is a low-level, entry position relative to others within the same occupation, and that, as clear by comparison with DOL's instructive comments about the next higher level (Level II), the proffered position did not even involve "moderately complex tasks that require limited judgment" (the level of complexity noted for the next higher wage-level, Level II).

For all of these reasons, the evidence in the record of proceeding fails to establish that the proposed duties meet the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As the evidence of record does not satisfy at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation. Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

## V. CONCLUSION AND ORDER

As set forth above, we agree with the director's findings that the petitioner failed to demonstrate that the proffered position qualifies for classification as a specialty occupation. Accordingly, the director's decision will not be disturbed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of

the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed. The petition is denied.