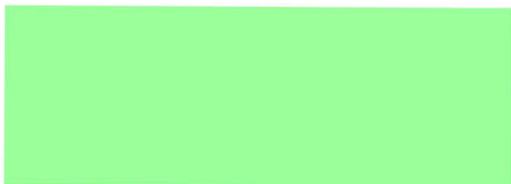


(b)(6)

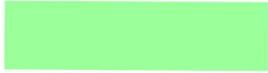
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090

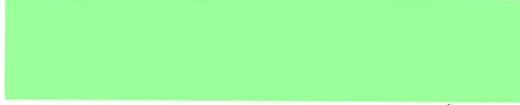


U.S. Citizenship  
and Immigration  
Services



DATE: JUN 03 2014

OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg  
Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on April 8, 2013. In the Form I-129 visa petition and supporting documentation, the petitioner describes itself as a garment manufacturer and distribution business established in 1983. In order to employ the beneficiary in what it designates as a market research analyst position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on September 24, 2013, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

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

For the reasons that will be discussed below, we agree with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed.

## I. FACTUAL AND PROCEDURAL HISTORY

In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services as a market research analyst to work on a full-time basis at a rate of pay of \$34,071 per year. In a support letter dated March 21, 2013 the petitioner stated that the proffered position involves the following duties and requirements:

The job offered, Market Research Analyst, is an integral part of our Sales and Marketing team. The position is responsible for developing and managing portfolios on key competitors, following market trends and providing information to sales and marketing that will drive sales volumes. The job entails the following primary duties:

- Conduct extensive market research on national and regional as well as local levels to determine or forecast market demand and preferences with regard to styles, colors, fabrics; make in-depth findings on buyers groupings taking into consideration of age, income, ethnicity and occupations and the needs and wants of each group. The individual will spend approximately 25% of the employment time on this duty.

- Prepare effective marketing report for the Management based on research findings and make suggestions to initiate or adjust general strategies, existing programs, sales focus areas, marketing campaigns, promotions, point of sales, etc. Conduct surveys and provide research results (market size, segment trends, customer insights, etc.). Approx. 15% of time.
- Analyze market conditions with regard to industrial or governmental regulations, general business environment, economic development levels, infrastructures with an eye to develop new geographic areas to enter and expand market share. Approx. 15% of time.
- Provide market findings with regard to customer preferences to sales force worldwide for new product development, coordinate activities between marketing and production. Approx. 10% of time.
- Develop and manage portfolios on key competitors or market players and pay particular attention [to] their product features & benefits, price positions, find out their marketing strategy, corporate structure and overall value proposition. Coordinate Marketing, Sales and Products Development to enhance marketing efforts regarding competitor situation and activities. Oversee and support sales data input to routine internal tracking tools used by the local and global organization. Approx. 10% of time.
- Determine standard process and format for method of supplying market related information in a consistent manner. Coordinate and manage programs or accounts. Provide quarterly reports regarding sales developments and trends. Approx. 15% of time.
- Responsible for establishing process for maintaining and updating market research information on a routine basis in a timely manner. Approx. 10% of time.

The petitioner stated that the beneficiary received a Master of Business Administration degree with a concentration in Marketing from the [REDACTED]. The petitioner provided a copy of a diploma and academic transcripts issued to the beneficiary.

In addition, the petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. We note that the LCA designation for the proffered position corresponds to the occupational classification "Market Research Analysts and Marketing Specialists" - SOC (ONET/OES Code) 13-1161, at a Level I (entry level) wage. The petitioner also submitted: (1) a printout of an advertisement on [REDACTED] for the position of "Market Research Analyst – MBA Bilingual English/Chinese preferred [REDACTED]" with the petitioner, listing the ideal candidate qualifications as "BA is a must" and dated March 19, 2013; (2) an excerpt from the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* on Market Research Analysts; (3) the petitioner's Articles of Incorporation, business license and seller's permit; and (4) the petitioner's state and federal quarterly wage report for 2012.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on May 13, 2013. The director outlined the evidence to be submitted. The director specifically requested that the petitioner submit probative evidence to establish that the proffered

position qualifies as a specialty occupation.

On July 30, 2013, the petitioner responded to the director's RFE with a detailed description of the proffered position as follows:

- Gather and review, analyze market and industrial data on national and regional as well as local levels to determine, forecast market demand and preferences with regard to styles, colors, fabrics; make in-depth findings on buyers groupings taking into consideration of age, income, ethnicity and occupations and the needs and wants of each group. The individual will spend approximately 25% of the employment time on this duty.
- Draft and compile effective marketing report for the Management based on research findings using convincing charts and statistics. Participate in setting general marketing strategies, adjust existing practices, sales focus areas, implement marketing campaigns, promotions, point of sales, etc. Conduct surveys and provide research results (market size, segment trends, customer insights, etc.). Approx. 15% of time.
- Analyze market conditions with regard to industrial or governmental regulations, general business environment, economic development levels, infrastructures with an eye to develop new geographic areas to enter and expand market share. Approx. 15% of time.
- Provide market findings with regard to customer preferences to sales force worldwide for new product development, coordinate activities between marketing and production. Approx. 10% of time.
- Develop and manage portfolios on key competitors or market players and pay particular attention [to] their product features & benefits, price positions, find out their marketing strategy, corporate structure and overall value proposition. Coordinate Marketing, Sales and Products Development to enhance marketing efforts regarding competitor situation and activities. Oversee and support sales data input to routine internal tracking tools used by the local and global organization. Approx. 10% of time.
- Determine standard process and format for method of supplying market related information in a consistent manner. Coordinate and manage programs or accounts. Provide quarterly reports regarding sales developments and trends. Approx. 15% of time.
- Responsible for establishing process for maintaining and updating market research information on a routine basis in a timely manner. Approx. 10% of time.

The above job requires that the individual review on a daily basis a large amount of written materials and write reports on marketing plans and make suggestions to the management as a marketing consultant on constant improvement of business management and marketing. The beneficiary reports directly to the top management of the company and will not supervise any other employees.

In addition, the petitioner submitted a list of eight employees it claimed to have hired in same or similar positions and the employees' educational backgrounds, several job announcements, and a printout from the company webpage listing its profile, products and services information. The petitioner resubmitted the excerpt from the *Handbook* and the [REDACTED] posting.

Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty, or its equivalent. The director denied the petition on September 24, 2013. Counsel subsequently filed the instant appeal.

## II. DIRECTOR'S DECISION

### Specialty Occupation

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

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

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

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

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

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

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

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

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

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

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the

ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

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

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

We recognize DOL's *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>1</sup> As previously mentioned, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Market Research Analysts and Marketing Specialists."

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

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

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.

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<sup>1</sup> All of the references in this decision are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

## Education

Market research analysts typically need a bachelor's degree in market research or a related field. Many have degrees in fields such as statistics, math, or computer science. Others have 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.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Market Research Analysts, on the Internet at <http://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm#tab-4> (last visited May 8, 2014).

The petitioner designated the wage level of the proffered position as a Level I position on the LCA.<sup>2</sup> This designation is indicative of a comparatively low, entry-level position relative to others within the occupation and signifies that the beneficiary is only expected to possess a basic understanding of the occupation and will perform routine tasks that require limited, if any, exercise of judgment. In accordance with the relevant DOL explanatory information on wage levels, the beneficiary will be closely supervised and her work closely monitored and reviewed for accuracy. Furthermore, she will receive specific instructions on required tasks and expected results. The petitioner has not established that the beneficiary will serve in a top-research position, a high-level or leadership position, or a position that performs more technical research.

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<sup>2</sup> The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. A Level I wage rate is described by DOL as follows:

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

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)

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

In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum requirement 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 disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in the specific specialty (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

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

As previously stated, USCIS does not simply rely on a position's title to determine whether a particular position qualifies as a specialty occupation. Rather, USCIS considers the duties of a proffered position, the nature of the petitioning entity's business operations, and all other relevant factors to make its determination. Again, the critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and

practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

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

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

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

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

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner submitted copies of job advertisements. However, upon review of the evidence, we find that the petitioner's reliance on the job announcements is misplaced.

For the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, documentation submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the advertising organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may

be considered). It is not sufficient for the petitioner to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

In the Form I-129 and supporting documentation, the petitioner stated that it is a garment manufacture and distribution business established in 1983, with 49 employees. The petitioner stated its gross annual income is \$70,669,375. Although requested on the form, the petitioner did not provide its net annual income. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 315999 – "Other Apparel Accessories and Other Apparel Manufacturing."<sup>3</sup> The U.S. Department of Commerce, Census Bureau website describes this NAICS code as follows:

This U.S. industry comprises establishments primarily engaged in manufacturing apparel and apparel accessories (except apparel knitting mills; cut and sew apparel contractors; cut and sew apparel; hats and caps; mittens and gloves; and men's and boys' neckwear). Jobbers for these products, who perform entrepreneurial functions involved in other apparel and accessory manufacture, including buying raw materials, designing and preparing samples, arranging for other apparel and accessories to be made from their materials, and marketing finished other apparel and accessories, are included. Examples of products made by these establishments are apparel trimmings and findings, belts, women's scarves, and suspenders.

*See* U.S. Dep't of Commerce, U.S Census Bureau, 2012 NAICS Definition, 315999 – Other Apparel Accessories and Other Apparel Manufacturing on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited May 8, 2014).

In response to the RFE, the petitioner submitted several job announcements. However, the documentation does not establish the proffered position qualifies as specialty occupation under this criterion of the regulations. For instance, the petitioner has not established that the advertising organizations are similar to the petitioner. The record of proceeding contains job postings for Krypt, Inc. and ATP Electronics (computer/IT services industry), Iceology (management consulting services industry), and an unnamed company (B2B media/technology industry). In addition, some of the advertisements provide no details regarding the advertising company, including the postings from Holy-G, Inc. and Braveberry. The petitioner failed to specify what characteristics it believes it shares with these organizations.

Additionally, some of the advertisements appear to be for dissimilar positions and/or for more senior positions. For example, the posting from Pink Pleasure, Inc. states a degree requirement and five years of progressive experience in the field. As previously discussed, the petitioner has classified the proffered position as a Level I (entry level) position, the lowest of four possible

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<sup>3</sup> NAICS is used to classify business establishments according to type of economic activity, and each establishment is classified to an industry according to the primary business activity taking place there. *See* U.S. Dep't of Commerce, U.S. Census Bureau, NAICS, on the Internet at <http://www.census.gov/eos/www/naics/> (last visited May 8, 2014).

designations. According to DOL guidance, a Level I wage is appropriate for a worker in training or an internship.

The posting for a Fashion E-Commerce Marketing Manager from “Top Swimwear Company” lists general responsibilities that correspond to the duties of a marketing manager, and not those of a market research analyst. The posting for Creative Circle is for a Brand Strategist Consultant and does not list the minimum requirements for the position. The posting for Pacific Continental Apparel lists average salaries for two market research analyst employees, but does not list the minimum requirements for the position or the job duties. One posting titled “Market Research Analysts in the Apparel Manufacturing Industry” contains no citation and lists only an average salary but does not include any minimum requirements or job duties. As the advertisements do not contain sufficient information regarding the day-to-day duties, complexity of the job duties, supervisory duties (if any), independent judgment required, or the amount of supervision received within the context of the advertising employers' business operations, a legitimate comparison of the advertised positions to the proffered position cannot be made. Upon review, the petitioner has not established that all of the job postings are for parallel positions.

Additionally, contrary to the purpose for which the advertisements were submitted, the petitioner submitted job postings, which do not indicate that a bachelor's degree in a directly related specific specialty is required. For instance, some of the employers indicate that a general-purpose degree, i.e., a degree in business administration is acceptable. The posting from Iceology lists a "Bachelor's degree required with 2-3 years of relevant quantitative work experience." The unnamed B2B media/technology company requests a four-year degree. Although a general-purpose bachelor's degree may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147. To qualify as a specialty occupation, a position must require at least a bachelor's degree in a *specific specialty* (or its equivalent) that is directly related to the duties of the position. The postings do not establish that the occupation of market research analyst is one that requires a bachelor's degree in a specific specialty or its equivalent. Rather, the postings indicate that a wide range of educational backgrounds is acceptable preparation for employment as a market research analyst.

As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, as the evidence does not establish that similar organizations in the same industry routinely require at least a bachelor's degree in a specific specialty, or its equivalent, for parallel positions, not every deficit of every job posting has been addressed.

Furthermore, the petitioner fails to establish the relevancy of the provided examples to the issue here. That is, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from these advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.<sup>4</sup>

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<sup>4</sup> According to the *Handbook's* detailed statistics on market research analysts, there were approximately 415,700 persons employed as market research analysts in 2012. *Handbook*, 2014-15 ed., available at

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

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

In response to the RFE and on appeal, the petitioner and its counsel submitted documentation regarding the petitioner's business operations, including the petitioner's quarterly tax returns and a printout from the petitioner's website. We have reviewed the record of proceeding in its entirety. However, upon review of the record, we find that the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of market research specialist.

We find that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent. This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, the LCA indicates a wage level based upon the occupational classification "Market Research Analysts and Marketing Specialists" at a Level I (entry level) wage. The wage-level of the proffered position indicates that, relative to others within the occupation, the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely

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<http://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm#tab-1> (last visited May 8, 2014). Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the job postings with regard to the common educational requirements for entry into parallel positions in similar organizations. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

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

monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

Without further evidence, the record does not establish that the petitioner's proffered position is so complex or unique that such a position would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."<sup>5</sup>

The petitioner states in its July 19, 2013 letter submitted in response to the RFE:

What differentiates this position is the complexity of the duties which requires knowledge not only in marketing but also in business management and knowledge in finance so that the person may truly assist the top management in making marketing decisions.

However, the petitioner failed to establish how the beneficiary's responsibilities and day-to-day duties are so complex or unique that the position can be performed only by an individual with a bachelor's degree in a specific specialty, or its equivalent. Overall, the record lacks sufficient probative evidence to distinguish the proffered position as more complex or unique from other market research specialist positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent. Moreover, the petitioner failed to provide documentary evidence to establish that the duties that will be performed by the beneficiary involve any particular level of complexity or uniqueness. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the position. Although a few related courses may be beneficial, or in some cases even required, to perform certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position.

The petitioner has indicated the beneficiary has a Master of Business Administration degree with a concentration in Marketing, as well as a Bachelor's degree in International Business. The test to establish a position as a specialty occupation, however, is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner and counsel do not sufficiently explain or clarify at any time in the record which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed

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<sup>5</sup> For additional information regarding the prevailing wage level, 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).

employment. Upon review of the record of proceeding, the petitioner has failed to establish the proffered position as satisfying this prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. To this end, we usually review the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position. In addition, we review any other probative documentation provided by the petitioner to satisfy this criterion of the regulations.

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

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

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

the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

In the instant case, the petitioner stated in the Form I-129 petition that it has 49 employees and was established in 1983 (approximately thirty years prior to the filing of the H-1B petition). Although the petitioner submitted a list of eight individuals, including the beneficiary, stating the job title, degree, major and name of school for each, it did not provide the total number of people it has employed to serve in the proffered position. No supporting evidence was submitted to verify that these individuals are actually employed in the position listed, nor did the petitioner submit resumes or other evidence of the degree of each individual other than the beneficiary.<sup>6</sup> Five individuals are listed as “Product Coordinator.” The petitioner failed to provide a job description for this position to demonstrate that it is related to the proffered position of Market Research Analyst. Further, the list includes majors such as “Interdisciplinary,” “Computer Science,” and “Administration.” These majors are general-purpose or unrelated to the specific specialty of the proffered position. As discussed above, to qualify as a specialty occupation, a position must require at least a bachelor's degree in a *specific specialty* (or its equivalent) that is directly related to the duties of the position.

The petitioner also submitted an advertisement for the position of “Market Research Analyst – MBA Bilingual English/Chinese preferred [REDACTED]” with its company. The advertisement states that the petitioner is “looking for ideal candidates with qualifications . . .” and lists “BA is a must” and “Bilingual in English and Chinese/Mandarin.”<sup>7</sup> The advertisement fails to state that a bachelor's degree in a specific specialty is required for the position.

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<sup>6</sup> On appeal, counsel acknowledges that the petitioner did not submit corroborating evidence in connection with the list of eight employees. Counsel asserts that, because the petitioner has 49 employees, it “should have been treated with certain weight of deference, especially when it is obviously not a frivolous petition.” Counsel cites no authority for such a position which exempts the petitioner from meeting its burden of proof. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The “preponderance of the evidence” standard requires that the evidence demonstrate that the applicant's claim is “probably true,” where the determination of “truth” is made based on the factual circumstances of each individual case. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)). In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *Id.* 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. Here, the submitted evidence is not probative and credible.

<sup>7</sup> In accordance with the guidance provided by DOL, a language requirement other than English in a petitioner's job offer generally is considered a special skill for all occupations, with the exception of “Foreign Language Teachers and Instructors,” “Interpreters,” and “Caption Writers.” In the instant case, the petitioner designated the proffered position under the occupational category “Market Research Analysts and Marketing Specialists” at a Level I (the lowest of four assignable wage levels), and it has not established that if there is a foreign language requirement, that it was reflected in the wage-level for the proffered position. Therefore, if foreign language is required for the position, then the petitioner has not established that it would pay the beneficiary an adequate salary for his work, as required under the Act, if the petition were granted.

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

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

We have reviewed the petitioner's statements and the documentation provided regarding its business operations and the proffered position. Upon review, we find that the petitioner has not established that the proffered position satisfies this criterion of the regulations. More specifically, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position.

Furthermore, we reiterate our earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four assignable levels). That is, the Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, DOL indicates that a Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, it is not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, as previously mentioned, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

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

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

### III. CONCLUSION AND ORDER

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D.

Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 145 (noting that the AAO conducts appellate review on a *de novo* basis).

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act; *see e.g., Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.