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



U.S. Citizenship  
and Immigration  
Services

DATE: JUN 19 2014 OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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

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

ON BEHALF OF PETITIONER:

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,

  
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 three-employee supplier of nutrition ingredients and fine chemicals to the food, feed, pharmaceutical and health industries,<sup>1</sup> established in 2009. In order to employ the beneficiary in what it designates as a part-time business analyst position at a salary of \$23.90 per hour,<sup>2</sup> 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 found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on May 2, 2013. Within the RFE, the director outlined the specialty occupation regulatory criteria and requested specific documentation to establish that the proffered position qualifies for classification as a specialty occupation. The director denied the petition, concluding that the evidence of record failed to establish 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, the AAO finds that the evidence of record does not overcome the director's basis for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

## II. LAW

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.

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<sup>1</sup> The petitioner provided a North American Industry Classification System (NAICS) Code of 424210, "Drugs and Druggists' Sundries Merchant Wholesalers." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "424210 Drugs and Druggists' Sundries Merchant Wholesalers," <http://www.naics.com/naics-code-description/?code=424210> (last visited June 11, 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" 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.

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

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

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

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to

meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), 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.

### III. ANALYSIS

Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation.

In a July 15, 2013 letter submitted in response to the director's RFE, the petitioner stated that the duties of the proffered position would include the following tasks:

- **Analyze and research market, [f]orecast the market demands, design and develop plans for purchasing, inventory, warehousing and distribution requirements. (20% of work hours)**

- Analyze possible factors to affect supply and demand curves, such as price, cost, season.
  - Compare current data collected from economic report with historical data to predict vitamin industry change in national scope.
  - Prepare report about predicting industry change, inventory and distribution status for IVC purchasing department to help them improve purchasing plan, inventory control and optimize supply chain.
  - Design customer survey; using census sampling, judgment sampling or statistical sampling base[d] on the project size.
  - Identify current and potential and premium markets for our products, including market size, trends and networks.
  - Identify and analyze grouping, efficiency, and networking of the vitamin industry.
  - Identify and analyze the leading firms, power relations, and rules set up by the leading firms.
  - Comparing [our] company[']s hot item data sales with the leading firm[']s top item sales.
  - Monthly report to the supervisor and the purchasing department.
- **Perform financial analysis and projection, particularly in profitability, cost, inventory turnover and cash flow on a regular basis. Research factors that contribute [to] or reduce profitability. Assess risks, benefits, and analyze data gathered on new investment and business opportunities to increase profitability and also to forecast future marketing trends. (15% of work hours)**
    - Read company financial statement[s] and main financial indexes, as well as financial statement[s] of competitors in vitamin industry.
    - Review the important events or transactions for company in last month.
    - Conclude current month financial status, main financial characters and financial situation abnormality[.]
    - Calculate financial ratios,

$$\text{Profitability index} = \frac{\text{PV of future cash flows}}{\text{Initial investment}}$$

$$\text{Asset Turnover} = \frac{\text{Net Sales Revenue}}{\text{Average Total Assets}}$$

$$\text{Current ratio} = \frac{\text{Current Assets}}{\text{Current Liabilities}}$$

- The situation of cash flow[.]

- Process comparative analysis, (a) with historical data, (b) with competitor in same industry.
- Write a report about company financial situation, possible risk and problems.
- Analyze the new investment for company, such as new acquisition of pharmaceutical factory in east coast. Focus on the change of output and profitability[,] based on previous data to forecast the influence on marketing trends.
- **Analyze cost effectiveness in the following areas: labor, storage, space rental warehouse, transportation, and all inbound/outbound processes and operation[s]. (10% of work hours)**
  - Compare the changes between old data and the new [data]. Produce output data report.
    - Prepare new data collected and measured from previous section[.]
    - Prepare secondary data gathered and recorded which [is] already in our system[.]
    - Separate into different segment, independent versus dependent[.]
    - Constructing a "Confidence Interval" for each segment[.]
    - Use "Hypothesis Testing" to prove the result[.]
  - Produce tables, graphs and charts to make the result[s] more understandable.
    - Edit data shown by charts and graphs in addition to the text and tables.
      - Using Pie chart in representing quantitative data and divided into different slices according to percentage in the category.
      - Using Line chart for static comparison that is the phenomenon at one time shows dynamic relation of the change with time such as time series fluctuations.
      - Using Bar chart to [show] the frequency or percentage of observations falling into a category.
  - Prepare the document to management.
    - [Include] a statement explaining the purpose of the study[.]
    - Detailed outline of procedures associated with a particular methodology[.]
    - Everything should be precise, specific and concrete.
- **Gather data on competitors and analyze prices, sales and methods of marketing and distribution; using such data to certify opportunities and problems, and to improve [operational] performance from quantitative and non-quantitative analysis. (15% of work hours)**

- Reviewing marketing projects that are assigned, previous marketing materials, which are used in assignment area and gathering materials about competitive companies in their field.
  - Collect data from competitor['s] annual reports and product brochures. Supervise and monitor campaigns with recorded data.
- Gaining observable data.
  - Collect data from competitors' active promotions and extra service for various tour package[s].
  - Compare competitors' discount price and discount period from similar tour packages.
- Gaining opportunistic data[.]
  - Discussions with suppliers and customers[.]
- Compare with strengths and weaknesses with our rivals[.]
  - Use SWOT concept to compare strength or weakness of marketing capabilities, and an assessment of distribution channels.
  - Use Five Forces Analysis concept to compare strengths and weaknesses, as well as those of our rivals.
    - Customer bargaining power[.]
    - Supplier bargaining power[.]
    - Product substitutes[.]
    - Barriers to entry[.]
    - Potential new competitors[.]
- **Collect data on customer preferences and service requirements. Research customer [feedback] to further improve the company's products and service[s] strategically. Explore effective and creative marketing plans to promote our products and service[s], expand the client base[.] (20% of work hours)**
  - Collect and analyze data on customer demographics, preferences, needs, and buying habits to identify potential markets and factors affecting product demand.
    - Design customer survey from "Census sampling," "Judgment sampling" or "Statistical sampling" base[d] on the project size.
      - Use "Exploratory research" conduct to clarify and define the nature of a problem[.]
      - Use "Descriptive research" describes [sic] characteristics of the phenomenon.
      - Use "Causal research" conduct to identify cause and effect relationships[.]
    - Data evaluation and measurement[.]
      - Evaluation and measurement from discrete data and continuous data.
      - Measure numerical data into different segment[.]

- ✓ Qualitative measurement: nominal data and ordinal data[.]
- ✓ Quantitative measurement: interval data and ratio data[.]
- Use SWOT concept (strengths, weaknesses, opportunities, and threats) analysis to determine what advantages and disadvantages of each segment.
- **Conduct marketing research on international and domestic business trends, competitors and potential client targets, collect customer [feedback] to further improve the company's products and service[s] strategically. Explore effective and creative marketing plans to promote our products and expand the client base. (20% of work hours)**
  - Planning and implementing recruitment promotions that include direct marketing, advertisement design and conference presence. To calculate marketing investment "ROMI" to measure the return on our marketing investment.
    - Collect data from short-term and long-terms results.
    - Use "Four Ps" (Product, Price, Place, and Promotion) theory to correctly define effectiveness and monitor the changes in consumer behavior.
  - To calculate marketing "ROI[.]" divide our net profit by our total investment.
    - Develop and implement procedures for identifying investment needs.
    - Establish and "ROI threshold"
      - Set marketing budget, have an "ROI" goal and annual revenue[.]
      - Calculate "ROI" on campaigns[.]
    - Determine levels for corporate, competitive, consumers, and exogenous factors based on "Four major dimensions" concept.
    - Focus on campaigns that deliver the greatest return.

The petitioner stated in the RFE response letter that the beneficiary would be responsible for the outcome of above-listed tasks, and that he would work under minimal supervision.<sup>3</sup> Additionally, the petitioner asserted that performing the proffered position's duties requires a minimum of a bachelor's degree in marketing or related fields, and thorough knowledge of business operations and marketing theories.<sup>4</sup>

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<sup>3</sup> The AAO notes that the petitioner presented the same duties and percentage of time allocation that appear in bold in the initial filing, and expanded upon each duty in more detail when responding to the RFE.

<sup>4</sup> In its initial filing, the petitioner stated that the minimum degree requirement is a bachelor's degree in business administration or closely related fields. This shift is notable and not explained by the petitioner.

The AAO observes that the petitioner has provided many details about the proposed duties indicating that the beneficiary would be employed in a position within the Market Research Analysts occupational category. Nonetheless, the AAO finds that the information does not establish that the duties as described, or the business analyst position that those duties are said to comprise, would be more specialized, complex, and/or unique than positions within the Market Research Analysts and Marketing occupational category that can be performed without the theoretical and practical application of at least a bachelor's degree level of knowledge in marketing or in another closely related specialty field of study.

The AAO will first address the letter from [REDACTED] who identifies himself as the Vice President of Marketing for [REDACTED]. In his letter dated July 2, 2013, Mr. [REDACTED] briefly lists the duties proposed for the beneficiary and states his belief that the duties require at least a bachelor's degree to perform them.<sup>5</sup> The AAO observes that Mr. [REDACTED] does not state the bachelor's degree he claims is necessary must be in a specific specialty as required by the pertinent statute and regulations.

Upon review, the AAO finds that this 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).

At the outset, the AAO notes that this letter is not accompanied by, and does not expressly state the full content of, whatever documentation, personal observations, and/or oral transmissions upon which it may have been based. Mr. [REDACTED] does not indicate whether he visited the petitioner's business premises or spoke with anyone affiliated with the petitioner, so as to ascertain and base his opinions upon, the substantive nature and educational requirements of the proposed duties as they would be actually performed. Nor did he specify and discuss any studies, surveys, or other authoritative publications, and, significantly, he did not discuss the pertinent occupational information provided in the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*). It appears as though Mr. [REDACTED] did not base his opinions on any objective evidence, but instead simply restated the duties of the proffered position as provided by the petitioner. The AAO finds that, for these reasons alone, and independent of the other material deficiencies to be noted below, this letter is not probative evidence of the proffered position satisfying any of the criteria described at 8 C.F.R. § 214.2(h)(4)(iii)(A).

However, even if these foundational deficiencies were not present, this letter would still not satisfy any of the criteria described at 8 C.F.R. § 214.2(h)(4)(iii)(A). First, it is noted that Mr. [REDACTED] did not discuss the duties of the proffered position in any substantive detail. To the contrary, he simply repeated the duties contained in the petitioner's letter of support. The extent of meaningful analysis involved in the formulation of his letter, therefore, is not apparent.

Furthermore, Mr. [REDACTED] finds that an individual with a bachelor's degree in any field of study could perform the duties of the proffered position. Even if established by the evidence of record, which it is not, the requirement of an unspecified bachelor's degree is inadequate to establish that a

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<sup>5</sup> Mr. [REDACTED]'s letter was not prepared on [REDACTED]'s letterhead, which diminishes the evidentiary weight of the assertions he makes with regard to the business practices of that company.

position qualifies as a specialty occupation. Mr. [REDACTED]'s claim that a bachelor's degree is a sufficient minimum requirement for entry into the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. There must be a close correlation between the required specialized studies and the position; thus, the mere requirement of a degree, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988) ("The mere requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility."). Thus, while a general-purpose 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 (1st Cir. 2007).

For all of these reasons, the AAO finds that the letter from Mr. [REDACTED] is not probative evidence towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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).

The AAO 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.

The AAO 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.

The AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.<sup>6</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 and Marketing" occupational category.

The *Handbook* states the following with regard to the duties of positions falling within the "Market Research Analysts" occupational category:

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<sup>6</sup> The *Handbook*, which is available in printed form, may also be accessed online at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are from the 2014-15 edition available online.

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
- 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.

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 June 11, 2014).

The *Handbook* states the following with regard to the educational requirements necessary for entrance into this field:

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.

*Id.* at <http://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm#tab-4> (last visited June 11, 2014).

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

The AAO notes that, 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>7</sup> Section 214(i)(1)(B) of the Act (emphasis added).

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<sup>7</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

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." As noted above, although a general-purpose bachelor's degree, such as a degree in business administration,<sup>8</sup> 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 standard, 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, the *Handbook* does not support the proffered position as being a specialty occupation.

The petitioner provided a copy of the Occupational Information Network (O\*NET) OnLine "Summary Report for: 13-1161.00 - Market Research Analysts and Marketing Specialists," to support its assertion that the proffered position qualifies as a specialty occupation. The AAO reviewed the O\*NET OnLine Summary Report but finds that the petitioner's reliance on the Job Zone rating is misplaced. That is, O\*NET OnLine assigns this occupation a Job Zone Four rating, which groups it among occupations that are described as follows: "[m]ost of these occupations require a four-year bachelor's degree, *but some do not* (emphasis added)." See O\*NET OnLine Summary Report for "Market Research Analysts and Marketing Specialists" - SOC (ONET/OES Code) 13-1161, available on the Internet at <http://www.onetonline.org/link/summary/13-1161.00> (last visited June 11, 2014). O\*NET OnLine does not report that for those occupations with an academic degree requirement, that such a degree must be in a *specific specialty* directly related to the occupation. As previously discussed, USCIS consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the duties and responsibilities of the position. Further, "most" is not indicative that a position normally requires at least a bachelor's degree in a specific specialty, or its equivalent.<sup>9</sup> Notably, O\*NET OnLine indicates that some of these occupations do not require a four-year bachelor's degree.

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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.

<sup>8</sup> As noted, the petitioner made the same assertion in its initial filing.

<sup>9</sup> 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 such positions require a four-year bachelor's degree, it could be said that "most" of the positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. 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

Also, upon review of the totality of the evidence in the entire record of proceeding, the AAO concludes that the petitioner has not established that the proffered position falls within an occupational category for which the *Handbook*, or other authoritative source, indicates that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is normally required for entry into the occupation. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the particular position that is the subject of this petition is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry.

Finally, we note 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.<sup>10</sup>

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)(I).

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"attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." § 214(i)(1) of the Act.

<sup>10</sup> The *Prevailing Wage Determination Policy Guidance* (available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf) (last visited June 11, 2014)) 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 [emphasis in original].

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 is appropriate for a proffered position that is actually a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, by submitting an LCA with a Level I wage rate, the petitioner effectively attests that the beneficiary is only required to possess a basic understanding of the occupation; that he will be expected to perform routine tasks requiring limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

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 1151, 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 evidence of record does not establish that the petitioner's 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. Also, there are no submissions from professional associations 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.

Nor do the twelve job-vacancy announcements submitted in response to the RFE satisfy the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

First, the AAO discounts these job-vacancy announcements because they do not relate to the petitioner's industry, as would be required if those submissions were to be within this prong's zone of consideration. 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.") Second, the petitioner has not established that these twelve positions are "parallel" to the proffered position.<sup>11</sup> Nor has the petitioner established that the positions advertised in these job-vacancy announcements require a bachelor's degree in a specific specialty, or the equivalent.<sup>12</sup> In addition, the petitioner did not submit any evidence regarding how representative these advertisements are of the industry's usual recruiting and hiring practices with regard to the positions advertised. As a final matter, the petitioner has not shown that the advertising organizations are similar to the petitioner.

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<sup>11</sup> For example, it is noted that five years of progressive work experience is required for two of these positions, and another six of these positions require some quantified period of experience. However, 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.

<sup>12</sup> Although all of the positions require a bachelor's degree, three job vacancy announcements do not specify that the degree must be in a specific specialty.

Again, simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).<sup>13</sup>

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 the instant case, the evidence of record does not credibly demonstrate relative complexity or uniqueness as aspects of the proffered position. Specifically, it is unclear how the business analyst position, as described, necessitates the theoretical and practical application of a body of highly specialized knowledge such that a person who has attained a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them. 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.

The AAO incorporates here by reference and reiterates its 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 he will receive specific instructions on required tasks and expected results; and that his work will be reviewed for accuracy.

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<sup>13</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. 369, 376 (AAO 2010). As just discussed, the evidence of record does not 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 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).

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.

Finally, the AAO observes that the petitioner has indicated that the beneficiary's educational background and marketing experience will assist him in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. In the instant case, the petitioner does not establish which of the proposed duties, if any, would render the proffered position so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. Again, the petitioner did not demonstrate 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.

For all of these reasons, it cannot be concluded that the evidence of record satisfies 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>14</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

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<sup>14</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.

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").

Within the record of proceeding is a copy of the petitioner's job vacancy announcement for the proffered position that was open at the time of responding to the RFE. According to counsel, the job vacancy announcement is identical to the announcement that had been posted when the petitioner hired the beneficiary. The director stated in the denial that because the petitioner would accept applicants with a bachelor's degree in business, the position itself does not meet the statutory definition of a specialty occupation.<sup>15</sup> The AAO agrees with the director on this point.<sup>16</sup>

The AAO finds that the record of proceeding does not establish the prior history of recruiting and hiring required to satisfy this particular criterion.

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<sup>15</sup> Again, the AAO observes that the petitioner initially stated that the minimum education requirement for the proffered position is a bachelor's degree in business administration or closely related fields, and then changed the minimum education requirement to a bachelor's degree in marketing or related fields when responding to the RFE.

<sup>16</sup> Again, the petitioner's claim that a bachelor's degree in "business" is a sufficient minimum requirement for entry into the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. Cf. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

To prove that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. 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.

Again, the petitioner in this matter claims that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree, i.e., a bachelor's degree in business administration. This assertion is tantamount to an admission that the proffered position is not in fact a specialty occupation. The director's decision must therefore be affirmed and the petition denied on this basis alone.

The record indicates that the petitioner has never employed a business analyst, and the director stated in the denial that the petitioner had no evidence to present on issue, as this was the first offering of the proffered position. The AAO agrees with the director on this point, and finds that here there is not an established history of recruiting and hiring that would be necessary to satisfy that the position actually requires the theoretical and practical application of knowledge. Although the fact that a proffered position is a newly-created one is not in itself generally a basis for precluding a position from recognition as a specialty occupation, an employer that has never recruited and hired for the position cannot satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a demonstration that it normally requires a bachelor's degree, or the equivalent, in a specific specialty for the position.

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, the AAO finds 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.

Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position's duties. In other words, the proposed duties have not been described with sufficient specificity to show that their nature is more specialized and complex than market research analyst positions whose duties are not of a nature so specialized and complex that their performance requires knowledge usually associated with a degree in a specific specialty. In reviewing the record of proceeding under this criterion, the AAO reiterates its 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), and the record indicates no factors, such as supervisory responsibilities, that would elevate the duties proposed for the beneficiary above those discussed in the *Handbook*. 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.

Counsel asserts in the RFE response that the incumbent in the proffered position would utilize principles of a body of highly specialized knowledge in the areas of business operations and marketing theories. However, counsel did not take the opportunity to demonstrate that business operations and marketing theories are usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, and that the specialized knowledge is necessarily applicable to performing the duties of the proffered position. Nor did counsel provide documentary evidence substantiating that these theories, as applied, are essential to successfully accomplishing the duties

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

Moreover, the AAO incorporates its earlier discussion regarding the wage-level designation on the LCA, which is appropriate for duties whose nature is less complex and specialized than required to satisfy this criterion. 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 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 June 11, 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.*

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).

Finally, the AAO does not find the case law counsel cited on appeal persuasive. The AAO notes that counsel cites to *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985 (S.D. Ohio 2012), for the proposition that "[t]he knowledge and not the title of the degree is what is important. Diplomas rarely come bearing occupation-specific majors. What is required is an occupation that requires highly specialized knowledge and a prospective employee who has attained the credentialing indicating possession of that knowledge."

The AAO agrees with the aforementioned proposition that "[t]he knowledge and not the title of the degree is what is important." In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added). For the aforementioned reasons, however, the evidence of record does not establish that the particular position offered in this matter requires a bachelor's or higher degree in a specific specialty, or its equivalent, directly related to its duties in order to perform those duties. See also *Health Carousel, LLC v. U.S. Citizenship & Immigration Services*, \_\_\_ F. Supp. 2d \_\_\_, 2014 WL 29591 (S.D. Ohio 2014) (agreeing with AAO's analysis of *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*).

In any event, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*.<sup>17</sup> The AAO also notes that, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States

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<sup>17</sup> It is noted that the district judge's decision in that case appears to have been based largely on the many factual errors made by the service center in its decision denying the petition. The AAO further notes that the service center director's decision was not appealed to the AAO. Based on the district court's findings and description of the record, if that matter had first been appealed through the available administrative process, the AAO may very well have remanded the matter to the service center for a new decision for many of the same reasons articulated by the district court if these errors could not have been remedied by the AAO in its *de novo* review of the matter.

district court in matters arising even within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Finally, the AAO notes that, on appeal, counsel cites to *Tapis Int'l v. INS*, 94 F. Supp. 2d 172 (D. Mass. 2000) when rejecting USCIS's statutory interpretation that the degree must be in a specific academic major. The AAO finds counsel's reliance on *Tapis Int'l v. INS* misplaced for the reasons set forth below.

The United States District Court [in *Tapis Int'l v. INS*] has held that in positions where an employer requires a Bachelor's degree, but does not specify a field, the regulatory definition of specialty occupation may be satisfied by looking at a combination of education with experience in a specific field.

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

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

Moreover, the AAO also agrees that, if the requirements to perform the duties and job responsibilities of a proffered position are a combination of a general bachelor's degree and experience such that the standards at both section 214(i)(1)(A) and (B) of the Act have been satisfied, then the proffered position may qualify as a specialty occupation. The AAO does not find,

however, that the U.S. district court is stating that any position can qualify as a specialty occupation based solely on the claimed requirements of a petitioner.

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

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

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

Second, in promulgating the H-1B regulations, the former INS made clear that the definition of the term "specialty occupation" could not be expanded "to include those occupations which did not require a bachelor's degree in the specific specialty." 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991). More specifically, in responding to comments that "the definition of specialty occupation was too severe and would exclude certain occupations from classification as specialty occupations," the former INS stated that "[t]he definition of specialty occupation contained in the statute contains this requirement [for a bachelor's degree in the specific specialty or its equivalent]" and, therefore, "may not be amended in the final rule." *Id.*

In any event, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Tapis Int'l v. INS*. The AAO also notes that, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising even within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning

underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

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, the AAO agrees with the director's findings that the evidence of record does not demonstrate that the proffered position qualifies for classification as a specialty occupation. Accordingly, the director's decision will not be disturbed.

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.