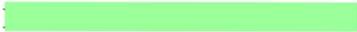


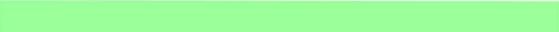


U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **MAR 13 2014** OFFICE: CALIFORNIA SERVICE CENTER 

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,

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.

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a software services company<sup>1</sup> established in 2007, with 21 employees. In order to employ the beneficiary in what it designates as a "Business Development Representative" 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 the grounds that the petitioner failed to establish that the proffered position qualifies for classification as a specialty occupation in accordance with the applicable statutory and regulatory provisions. The petitioner filed a timely appeal of the decision. On appeal, the petitioner's counsel asserts that the petitioner has established that the proffered position is a specialty occupation. In support of this assertion, counsel submits a brief and additional evidence.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's notice of decision; and (5) the petitioner's Notice of Appeal or Motion (Form I-290B) and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees with the director's decision that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

#### I. PROCEDURAL AND FACTUAL BACKGROUND

In this matter, the petitioner indicated in the Form I-129 and supporting documentation that it seeks the beneficiary's services in a position that it designates as a business development representative to work on a full-time basis at a salary of \$40,000 per year.

The petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The LCA designation for the proffered position corresponds to the occupational classification of "Market Research Analysts and Marketing" – SOC (ONET/OES) Code 13-1161, at a Level I (entry level) wage.

In an undated letter of support, the petitioner stated that the beneficiary will be responsible for the following duties:

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<sup>1</sup> On the Form I-129, the petitioner stated that its business is "[s]oftware services to manage customers' online content for marketing campaigns."

[The beneficiary] will serve as the first point of contact for potential clients and will be expected to assess whether the prospective clients' are qualified and would benefit from use of our services. This includes research, study and evaluation of clients' link graphs, current search rankings, on-page architecture and social media signals. He will also devise methods of collecting this data, analyzing this data and making recommendation[s] for future marketing programs and strategies. [The beneficiary] will also work with our sales department and account executives to assist in determining the return on investment for prospective clients. He will collaborate with the marketing department to further develop strategies and tactics to enhance qualified lead prospective clients for the company.

[The beneficiary] will be responsible for conducting market analysis and making recommendations to management. He will compile statistical information that directly impacts the company's market position. He will evaluate general market and economic conditions. The data and summaries he provides will help the company to evaluate current strategies, market conditions and implement new strategies for domestic and international growth.

[The beneficiary] will be expected to utilize the dynamics of reverse engineering of search engine rankings to enable firms to obtain first-page rankings for competitive keywords on search engines for clients. He is expected to stay abreast of the latest industry changes including search engine algorithmic changes to make recommendations on potential changes in product and service offerings for the company. This position requires comprehensive analysis of sales forecasts, initiation and management of market research, and strategic planning to ensure the profitability of products and services provided. This analysis and data collection is essential to [the petitioner's] market plan of business expansion and customer satisfaction. Analysis of internal and external data relevant to long-term strategy also involves understanding of statistical charts, industry trends, and the statistical correlation between supply and demand.

In its letter of support, the petitioner also stated that "[the beneficiary's] business administration and marketing education and his previous professional experience in our industry are essential to the understanding and application of market and business research."

In addition to the aforementioned letter of support, the documents filed with the Form I-129 included, among other things, the following:

- A copy of a letter dated March 2, 2012 from the registrar at [REDACTED] confirming that the beneficiary received a Bachelor of Science degree in marketing from [REDACTED]; and
- A copy of the beneficiary's transcript from [REDACTED]

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on January 28, 2013. The director asked the petitioner to submit evidence to demonstrate that the proffered position qualifies as a specialty occupation.

In response to the director's RFE, the petitioner provided additional supporting evidence including, among other things, the following:

- The petitioner's letter in response to the RFE, dated April 16, 2013, in which it stated that it satisfies the first and fourth prongs of 8 C.F.R. § 214.2(h)(iii)(A);
- Information about the petitioner's services; and
- Copies of the petitioner's press releases.

In its letter, dated April 16, 2013, the petitioner stated that the beneficiary's duties can be divided into three categories as follows:

A. ***Market Research and Development of Business Opportunities*** (approximately 40%). To supplement the description provided above, [the beneficiary's] typical day-to-day duties may include the following:

- Research, assess and evaluate the overall financial performance of clients through various means including, financial statement analysis, review of capital structure, review of capital budgeting, cost behavior, cost determination, planning and control, etc.
- Research, assess and evaluate factors and issues that can affect management decision-making process such as demand determinants, cost-output functions, and pricing issues in order to evaluate and assess sales/marketing opportunities for [the petitioner's] services/products.
- Review, analyze and assess clients' and potential clients' marketing strategies and practices, and their relevant corporate philosophy and policies with respect to on-line marketing to develop an appropriate sales/marketing strategy for [the petitioner's] products and services that best fit clients' specific needs and objectives.
- Develop the design, management and integration of [the petitioner's] products and services to clients' marketing/sales structure to maximize their marketing/sales effort through an improved on-line presence.

B. ***Research of Market Conditions and Development of New Business Strategies*** (approximately 30%). To supplement the description provided above, [the beneficiary's] typical day-to-day duties may include the following:

- Forecast and track marketing and sales performance/trends and measure the effectiveness of existing marketing, advertising and communications policies and strategies.
- Collect and analyze complex data on customer demographics, preferences, needs, and purchasing habits to identify potential market and industry sectors affecting demand.
- Conduct forecasting, process analysis, activity-based costing to assess the effectiveness and efficiency of operations management, and submit recommendations for improvement as appropriate.
- Research, analyze and assess economic behavior and economic policy choices made by the clients to calculate how and why some choices are made and design and develop corresponding modifications to [the petitioner's] allocation of resources to maximize monetary returns on investments; perform complex analysis through the use of exponential and logarithmic functions, etc. to provide a detailed forecast on the return on investment.

C. ***Research and Assessment of Industry Trends*** (approximately 30%). To supplement the description above, [the beneficiary's] typical day-to-day duties may include the following:

- Research, assess and analyze trends, updates, and changes with respect to search engine algorithm and relevant rules and formula developed and utilized by various search engines such as [redacted] to evaluate the breadth and scope of potential impact to [the petitioner's] existing services and products.
- Research, assess and analyze search engine market share data to determine which search engines are gaining/losing market share and make appropriate recommendations for improving the existing platforms to ensure that clients can maintain a high level of on-line visibility.
- Research, assess and analyze existing and emerging social media technologies and how they may be utilized to enhance and improve [the petitioner's] services.

On May 9, 2013, the director denied the petition finding that the petitioner failed to demonstrate that the proffered position qualifies for classification as a specialty occupation in accordance with the applicable statutory and regulatory provisions. The petitioner, through counsel, filed a timely appeal on June 10, 2013.

## II. LAW AND ANALYSIS

The AAO will now address the basis of the director's decision, chiefly whether the petitioner's proffered position qualifies as a specialty occupation. 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 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), 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.

Again, the issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence of record fails to establish that the position as described constitutes a specialty occupation.

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO turns to the supplemental, additional criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO will first review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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 that is the subject of the petition.

On the Form I-129, the petitioner stated that the beneficiary would be employed in a business development representative position. However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. As previously mentioned, the specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the 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 evidence in the record of proceeding establishes that performance of the particular proffered 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.

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 that it addresses.<sup>2</sup> As previously discussed, the petitioner asserts in the LCA that the proffered position falls within the occupational category "Market Research Analysts and Marketing."

The AAO reviewed the chapter of the *Handbook* entitled "Market Research Analysts" including the sections regarding the typical duties and requirements for this occupational category.<sup>3</sup> However, the *Handbook* does not indicate that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into this occupational group.

The subchapter of the *Handbook* entitled "What Market Research Analysts Do" describes the duties of such occupation as follows:

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<sup>2</sup> The *Handbook*, which is available in printed form, may also be accessed on the Internet at <http://www.bls.gov/ooh/>. The AAO's references to the *Handbook* are to the 2014-2015 edition available online.

<sup>3</sup> For additional information regarding the occupational category "Market Research Analysts" *see* U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2014-15 ed.*, Market Research Analysts, available on the Internet at <http://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm> (last visited March 12, 2014).

Market research analysts study market conditions in local, regional, or national areas 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, available on the Internet at <http://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm> (last visited March 12, 2014).

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.

### **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, 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.

### **Other Experiences**

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

### **Licenses, Certifications, and Registrations**

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

### **Important Qualities**

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

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

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

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

*Id.*, Market Research Analysts, available on the Internet at <http://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm> (last visited March 12, 2014).

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 proffered position. 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.

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 market research and computer science, 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>4</sup> Section 214(i)(1)(B) of the Act (emphasis added).

Furthermore, the *Handbook* indicates that a common field of study for this occupation is business and that some employers prefer to hire candidates who have an advanced degree in business administration. Although a general-purpose bachelor's degree, such as a degree in business

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<sup>4</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)(h). Still, the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. As just stated, this also includes even seemingly disparate specialties provided the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147. Therefore, the *Handbook's* recognition that a general, non-specialty "background" in business administration is sufficient for entry into the occupation strongly suggests that a bachelor's degree *in a specific specialty* is not a normal, minimum entry requirement for this occupation. Accordingly, as the *Handbook* indicates that working as a market research analyst does not normally require at least a bachelor's degree in a specific specialty or its equivalent for entry into the occupation, it does not support the proffered position as being a specialty occupation.

When, as here, the *Handbook* does not support the proposition that the proffered position satisfies this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise satisfies the criterion, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that supports a favorable finding with regard to this criterion. 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." 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The AAO notes that in the brief on appeal dated July 8, 2013, 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 petitioner has failed to meet its burden and establish that the

particular position offered in this matter requires a bachelor's or higher degree in a specific specialty, or its equivalent, directly related to its duties in order to perform those duties.

In any event, the AAO 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.

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. Thus, the petitioner failed to satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 requires 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, the AAO incorporates by reference its previous discussion on the matter. Also, the record of proceeding does not contain any submissions from professional associations, individuals or similar firms in the petitioner's industry attesting that a degree requirement is common to the industry for individuals employed in positions parallel to the proffered position.

Thus, based upon a complete review of the record, the AAO finds 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 in the petitioner's industry for positions that are (1) parallel to the proffered

position; and, (2) located in organizations similar to the petitioner. Therefore, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner shows that 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 the instant case, the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position. Specifically, the petitioner failed to demonstrate how the business development representative duties as described in this record of proceeding comprise a position that requires the theoretical and practical application of such an educational level of a body of highly specialized knowledge in a specific specialty that only a person with a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. The LCA indicates a wage level based upon the occupational classification "Market Research Analysts" at a Level I (entry level) wage.<sup>5</sup> This wage level designation is appropriate for positions for which the petitioner expects the beneficiary to only have a basic understanding of the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; 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 monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

By way of comparison, the AAO notes that a position classified at a Level IV (fully competent) position is designated by the DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems." Thus, the wage level designated by the

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<sup>5</sup> Wage levels should be determined only after selecting the most relevant Occupational Information Network (O\*NET) code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation. Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received. 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).

petitioner in the LCA for the proffered position is not consistent with claims that the position would entail any particularly complex or unique duties or that the position itself would be so complex or unique as to require the services of a person with at least a bachelor's degree in a specific specialty.

The evidence of record does not establish that this position is significantly different from other market research analyst positions such that it refutes the *Handbook's* information that there are various acceptable degrees for these positions including a general-purpose degree such as business administration, for entry into the occupation. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique than positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

Consequently, as the petitioner fails to demonstrate how the proffered position is so complex or unique relative to other business development representative positions in the pertinent occupation that can be performed by a person without at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

Of course, the AAO will necessarily review and consider whatever evidence the petitioner may have submitted with regard to its history of recruiting and hiring for the proffered position and with regard to the educational credentials of the persons who have held the proffered position in the past.

To merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position. Further, it should be noted that 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.

While a petitioner may believe or otherwise 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 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. 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 letter submitted on appeal, dated July 8, 2013, the petitioner states that “at the filing of the I-129 change of employer petition and until USCIS’ May 9, 2013 denial of the same, [the beneficiary] was the only person to be hired for the Business Development Representative position.” The petitioner further states that “[i]n June 2013, [the petitioner] hired [redacted] whose duties and responsibilities are essentially identical to those executed by [the beneficiary].” The petitioner provided a copy of a job offer letter, dated May 31, 2013, from the petitioner to Curt Franke for a “Senior Account Executive” position to establish that it normally requires at least a bachelor’s degree in a specific specialty, or its equivalent, for the proffered position. First, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm’r 1978). Second, while the petitioner claims that the duties and responsibilities of the senior account executive position “are essentially identical to those executed by [the beneficiary],” the record does not contain any evidence demonstrating that the senior account executive position and the proffered position have the same job duties and responsibilities. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190). Third, the job offer letter to [redacted] does not indicate any educational requirement for the senior account executive position. Moreover, while the petitioner states that [redacted] has a bachelor’s degree in business, the petitioner has not submitted any

evidence that [REDACTED] possesses any degrees.<sup>6</sup> In addition, the petitioner has not provided an organizational chart to show how [REDACTED] position and the proffered position fit within the organization. Fourth, the petitioner stated that the proffered position was “created specifically for [the beneficiary] to reflect his educational background and furthermore, the job duties were vetted based on [the beneficiary’s] course work.” Thus, since the petitioner claims that the proffered position was tailored to the beneficiary, it does not appear that individuals other than the beneficiary would be suitable for the position. Finally, the petitioner stated on the Form I-129 that it has been in business since 2007. Even if the petitioner had hired [REDACTED] prior to the filing of the petition and established the aforementioned points, the hiring of only one individual since 2007 does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor’s degree, or the equivalent, in a specific specialty.

Upon review of the record, the petitioner has not provided evidence to establish that it normally requires at least a bachelor’s degree in a specific specialty, or its equivalent, for the proffered position. Therefore, 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 the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

Upon review of the record of the proceeding, the AAO finds that the petitioner has not provided sufficient evidence to satisfy this criterion of the regulations. There is insufficient evidence to establish that the duties of the proffered position require the theoretical and practical application of at least a bachelor’s degree level of a body of highly specialized knowledge in a specific specialty.

The AAO finds that the petitioner has not provided probative evidence to satisfy this criterion of the regulations. In the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish their nature as more specialized and complex than the nature of the duties of other positions in the pertinent occupational category whose performance does not require the application of knowledge usually associated with attainment of at least a bachelor’s degree in a specific specialty, or its equivalent.

In this regard, the AAO here incorporates into this analysis its earlier comments and findings with regard to the implication of the Level I wage-rate designation (the lowest of four possible wage-levels) in the LCA. That is, the proffered position’s Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category of “Market Research Analysts” and hence one not likely distinguishable by relatively specialized and complex duties. As

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<sup>6</sup> The petitioner states that it does not disclose the educational background of its employees as its confidential information and that its competitors likewise would not disclose such information. See the petitioner’s letter dated July 8, 2013.

noted earlier, the DOL indicates that a Level I designation is appropriate for “beginning level employees who have only a basic understanding of the occupation.”

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

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. The appeal will be dismissed and the petition denied for this reason.

### III. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reason.<sup>7</sup> 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.

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<sup>7</sup> Public records indicate that the petitioning company was involved in a corporate restructuring. See Indiana Secretary of State, Business Entity Name Search, Business Services Online, available at [https://secure.in.gov/sos/online\\_corps/name\\_search.aspx](https://secure.in.gov/sos/online_corps/name_search.aspx) (last visited March 12, 2014). Nevertheless, as the petition cannot be approved for the reason discussed in this decision, the AAO will not attempt to determine whether the new corporate entity succeeded the interests and obligations of the petitioner and whether the terms and conditions of the proffered position remain the same. Section 214(c)(1) of the Act. That is, as the grounds discussed above are dispositive of the petitioner's eligibility for the benefit sought in this matter, the AAO will not address and will instead reserve its determination on any additional issues in the record of proceeding with regard to the H-1B petition.