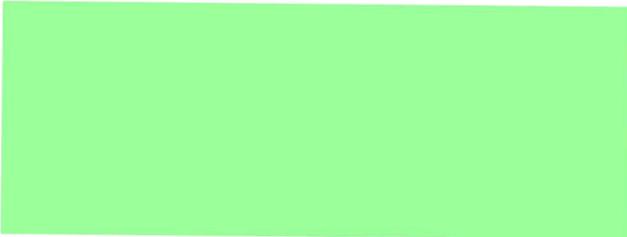
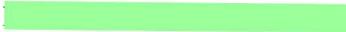




U.S. Citizenship
and Immigration
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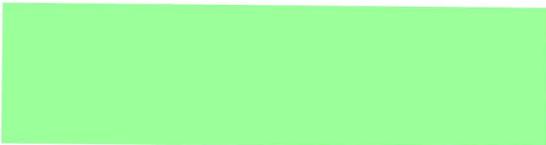
DATE: **MAR 19 2014** OFFICE: CALIFORNIA SERVICE CENTER 

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:

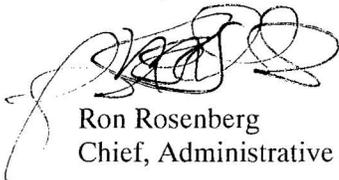


INSTRUCTIONS:

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.

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on April 11, 2012. In the Form I-129 visa petition and supporting documentation, the petitioner describes itself as an e-commerce wholesaler of beauty products established in 2003.¹ In order to employ the beneficiary in what it designates as a market research specialist position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on February 27, 2013, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) counsel's response to the RFE; (4) the director's denial letter; (5) the Form I-290B and supporting documentation; (6) the AAO's RFE; and (7) the petitioner's response to the AAO's RFE. 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 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.

¹ On the Form I-129 petition, the petitioner stated that it has three employees. Thereafter, in response to the AAO's request for evidence, the petitioner stated that it has two employees: the owner () and a part-time executive assistant (). Although the AAO requested the petitioner provide copies of pay statement issued for the past six months and copies of Form 941, Quarterly Wage Reports, for the prior four quarters, the petitioner did not submit these documents. The response to the AAO's RFE included three Form 1099, Miscellaneous Income, documents issued by the petitioner for 2013. Specifically, for (1) ; for nonemployee compensation in the amount of \$21,000; (2) for nonemployee compensation in the amount of \$18,000; and (3) for nonemployee compensation in the amount of \$2,700. Thus, the owner, executive assistant and another individual were compensated as nonemployees. No explanation was provided by the petitioner.

While the petitioner claimed that it has two employees (the owner and an executive assistant) it also stated, "In addition, the company relied heavily upon the service of independent contractors." The AAO observes, however, that the record of proceeding lacks probative documentation to support the petitioner's statement. The petitioner provided its 2011 and 2012 tax returns, which indicate that no compensation to officers was paid and no salaries and wages were paid (lines 12 and 13), and there were no costs for labor (line 4 of Form 1125-A).

I. FACTUAL AND PROCEDURAL HISTORY

In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services as a market research specialist to work on a part-time basis (20 hours per week) at a rate of pay of \$348.20 per week. In a support letter dated April 4, 2012 the petitioner stated that the proffered position involves the following duties and requirements:

As a Marketing Research Specialist, [the beneficiary] will be responsible for seeking and providing information to help companies determine their position overseas;² gathering data on competitors and analyzing their prices, sales, and method of marketing and distribution; collecting and analyzing data on customer demographics, preferences, needs, and buying habits to identify potential markets and factors affecting product demand; monitoring industry statistics and follow their trends in trade literature; measuring the effectiveness of marketing, advertising, and communications programs and strategies in targeting customers, and forecasting and tracking marketing and sales trends and analyzing collected data[.]

In order to be assured that the candidate for the job offered will successfully assume the broad range of responsibilities given to him or her, we require the candidate for this position to possess at minimum of a Master's degree in Business Administration or related field.

The petitioner stated that the beneficiary received a Master of Business Administration from [REDACTED]. The petitioner provided a copy of a diploma issued to the beneficiary.³ Further, the petitioner claimed that the beneficiary's prior experience and proficiency in English and Chinese languages "make her a suitable candidate for the position offered herein."

In addition, the petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification "Market Research Analysts and Marketing Specialists" - SOC (ONET/OES Code) 13-1161, at a Level I (entry level) wage. No further documentation regarding the proffered position or the petitioner's business operations was submitted.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on September 26, 2012. The director outlined the evidence to be submitted. The AAO notes that the director specifically requested that the petitioner submit probative evidence to establish that the proffered position qualifies as a specialty occupation.

² The job description indicates that the beneficiary will be helping "companies" but the petitioner did not provide further information as to the identity of these "companies."

³ The petitioner did not submit the beneficiary's transcript.

On November 23, 2012, counsel responded to the director's RFE with a revised description of the proffered position.⁴ In addition, counsel submitted an excerpt from the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* and several job announcements. Counsel did not submit any other documentary evidence regarding the proffered position or the petitioner's business operations.

Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty, or its equivalent. The director denied the petition on February 27, 2013. Counsel subsequently filed the instant appeal of the denial of the H-1B petition.

II. DIRECTOR'S DECISION

Specialty Occupation

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

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

- (A) theoretical and practical application of a body of highly specialized knowledge, and

⁴ In response to the RFE, counsel revised the job duties and requirements for the proffered position. The information varies significantly from the petitioner's duties and requirements for the proffered position. No explanation was provided for the variance. Moreover, counsel's brief was not endorsed by the petitioner and the record of proceeding does not indicate the source of the duties, responsibilities and requirements that counsel attributes to the proffered position. Thus, counsel's revised description is not probative evidence as the description was provided by counsel, not the petitioner. 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).

Furthermore, a petitioner (or its counsel) cannot materially change a position's job responsibilities and requirements in response to an RFE. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). A petitioner (or its counsel) may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

- (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.

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

Thus, a crucial aspect of this matter is whether the petitioner has adequately described the duties of the proffered position, such that USCIS may discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through at least a baccalaureate degree in a specific discipline, or its equivalent. The AAO finds that the petitioner has not done so.

More specifically, the wording of the duties provided by the petitioner for the proffered position is virtually verbatim from the occupation "Market Research Analysts and Marketing Specialists" as

described in the Occupational Information Network (O*NET) Code Connector. That is, O*NET states, in pertinent part, the following regarding the tasks for the occupational category "Market Research Analysts and Marketing Specialists" Code – 13-1161.00:

- Seek and provide information to help companies determine their position in the marketplace.
- Gather data on competitors and analyze their prices, sales, and method of marketing and distribution.
- Collect and analyze data on customer demographics, preferences, needs, and buying habits to identify potential markets and factors affecting product demand.
- Monitor industry statistics and follow trends in trade literature.
- Measure the effectiveness of marketing, advertising, and communications programs and strategies.
- Forecast and track marketing and sales trends, analyzing collected data.

See Occupational Information Network (O*NET) Code Connector, Market Research Analysts and Marketing Specialists–Code 13-1161.00 on the Internet at <http://www.onetonline.org/link/summary/13-1161.00> (last visited March 18, 2014).⁵

The AAO notes that simply copying a job description from O*NET (or other source) is generally not sufficient for establishing H-1B eligibility. While this type of generalized description may be appropriate when defining the range of duties that may be performed within an occupational category, it generally cannot be relied upon by a petitioner when discussing the duties attached to specific employment for H-1B approval. The description does not adequately convey the substantive work that the beneficiary will perform within the petitioner's business operations. In establishing a position as qualifying as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in the context of the petitioner's business activities, demonstrate a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition.

Further, the AAO notes that the petitioner did not provide any information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform these functions and tasks. Thus, the petitioner failed to specify which tasks were major functions of the proffered position, and it did not establish the frequency with which each of the duties would be performed (e.g., regularly, periodically or at irregular intervals). As a result, the petitioner did not establish the primary and essential functions of the proffered position.

Moreover, it is reasonable to assume that the size of an employer's business has or could have an impact on the duties of a particular position. See *EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the duties of a particular position. In matters where a petitioner's operations

⁵ The AAO hereby incorporates into the record the excerpt of the O*NET Code Connector regarding the occupational category "Market Research Analysts and Marketing Specialists."

are relatively small, the AAO reviews the record for evidence that its operations, are, nevertheless, of sufficient complexity to indicate that it would employ the beneficiary in position requiring the theoretical and practical application of a body of highly specialized knowledge that may be obtained only through a baccalaureate degree or higher in a specific specialty, or its equivalent. Additionally, when a petitioner employs relatively few people, it may be necessary for the petitioner to establish how the beneficiary will be relieved from performing non-qualifying duties. Here, the petitioner stated in response to the AAO's RFE that its operations consist of the owner and a part-time employee as an executive assistant.⁶ The petitioner did not address, nor did it establish, how the beneficiary will be relieved from performing non-qualifying duties.

In the instant case, it is not evident that the proposed duties as described in this record of proceeding, and the position that they comprise, merit recognition of the proffered position as a specialty occupation. To the extent that they are described, the AAO finds the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire period requested, so as to persuasively support the claim that the position's actual work would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific specialty directly related to the duties and responsibilities of the proffered position, or its equivalent. The job description fails to communicate (1) the actual work that the beneficiary would perform on a day-to-day basis; (2) the complexity, uniqueness and/or specialization of the tasks; and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. The petitioner failed to provide sufficient details regarding the demands, level of responsibilities and requirements necessary for the performance of the duties of the proffered position.

Further, the AAO notes that in the letter of support dated April 4, 2012, the petitioner stated that it requires "the candidate for this position to possess at minimum of a Master's degree in Business Administration or related field."⁷ USCIS interprets the degree requirement at 8 C.F.R.

⁶ In response to the AAO's RFE, the petitioner claims that it relies heavily on independent contractors; however, it did not provide the number of independent contractors utilized, the titles of their positions, roles within the petitioner's business operations, job duties and responsibilities, number of hours worked, frequency of services provided, etc. Moreover, it did not submit probative evidence to support its statement. Notably, the 2011 and 2012 tax returns provided by the petitioner indicate that no compensation and no salaries were paid (lines 12 and 13), and there were no costs for labor (line 4 of Form 1125-A). The petitioner provided three Form 1099s indicating that the owner, the executive assistant, and another individual received nonemployee compensation. For 2013, the executive assistant received \$2,700.

⁷ In the initial submission, the petitioner states that it requires a candidate to possess at a minimum a master's degree in business administration or a related field. The petitioner cites the beneficiary's master of business degree as relevant. In response to the RFE, however, counsel provides entirely new requirements for the proffered position. Specifically, counsel asserts, "It is clear that without attainment of a minimum of a bachelor's degree in specific specialty such as statistics, mathematics, computer science or marketing, the candidate would not be able to perform the job duties due to the complex professional nature of the position." Thereafter, in the same letter, counsel claims that "it is clear that a baccalaureate degree in marketing or related field is a minimum requirement for the job of Marketing Research Specialist at [the petitioner's]." Notably, no explanation for the variances in the claimed level of education and acceptable disciplines was

§ 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.⁸

In response to the RFE and appeal, counsel claimed that USCIS "misquoted the statute to mean that a 'specialty occupation' means an occupation requires 'attainment of a bachelor degree in a specific specialty," when the Statute actually states 'in the specific specialty.'" Counsel asserted that "[b]y misquoting the law to define the 'specialty occupation' to occupations [that] require[sic] attainment of bachelor degree in specialties which although specific, but nonetheless include multidiscipline branch of specialty studies, as in the case of Market research analyst." However, contrary to counsel's assertion, the use of "a specific specialty" is not a misquote from the statute, but rather is a quotation from the regulation at 8 C.F.R. § 214.2(h)(4)(ii).

While the statutory "the" and the regulatory "a" both denote a singular "specialty," 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. *See* section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes

provided by the petitioner or its counsel. Furthermore, as discussed earlier in this decision, as the response to the RFE was not endorsed by the petitioner, counsel's assertions regarding the requirements for the proffered position are not probative evidence. Further, counsel cannot materially change a position's requirements in response to an RFE.

Furthermore, although a beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation, the AAO observes that the petitioner only provided a copy of the beneficiary's diploma indicating that she received a Master of Business Administration. Thus, if the proffered position requires (1) "a minimum of a bachelor's degree in specific specialty such as statistics, mathematics, computer science or marketing," or (2) "a baccalaureate degree in marketing or related field" as claimed by counsel (but not confirmed by the petitioner), then the record lacks evidence establishing that the beneficiary is qualified to serve in the proffered position.

⁸ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. *See, e.g., Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; *cf. Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: otherwise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

Id.

even seemingly disparate specialties providing, again, the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

Counsel cites to *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985 (S.D. Ohio 2012) as relevant to this matter. The employer in that case sought to hire an individual for a position it designated as a market research analyst. Counsel references the case 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." However, in this matter, the petitioner failed to demonstrate that the proffered position requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation. See 214(i) of the Act. The petitioner has not demonstrated that it requires a degree in a specific specialty that is directly related to the duties of the proposed position.⁹ Again, the petitioner indicated that a general-purpose degree, i.e., a degree in business administration, is sufficient for the proffered position. Moreover, upon review, 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*. Accordingly, counsel's reliance on this United States district court's decision is misplaced.¹⁰

Further, it must be noted 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.

⁹ On appeal, counsel asserts that "[the beneficiary]'s position was a distinct occupation with a specialized course of study that included multiple specialized fields and her degree was highly relevant." However, as discussed, in the letter filed in support of the Form I-129, the petitioner stated that the requirement for the proffered position is "at minimum of a Master's degree in Business Administration or related field" and not "multiple specialized fields" as claimed by counsel.

¹⁰ 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 the 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.

The fact that a person may be employed in a position designated by an employer as that of a market research specialist and may apply some related principles in the course of his or her job is not in itself sufficient to establish the position as one that qualifies as a specialty occupation. Thus, it is incumbent on the petitioner to provide sufficient evidence to establish that the particular position that it proffers would necessitate services at a level requiring both the theoretical and practical application of a body of highly specialized knowledge and the attainment of at least a bachelor's degree in a specific specialty, or its equivalent. When "any person makes an application for a visa or any other document required for entry, or makes an application for admission, [. . .] the burden of proof shall be upon such person to establish that he is eligible" for such benefit. Section 291 of the Act; see also *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972).

The AAO now turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), and will first review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), 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.

The AAO recognizes DOL's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹¹ As previously mentioned, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Market Research Analysts and Marketing Specialists."

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. However, the *Handbook* does not indicate that "Market Research Analysts" comprise an occupational group for which at least a bachelor's degree *in a specific specialty*, or its equivalent, is normally the minimum requirement for entry.

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

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

Education

Market research analysts typically need a bachelor's degree in market research or a related field. Many have degrees in fields such as statistics, math, or computer science. Others have backgrounds in business administration, the social sciences, or communications. Courses in statistics, research methods, and marketing are essential

¹¹ For additional information regarding market research analyst positions, see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., Market Research Analysts, on the Internet at <http://www.bls.gov/ooh/Business-and-Financial/Market-research-analysts.htm#tab-1> (last visited March 18, 2014). The AAO hereby incorporates into the record of proceeding the excerpt from the *Handbook* regarding the occupational category "Market Research Analysts."

for these workers; courses in communications and social sciences—such as economics, psychology, and sociology—are also important.

Some market research analyst jobs require a master's degree. Several schools offer graduate programs in marketing research, but many analysts complete degrees in other fields, such as statistics and marketing, and/or earn a Master of Business Administration (MBA). A master's degree is often required for leadership positions or positions that perform more technical research.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Market Research Analysts, on the Internet at <http://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm#tab-4> (last visited March 18, 2014).

When reviewing the *Handbook*, the AAO must note that the petitioner designated the wage level of the proffered position as a Level I position on the LCA.¹² This designation is indicative of a comparatively low, entry-level position relative to others within the occupation and signifies that the beneficiary is only expected to possess a basic understanding of the occupation and will perform routine tasks that require limited, if any, exercise of judgment. In accordance with the relevant DOL explanatory information on wage levels, the beneficiary will be closely supervised and her work closely monitored and reviewed for accuracy. Furthermore, she will receive specific instructions on required tasks and expected results. The petitioner has not established that the beneficiary will serve in a top-research position, a high-level or leadership position, or a position that perform more technical research.

The *Handbook* does not state that a baccalaureate or higher degree in a specific specialty, or its equivalent is normally the minimum requirement for entry into the occupation. 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

¹² The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. A Level I wage rate is described by DOL as follows:

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

See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf

Handbook, other market research analysts have a background in fields such as business administration, one of the social sciences, or communications. The *Handbook* notes that various courses are essential to this occupation, including statistics, research methods, and marketing. The *Handbook* states that courses in communications and social sciences (such as economics, psychology, and sociology) are also important.

In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum requirement of a bachelor's of higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in the specific specialty (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

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

As previously stated, USCIS does not simply rely on a position's title to determine whether a particular position qualifies as a specialty occupation. Rather, USCIS considers the duties of a proffered position, the nature of the petitioning entity's business operations, and all other relevant factors to make its determination. Again, the critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other independent, authoritative source, indicates that at least a

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

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

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

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

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

For the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, documentation submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the advertising organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

In the Form I-129 and supporting documentation, the petitioner stated that it is an e-commerce wholesaler of beauty products established in 2003, with three employees. The petitioner stated its gross annual income is \$571,591. Although requested on the form, the petitioner did not provide its net annual income. The petitioner provided its 2012 income tax return, indicating that it has \$788 in

total assets. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 446120 – "Cosmetics, Beauty Supplies, and Perfume Stores"¹³ The U.S. Department of Commerce, Census Bureau website describes this NAICS code as follows:

This industry comprises establishments known as cosmetic or perfume stores or beauty supply shops primarily engaged in retailing cosmetics, perfumes, toiletries, and personal grooming products.

See U.S. Dep't of Commerce, U.S Census Bureau, 2012 NAICS Definition, 446120 – Cosmetics, Beauty Supplies, and Perfume Stores on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited March 18, 2014).

Upon review of the documents, the AAO finds that they do not establish that a requirement for a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry in similar organizations for parallel positions to the proffered position.¹⁴

For example, the petitioner has submitted advertisements for organizations that do not appear to be similar to the petitioner. More specifically, the advertisements include positions with [REDACTED] (a market research firm for pharmaceutical and biotech industries); [REDACTED]

[REDACTED] did not state which aspects or traits (if any) it believes it shares with the advertising organization. Without further information, the advertisements appear to be for organizations that are not similar to the petitioner and the petitioner has not provided any probative evidence to suggest otherwise. The petitioner failed to supplement the record of proceeding to establish that the advertising organizations are similar to it.

¹³ NAICS is used to classify business establishments according to type of economic activity, and each establishment is classified to an industry according to the primary business activity taking place there. See U.S. Dep't of Commerce, U.S. Census Bureau, NAICS, on the Internet at <http://www.census.gov/eos/www/naics/> (last visited March 18, 2014).

¹⁴ Moreover, petitioner did not provide any independent evidence of how representative the job postings are of the particular advertising employers' recruiting history for the type of job advertised. As the advertisements are only solicitations for hire, they are not evidence of the actual hiring practices of these employers.

Further, the petitioner provided an advertisement from a staffing company, [REDACTED], for (1) a specialty pharmaceutical company focused in neurology, and (2) [REDACTED] a recruiting services company. The record also includes an advertisement from [REDACTED], and an unnamed employer in the consumer electronic industry, but these job postings do not provide any further information regarding the companies' business activities or industries. Consequently, the record lacks sufficient information regarding the advertising employers to conduct a legitimate comparison of the organizations to the petitioner. In the instant case, the petitioner failed to supplement the record of proceeding to establish that the employers are similar to it.

Furthermore, the petitioner has not established that the advertisements are for parallel positions. For example, the position with [REDACTED] requires a degree in international business plus five years of experience. Further, the posting by [REDACTED] for a pharmaceutical company requires a degree and five years of market research experience in the pharmaceutical industry. The advertisement for [REDACTED] requires a degree and "3-5 years [of] experience in a direct mail or direct response marketing analytics related position." The positions with [REDACTED] require a degree and three to five years of relevant market research experience. Further, the digital marketing strategist position for an unnamed employer requires a degree and four years of digital marketing experience, along with project management skills. Also, the [REDACTED] requires a degree or equivalent experience and "2-5+ years of experience in custom survey research." Further, some of the offered salaries in the job postings are significantly higher than the salary offered to the beneficiary. As previously discussed, the petitioner designated the proffered position on the LCA through the wage level as a Level I (entry level) position relative to others within the occupation. Based upon the information provided in the job postings, the advertised positions appear to be for more senior positions than the proffered position. More importantly, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.

Additionally, contrary to the purpose for which the advertisements were submitted, the petitioner submitted job postings, which do not indicate that a bachelor's degree in a directly related specific specialty is required. For instance, some of the employers indicate that a general-purpose degree, i.e., a degree in business administration is acceptable. As previously mentioned, although a general-purpose bachelor's degree may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147. Furthermore, MRI Network and NPD will accept a bachelor's degree in any discipline for their advertised positions. The AAO here reiterates that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a specific specialty that is directly related to the specialty occupation claimed in the petition.

As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, as the evidence does not establish that similar organizations in the same industry

routinely require at least a bachelor's degree in a specific specialty, or its equivalent, for parallel positions, not every deficit of every job posting has been addressed.

Furthermore, the petitioner fails to establish the relevancy of the provided examples to the issue here.¹⁵ That is, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from these advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.¹⁶

Thus, based upon a complete review of the record of proceeding, 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 to the petitioner's industry in positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. Thus, for the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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 response to the AAO's RFE, the petitioner and its counsel submitted documentation regarding the petitioner's business operations, including the petitioner tax returns, photos of the petitioner's premises, financial documents, and commercial and shipping invoices. The AAO reviewed the

¹⁵ As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed.

¹⁶ According to the *Handbook's* detailed statistics on market research analysts, there were approximately 415,700 persons employed as market research analysts in 2012. *Handbook*, 2014-15 ed., available at <http://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm#tab-1> (last visited March 18, 2014). Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the job postings with regard to the common educational requirements for entry into parallel positions in similar organizations. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

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

record of proceeding in its entirety. However, upon review of the record, the AAO finds that the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of market research specialist.

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

Without further evidence, it is not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."¹⁷

The petitioner failed to establish how the beneficiary's responsibilities and day-to-day duties are so complex or unique that the position can be performed only by an individual with a bachelor's degree in a specific specialty, or its equivalent. Rather, as previously discussed, the petitioner recited tasks from the O*NET Code Connector description for the occupational category "Market Research Analysts and Marketing Specialists." Overall, the record lacks sufficient probative evidence to distinguish the proffered position as more complex or unique from other market research specialist positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent. Moreover, the petitioner failed to provide documentary evidence to establish that the duties that will be performed by the beneficiary involve any particular level of complexity or uniqueness. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the position. Although a few related courses may be beneficial, or in some cases even required, to perform certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position.¹⁸

¹⁷ For additional information regarding the prevailing wage level, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

¹⁸ Further, while the petitioner provided a copy of the beneficiary's diploma, it did not submit a copy of her transcript.

The AAO observes that the petitioner has indicated that in addition to a Master of Business Administration, the beneficiary "has close to two-years' experience working as a marketing research assistant for a Taiwan based commercial real estate company." The petitioner further stated that the beneficiary's experience and "proficiency in both English and Chinese languages, make her a very suitable candidate for the position offered."¹⁹ The test to establish a position as a specialty occupation, however, is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner and counsel do not sufficiently explain or clarify at any time in the record which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. Upon review of the record of proceeding, the petitioner has failed to establish the proffered position as satisfying this prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

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

While a petitioner may assert that a proffered position requires a specific degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty, or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the

¹⁹ In accordance with the guidance provided by DOL, a language requirement other than English in a petitioner's job offer generally is considered a special skill for all occupations, with the exception of "Foreign Language Teachers and Instructors," "Interpreters," and "Caption Writers." In the instant case, the petitioner designated the proffered position under the occupational category "Market Research Analysts and Marketing Specialists" at a Level I (the lowest of four assignable wage levels), and it has not established that if there is a foreign language requirement, that it was reflected in the wage-level for the proffered position. Therefore, if foreign language is required for the position, then the petitioner has not established that it would pay the beneficiary an adequate salary for her work, as required under the Act, if the petition were granted.

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 the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. See *id.* at 388.

In the instant case, the petitioner stated in the Form I-129 petition that it has three employees and was established in 2003 (approximately ten years prior to the filing of the H-1B petition), but it did not provide the total number of people it has employed to serve in the proffered position. Upon review of the record, the petitioner has not provided sufficient evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

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

Furthermore, the AAO reiterates its earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four assignable levels). That is, the Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, DOL indicates that a Level I

designation is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, it is not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, as previously mentioned, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

The petitioner has submitted inadequate probative evidence to satisfy this criterion of the regulations. Thus, the petitioner has not established that the duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. 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.²⁰ The appeal will be dismissed and the petition denied for this reason.

III. BEYOND THE DIRECTOR'S DECISION

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 the additional issues and deficiencies that it observes in the record of proceeding with regard to the approval of the H-1B petition.

Nevertheless, the AAO will note the record of proceeding in the instant case does not establish that the petitioner is a corporation in good standing in the State of Ohio. Further, the petitioner's "Cancelled" corporate status raises serious questions about whether it exists as an importing employer, whether the petitioner qualifies as a United States employer, and whether it is authorized to conduct business. See section 214(c)(1) of the Act, 8 U.S.C. § 1184(c)(1); see also 8 C.F.R. §§ 214.2(h)(2)(i)(A), (4)(ii), (11)(ii).

In the AAO's RFE, the petitioner was reminded that the regulation at 8 C.F.R. § 214.2(h)(11)(ii) addresses the grounds for automatic revocation of the approval of a petition and states, in pertinent part, that the "approval of any petition is immediately and automatically revoked if the petitioner goes out of business." It logically flows that a petitioner must be doing and continue to do business for the director to grant the petition. If the petitioner were not in business and the director granted the petition, it would result in the absurd result of the approved petition immediately and automatically being revoked the instant it was approved. See 8 C.F.R. § 214.2(h)(11)(ii).

²⁰ The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the proffered position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.

In response to the RFE, the petitioner claimed that it recently discovered that the State of Ohio listed it as a cancelled corporation due to a tax issue. The petitioner claimed that it had paid the required fees and was now in good standing. In support of its assertion, the petitioner submitted the following documents:

- A letter from Ohio Department of Taxation dated January 24, 2014 regarding "Reinstatement/Qualification-[the petitioner]." The letter states that "in order to reinstate a corporation's charter or license with the Ohio Secretary of State or qualify a corporation to do business in Ohio, a D-3 or D-4 certificate must be issued." The letter indicated "to receive this certificate, please provide the following documents."

TAX LIABILITY

DELINQUENT RETURNS

Our records indicate that you have not filed returns for the periods listed below, please submit returns along with payment. If you have any questions about these delinquent returns, please contact us.

| Tax Type | Account# | Period |
|----------------------|-----------------|------------------|
| Sales Tax | [REDACTED] | 08.01-08.31.2004 |
| Employer Withholding | [REDACTED] | 2005IT941 |

PREASSESSSED LIABILITIES

Our records indicate that you have outstanding liabilities for the period(s) listed below. If you have any questions about these pre-assessed liabilities, please contact us.

| Tax Type | Account# | Case Type | Period | Total Due |
|---------------------|-----------------|------------------|---------------|------------------|
| Corporate Franchise | [REDACTED] | Non-Remittance | 2004 FT1120 | \$174.93 |
| Corporate Franchise | [REDACTED] | Non-Remittance | 2007 FT1120 | \$167.27 |
| Corporate Franchise | [REDACTED] | Non-Remittance | 2008 FT1120 | \$163.27 |
| Corporate Franchise | [REDACTED] | Non-Remittance | 2009FT1120 | \$159.39 |

CERTIFIED ASSESSMENTS

The following assessment(s) has been certified to the Attorney General for collection. If you have any questions regarding this certified assessment(s), contact the Attorney General's Office at (888) 246-0488.

| Tax Type | Account# | Case Type | Assessment # | Period | Total Due |
|----------------------|------------|----------------|--------------|-------------|-----------|
| Employer Withholding | [REDACTED] | Non-Remittance | [REDACTED] | 2012 IT-941 | \$231.67 |

- The petitioner's bank statement from [REDACTED] covering December 1 to December 31, 2013.

The evidence in the record does not support the petitioner's assertions. The petitioner claims in its letter dated January 24, 2014 that it is now a corporation in good standing in the State of Ohio; however, the letter from Ohio Department of Taxation dated January 24, 2014 indicates that the petitioner has delinquent returns, preassessed liabilities and certified assessments. Further, while the petitioner claims that "our records show that the State of Ohio has cashed all of the checks that we sent in conjunction with this matter," there is no documentary evidence in the record to support this claim. The petitioner submitted a bank statement from [REDACTED] however, it does not show any financial transactions or checks written out to Ohio Department of Taxation to establish that the petitioner fully paid the outstanding taxes.

Further, as of March 18, 2014, the website for the Secretary of State for the State of Ohio still shows the petitioner's corporate status as "Cancelled."²¹ The AAO reminds the petitioner that 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). Accordingly, the record contains insufficient evidence to establish that the petitioner's business was in good standing at the time of filing the instant petition and remains so.

The petitioner further asserted that the business "could be maintained at home, specifically the garage area for the receipt, packaging and send-out of the high-end beauty products." The petitioner claimed that "the City indicated that as long as there is no customer food traffic to the physical site and that there is no significant vehicle traffic in the residential area, [the petitioner] can operate from its current location." The petitioner further asserted "[s]ince our business is all on-line, we do not have foot traffic; additionally, the delivery and pick-up of our products are only when there are orders." The petitioner also stated that it "has operated the wholesale/export business and on-line store business for the past over 4-years, since 2009," but "never once received any notice of warning or citation of violation of building code from the local government." In support, the petitioner states "please find the on-line material published by the City of [REDACTED] specifying the permitted use,

²¹ For additional information regarding the status of the petitioning company, see Ohio Secretary of State, business name search on the Internet at [REDACTED]

including 'home offices and occupation' for the subject property (one-family dwellings), primarily the accessory buildings." In the record of proceeding, a copy of printout entitled "1123.03 Permitted Uses" states the following:

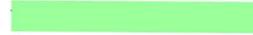
| <u>District</u> | <u>Main Buildings and Uses</u> | <u>Accessory Buildings and uses</u> |
|-----------------|---|---|
| U-1 | (a) One-family dwellings | (a) Private garages and parking facilities |
| | (b) Publicly owned parks, playgrounds and buildings | (b) Garden and recreation uses, structures, pools, fences, walls |
| | | (c) Home offices and occupations |
| | | (d) Renting of rooms |
| U-2 | Two-family dwellings | (a) Storage garages and parking areas accessory to two-family dwellings |
| | | (b) Also accessory uses provided in U-1 (items (b) through (c)) |
| U-3 | Multi-family dwellings | (a) Storage garages and parking areas accessory to multi-family |
| | | (b) Also accessory uses provided in U-1 (items (b) through (d)) |

Upon review, the AAO finds that the printout does not provide sufficient information to support the petitioner's assertions. While the printout lists "one-family dwellings" under "Main Buildings and Uses," and "private garages and parking facilities" and "home offices and occupations" under "Accessory Buildings and Uses," it does not provide any other information regarding the purpose or significance of this chart. The documentation is insufficient to establish that the petitioner is authorized to conduct business and employ individuals at this site per local zoning laws and regulations.

IV. CONCLUSION AND ORDER

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

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



(b)(6)

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The petition must be denied for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act; *see e.g., Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.