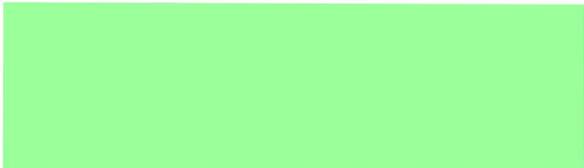


(b)(6)

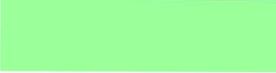
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Service  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



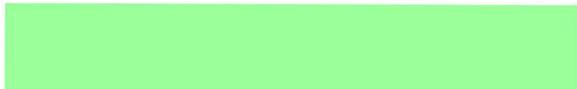
U.S. Citizenship  
and Immigration  
Services



DATE: **MAY 21 2014**

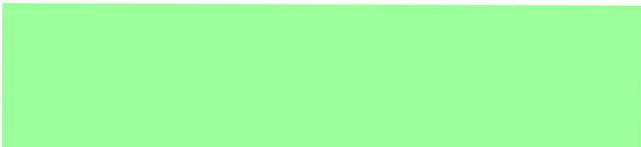
OFFICE: VERMONT SERVICE CENTER FILE: 

IN RE: Petitioner:  
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

*for Michael T. Kelly*  
Ron Rosenberg  
Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as a 17-employee dialysis clinic<sup>1</sup> established in 2006. In order to employ the beneficiary in what it designates as a full-time market research analyst position at a salary of \$44,000 per year<sup>2</sup> the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, concluding that the evidence of record does not demonstrate that the proffered position qualifies for classification as a specialty occupation.

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

On appeal counsel refers to an unpublished decision in which the AAO determined that the position of market research analyst proffered in that matter qualified as a specialty occupation. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Counsel further maintains that the "preponderance of the evidence" standard is relevant to this matter. With respect to the preponderance of the evidence standard, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), states in pertinent part the following:

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

\* \* \*

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<sup>1</sup> The petitioner provided a North American Industry Classification System (NAICS) Code of 339920, "Offices of Physicians (except Mental Health Specialists)." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "621111 Offices of Physicians (except Mental Health Specialists)," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited May 6, 2014).

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

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case.

\* \* \*

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

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

Applying the preponderance of the evidence standard, the AAO finds that upon review of the entire record of proceeding, the evidence of record does not overcome the director's grounds for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

#### I. SPECIALTY OCCUPATION

The AAO will now address the director's determination that the evidence of record has not established that the proffered position is a specialty occupation. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation. Accordingly, the appeal will be dismissed, and the petition will be denied.

As indicated above, the petitioner seeks to employ the beneficiary in a position that it describes as a "Market Research Analyst" on a full-time basis. The petitioner stated at page 5 of the Form I-129 that the beneficiary would work full-time, and the petitioner stated on both the Form I-129 and the LCA that it would pay her a salary of \$44,000 per year.

In its March 26, 2013 letter, the petitioner stated that the beneficiary "will be responsible for the following duties":

- Demonstrate strong analytical skills, taking the lead in evaluating initial information produced by the data collections group;
- Provide research input on metro-level and submarket-level forecasting for patient related information;
- Accumulation, format, analyze and disseminate third-party economic, demographic and medical real estate data;
- Manage overall quality of market data and ensure healthcare relevance;
- Analyze market trends and produce reports for Dialysis clinics that include revenues, operating costs, and net income. Reports should be for similar demographics in which [REDACTED] LP operates in;
- Create new analysis to incorporate into physician research products, creating and implementing report graphics, maps and photos, and helping to define needed database enhancements;
- Provide input for analytical content and appropriate graphics, tables/charts, product formatting, etc. for special projects such as industry events, conferences and presentations;
- Work with medical suppliers to price products;
- Ensure our medical purchases are on par with the average of the healthcare industry; and
- Produce market reports of collections in correlation to billing of insurance companies.

In a May 15, 2013 letter attached to counsel's May 23, 2013 response to the director's RFE, the petitioner provided further details regarding the proffered position:

Our practice is looking to expand even further in order to meet the growing need for Dialysis in the Dallas area. This growth has fueled an aggressive expansion campaign, which includes increasing staff. Therefore, [REDACTED] requires a qualified Market Research Analyst to manage our company's overall quality of market data and ensure healthcare relevance. Further, the Market Research Analyst will help us to better understand our competitors, our patients, and provide us with essential information that will allow our company to be able to strategically compete with competitors in the same industry. To do so, we have to understand our patient needs, demographics, reduce operating costs, and market our clinics effectively.

A Market Research Analyst will survey the market and communicate with suppliers to make sure the company always receives the most cost effective products that it will utilize in the business. This is very essential for the growth of the company as it will reduce the operating costs and thus increase net income. Also, the Market Research Analyst will record which business patterns and marketing programs have been the most successful. This will allow us to only concentrate in the areas in which we have proven to flourish.

By observing the competition, will (*sic*) be able to establish new and creative strategies to make [REDACTED] presence in the market more prominent, allowing the company to grow and increase profitability.

### PROPOSED DUTIES

In the position of Market Research Analyst, Ms. [REDACTED] [the beneficiary] will be responsible for numerous duties, all of which require a Bachelor's degree in business. None of her duties are non-qualifying as all of the below duties are specialized and complex, and require the attainment of a Bachelor's degree in business.

- Demonstrate strong analytical skills, taking the lead in evaluating initial information provided by the data collections group; - 5%
- Provide research input on metro-level and submarket-level forecasting for patient related information; - 10%
- Accumulate, format, analyze and disseminate third-party economic, demographic and medical real estate data; - 5%
- Manage overall quality of market data and ensure healthcare relevance; - 10%
- Analyze market trends and produce reports for Dialysis clinics that include revenues, operating costs, and net income. Reports should be for similar demographics in which [REDACTED] LP operates in; - 30%
- Create new analysis to incorporate into physical research products, creating and implementing report graphics, maps and photos, and helping to define needed database enhancements; - 5%
- Provide input for analytical content and appropriate graphics, tables/charts, product formatting, etc. for special projects such as industry events, conferences and presentations; - 5%

- Work with medical suppliers to price products; - 10%
- Ensure our medical purchases are on par with the average of the healthcare industry; and
- Produce market reports of collections in correlation to billing of insurance companies. - 20%

Below is a description of the various projects that we plan to have the Market Research Analyst undertake as part of the performance of her duties.

- Provide market pattern, forecast, and feedback to administrator and president by analyzing and monitoring sales forecasts, project pipelines and historical data.
- Corporate business development; Analyze, plan and develop existing/implement new sales channels.
- New marketing campaigns: Design and launch new marketing campaigns to notify the public of the company's services. These campaigns must be launched on a continuous basis and in a creative manner to attract clientele.
- Regional marketing plan: Develop product line specific regional marketing plan, including detailed budgets and actions plans. This project also consists of new services that may be offered in the future such as Home Dialysis Care.
- Tools Evaluation: Monitor the effectiveness of implemented sales strategies and marketing campaigns. Report results to Administrator and President.
- Key account management: Strategize and campaign to attain hospital accounts (national accounts, key accounts) in the assigned area.
- Sales training: Provide direction and sales training to new hires.

Before proceeding further, upon consideration of the totality of all of the petitioner's duty descriptions, position descriptions, explanations, and assertions, as well as the complete complement of documents submitted in support of the petitioner's specialty occupation claim, we find that the evidence in the record of proceeding does not establish relative complexity, specialization and/or uniqueness as distinguishing aspects of either the proposed duties or the position that they are said to comprise.

While the petitioner and counsel may claim that the nature of the proposed duties and the position that they are said to comprise elevate them above the range of usual Market Research Analyst positions and duties by virtue of their level of specialization, complexity, and/or uniqueness, the evidence of record does not support these claims. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). 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).

The record's descriptions of the proffered position and its duties do comport with general duties of the Market Research Analysts occupational group. However, as evident in the list of duties quoted above, the record of proceeding presents the duties comprising the proffered position in terms of relatively abstract and generalized functions. They lack sufficient detail and concrete explanation to establish the substantive nature of the work and associated applications of specialized knowledge that their actual performance would involve within the context of the petitioner's particular business operations. Take for example the following duty description:

Analyze market trends and produce reports for Dialysis clinics that include revenues, operating costs, and net income. Reports should be for similar demographics in which [REDACTED] LP operates in[.]

The evidence of record contains neither substantive explanation nor documentation showing the range and volume of such reports that the beneficiary would have to produce. Likewise, the record does not illuminate the substantive work and associated applications of specialized knowledge that would be involved in the market-trends analysis and in producing the reports. Likewise, we see that the petitioner does not provide substantive information with regard to the particular work, methodologies, and applications of knowledge that would be required for the percentage-assigned duties, such as "Produce market reports of collections in correlation to billing of insurance companies. -20%."

The duties of the proffered position, and the position itself, are described in relatively generalized and abstract terms that do not relate substantial details about either the position or its constituent duties. Further, we find that the petitioner has not supplemented the job and duty descriptions with documentary evidence establishing the substantive nature of the work that the beneficiary would perform, whatever practical and theoretical applications of highly specialized knowledge in a specific specialty would be required to perform such substantive work, and whatever correlation may exist between such work and associated performance-required knowledge and attainment of a particular level of education, or educational equivalency, in a specific specialty.

Thus, we conclude that, as generally described as all of the elements of the constituent duties are, they do not - even in the aggregate - establish the nature of the position or the nature of the position's duties as more complex, specialized, and/or unique than those of market research analyst

positions that do not require the services of a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

To meet its burden of proof in establishing the proffered position as a specialty occupation, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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

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

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

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

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

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

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

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

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

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

The AAO will first consider the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which is satisfied by establishing that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of the petition.

The AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.<sup>3</sup> As noted above, the LCA that the petitioner submitted in support of this petition was certified for a job offer falling within the "Market Research Analysts" occupational category.

The *Handbook* states the following with regard to the duties of market research analysts:

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

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.

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<sup>3</sup> The *Handbook*, which is available in printed form, may also be accessed online at <http://www.bls.gov/ooh>. The AAO's references to the *Handbook* are from the 2014-15 edition available online.

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

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

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Market Research Analysts," <http://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm#tab-1> (last visited May 6, 2014).

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

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

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

Courses in statistics, research methods, and marketing are essential for these workers. Courses in communications and social sciences, such as economics, psychology, and sociology, are also important.

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

*Id.* at <http://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm#tab-4> (last visited May 6, 2014).

The statements made by DOL in the *Handbook* regarding entrance into this occupational category do not support a finding that a bachelor's degree, or the equivalent, in a specific specialty is normally required. First, the *Handbook* specifically states that "[m]ost market research analysts need at least a bachelor's degree." The first definition of "most" in *Webster's New College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of market research analyst positions require at least a

bachelor's degree, it could be said that "most" market research analyst positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." § 214(i)(1) of the Act.

Additionally, the *Handbook* indicates that baccalaureate degrees in various fields are acceptable for entry into the occupation. The *Handbook's* recognition that a bachelor's degree in business administration would provide sufficient preparation for a career as a market research analyst is further evidence that a bachelor's degree in a specific specialty, or the equivalent, is not required for this position. Although a general-purpose bachelor's degree, such as a degree in business administration without further specification, 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. The fields referenced do not constitute a specific specialty; such a wide range of acceptable majors or academic concentrations is not indicative of a position requiring the theoretical and practical application of a distinct body of highly specialized knowledge in a specific specialty, as required by section 214(i)(1) of the Act and its implementing regulation at 8 C.F.R. § 214.2(h). A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business, without further specification, does not establish the position as a specialty occupation. Cf. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

Accordingly, as the *Handbook* indicates that entry into the Market Research Analyst occupational group does not normally require at least a bachelor's degree in a specific specialty or its equivalent, it does not support the proffered position as satisfying this first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). That is, in light of the *Handbook's* information on the range of acceptable educational credentials for entry into the market research analyst occupational group, a position's inclusion within this group is not in itself sufficient to establish that position as one for which a baccalaureate or higher degree in a specific specialty or its equivalent is normally a minimum requirement for entry.

Nor is the AAO persuaded by counsel's citation to the DOL's Occupational Information Network (O\*NET OnLine) and his argument regarding the value of Job Zone 4. On May 6, 2014, the AAO accessed the pertinent section of the O\*NET OnLine Internet site relevant to 13-1161.00-Market Research Analysts and Marketing Specialists. Contrary to the assertions of counsel, O\*NET OnLine does not state a requirement for a bachelor's degree. Rather, it assigns this occupation a Job Zone "Four" rating, which groups it among occupations of which "most," but not all, "require a four-year bachelor's degree." Further, O\*NET OnLine does not indicate that if an occupation

within this broad Zone Four group is among those requiring a four-year bachelor's degree that degree would have to be in a specific specialty directly related to the occupation. Therefore, O\*NET OnLine information is not probative of the proffered position being a specialty occupation.

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

Finally, it is noted that the petitioner submitted an LCA certified for a job prospect with a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation (that is, Level I), which signifies that the beneficiary is only expected to possess a basic understanding of the occupation.<sup>4</sup>

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

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a

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<sup>4</sup> The *Prevailing Wage Determination Policy Guidance* (available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf) (last visited May 6, 2014)) issued by DOL states the following with regard to Level I wage rates:

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

The proposed duties' level of complexity, uniqueness, and specialization, as well as the level of independent judgment and occupational understanding required to perform them, are questionable, as the petitioner submitted an LCA certified for a Level I, entry-level position. The LCA's wage-level is appropriate for a proffered position that is actually a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, by submitting an LCA with a Level I wage rate, the petitioner effectively attests that the beneficiary is only required to possess a basic understanding of the occupation; that she will be expected to perform routine tasks requiring limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common (1) to the petitioner's industry; and (2) for positions within that industry that are both: (a) parallel to the proffered position, and (b) located in organizations that are similar to the petitioner.

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

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

In response to the director's April 22, 2013 RFE, counsel submitted four letters from physicians<sup>5</sup> in the McKinney/Greenville/Plano areas of Texas- [REDACTED] a physician at [REDACTED] [REDACTED] M.D., a physician at [REDACTED] M.D., a physician at [REDACTED] and [REDACTED], M.D., a physician at [REDACTED]. After providing their names, where they work, how long they have been practicing in the above-referenced cities in Texas, and how many individuals are currently employed by the entity, all four physicians state the following<sup>8</sup>:

In my practice as a Physician, we have had to employ the services of a Market Research Analyst. For the purposes of our practice, we only consider candidates for the Market Research Analyst position who have a bachelor's degree in Business or a related field.

As discussed in detail above, 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. An equally fundamental and compelling reason for not according any significant weight to the above-referenced letters is the fact that there is no documentary evidence in the record of proceeding that establishes that the practices that the above-

<sup>5</sup> Three of the four physicians who provided the above-referenced letters maintain in their letters that they work for the same practice- [REDACTED]

<sup>6</sup> The letterhead references [REDACTED] and cites a different address than that of [REDACTED]

<sup>7</sup> The letterhead references [REDACTED] and cites the same street address as that of [REDACTED] but a different suite number.

<sup>8</sup> The use of identical language and phrasing across the various letters suggest that the language in the letters is not the authors' own. Cf. *Surinder Singh v. BIA*, 438 F.3d 145, 148 (2d Cir. 2006) (upholding an adverse credibility determination in asylum proceedings based in part on the similarity of the affidavits); *Mei Chai Ye v. U.S. Dept. of Justice*, 489 F.3d 517, 519 (2d Cir. 2007) (concluding that an immigration judge may reasonably infer that when an asylum applicant submits strikingly similar affidavits, the applicant is the common source).

referenced physicians attribute to their two practices are representative of recruiting and hiring practices common to the industry with regard to positions parallel to the one proffered here that are found among organizations similar to this petitioner. Finally, the record contains no documentary supporting evidence that [REDACTED] and [REDACTED] have previously employed individuals in positions similar to the one proffered here, or that, if so, those individuals held a bachelor's degree in a specific specialty, or the equivalent. Accordingly, we conclude that the above-referenced letters do not merit any probative weight towards satisfying the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Further, as reflected in this decision's earlier comments regarding the implications of a petitioner's accepting for the position a bachelor's degree in Business without further specification, the fact that all of the letters indicate that their firms found a general Business degree acceptable for their market research analyst positions is evidence weighing against the proposition that the proffered position is one

Nor do the six vacancy announcements submitted by counsel satisfy the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

First, the AAO discounts all six advertisements because counsel has failed to establish that they relate to the petitioner's industry, as would be required if those submissions were to be within this prong's zone of consideration. For instance, the first job posting is for a law firm and the second job posting is for a manufacturer. These two postings are for positions in different industries and dissimilar organizations and, thus, they cannot be found to be a parallel position. It is unclear from the third, fourth and fifth advertisements what industry the hiring companies are in and whether they would be similar to the petitioner and, as such, it also cannot be determined whether the jobs would be considered parallel to that of the proffered position. Lastly, while the sixth job posting is for a position in the pharmaceutical industry, it appears to be a corporate level job for a large pharmaceutical company and, therefore, it cannot be found to be a parallel position in a similar organization. Again, the language of this prong limits the range of relevant evidence to the petition-pertinent industry's practices (stating "[t]he degree requirement" as one that would be "common to the industry" as well as "in parallel positions among similar organizations.")

Second, the petitioner has not established that many of the positions advertised are "parallel" to the proffered position. Margaret A. Donnelly P.C. requires a Master's degree and two years of legal experience. Infratech, Inc. requires a Master's Degree and one year of experience. An unidentified posting (ID 8229587) requires a Bachelor's degree and five years of experience. WorldLink, Inc. requires a Bachelor's degree in accounting, finance, or marketing and at least two years of related experience in a telecommunication, networking, IT, or other high-tech related company. Novartis Pharmaceuticals is seeking a Senior Marketing Science Analyst II and requires a Bachelor's degree and a minimum of 3-5 years of relevant consulting, financial or market research analyst experience. As noted above, the petitioner's submission of an LCA certified for a Level I wage rate suggests that the petitioner regards the proffered position as a comparatively low, entry-level position relative to others within its occupation and one in which the beneficiary would only be expected to possess a basic understanding of the occupation. It is therefore difficult to envision how these attributes assigned to the proffered position by the petitioner by virtue of its wage-level designation on the LCA would be parallel to the positions described in these job vacancy announcements. Nor has the petitioner established that the positions advertised in these job-vacancy announcements require a

bachelor's degree in a specific specialty, or the equivalent.<sup>9</sup> Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).<sup>10</sup>

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

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

We here refer the petitioner back to our earlier comments and findings with regard to the record's general and relatively abstract descriptions of the proffered position and the duties comprising it, which we here incorporate into the present analysis.

In this particular case, the evidence of record does not credibly demonstrate that the duties the beneficiary will perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty or its equivalent. The record of proceeding does not contain evidence establishing relative complexity or uniqueness as aspects of the proffered position, let alone that the position is so complex or unique as to require the theoretical and practical application of a body of highly specialized knowledge such that a person with a bachelor's or higher degree in a specific specialty or its equivalent is required to perform the duties of that position. Rather, the AAO finds, that, as reflected in this decision's earlier quotation of duty descriptions from the record of proceeding and in our comments and finding about them, the evidence of record does not distinguish the proffered position from other positions falling within the "Market Research Analysts" occupational category, which, the

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<sup>9</sup> Margaret A. Donnelly P.C. and Infratech, Inc. require a Master's degree but make no reference to a specific specialty. Novartis Pharmaceuticals and two unidentified postings (ID 6876009 and 8229587) require a bachelor's degree but they do not require that it be in a specific specialty. Worldlink, Inc. requires a bachelors' in accounting, finance or marketing.

<sup>10</sup> USCIS "must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." *Matter of Chawathe*, 25 I&N Dec. at 376. As just discussed, the petitioner has failed to establish the relevance of the job advertisements submitted to the position proffered in this case. Even if their relevance had been established, the petitioner still fails to demonstrate what inferences, if any, can be drawn from these few job postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the same industry. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995).

*Handbook* indicates, encompasses positions that are performed by persons without at least a bachelor's degree in a specific specialty or its equivalent to enter those positions.

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

Accordingly, given the *Handbook's* indication that positions located within the "Market Research Analysts" occupational category are performed by persons without at least a bachelor's degree in a specific specialty, or the equivalent, it is not credible that a position involving limited, if any, exercise of independent judgment, close supervision and monitoring, receipt of specific instructions on required tasks and expected results, and close review *would* be so complex or unique that it could only be performed by a person with at least a bachelor's degree in a specific specialty or the equivalent.

The petitioner therefore failed to establish how the beneficiary's responsibilities and day-to-day duties comprise a position so complex or unique that the position can be performed only by an individual with a bachelor's degree, or the equivalent, in a specific specialty.

As the evidence of record therefore fails to establish how the beneficiary's responsibilities and day-to-day duties comprise a position so complex or unique that the position can be performed only by an individual with at least a bachelor's degree in a specific specialty or its equivalent, the petitioner has not satisfied the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) either.

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

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

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

imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the proffered position.<sup>11</sup>

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

The director's April 22, 2013 RFE specifically requested the petitioner to document its past recruiting and hiring history with regard to the proffered position. The RFE included the following specific request for such documentation:

Documentation of how many other individuals in your establishment are currently, or were, employed in this position, supported by copies of the employees' degrees and evidence of employment such as pay stubs or Form W-2s, W-3s, or 1099s.

Although the director provided the petitioner with the opportunity to establish a history of recruiting and hiring only individuals for this position with a bachelor's degree in a specific specialty, or the equivalent, the petitioner submitted no such evidence. While a first-time hiring for a position is certainly not a basis for precluding a position from recognition as a specialty occupation, it is not possible that an employer that has never recruited and hired for the position would be able to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a demonstration that the petitioner normally requires at least a bachelor's degree in a specific specialty or its equivalent for the position. Even if the record contained such evidence, the AAO would still find that the petitioner failed to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) because the record does not, as indicated above, establish that its degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the proffered position, a determination which is strengthened by the petitioner's submission as the supporting LCA one that was certified for the lowest wage-level, which is appropriate for a comparatively low, entry-level position relative to others within its occupation.

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

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<sup>11</sup> Any such assertion would be undermined in this particular case by the fact that the petitioner submitted an LCA that had been certified for a Level I wage-level, which is appropriate for use with a comparatively low, entry-level position relative to others within the same occupation.

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

In reviewing the record of proceeding under this criterion, the AAO reiterates its earlier discussion regarding the *Handbook's* entries for positions falling within the "Market Research Analysts" occupational category. Again, the *Handbook* does not indicate that a bachelor's degree in a specific specialty, or the equivalent, is a standard, minimum requirement to perform the duties of such positions (to the contrary, it indicates precisely the opposite); and the record indicates no factors, such as supervisory responsibilities, that would elevate the duties proposed for the beneficiary above those discussed in the *Handbook*. As reflected in this decision's earlier discussion of the duty descriptions in the petitioner's letter of support, the proposed duties as described in the record of proceeding contain no indication of specialization and complexity such that the knowledge they would require is usually associated with any particular level of education in a specific specialty. As generically and generally as they were described, the duties of the proposed position are not presented with sufficient detail and explanation to establish the substantive nature of the duties as they would be performed in the specific context of the petitioner's particular business operations. Also as a result of the generalized and relatively abstract level at which the duties are described, the record of proceeding does not establish their nature as so specialized and complex as to require knowledge usually associated with at least a bachelor's degree in a specific specialty, or the equivalent.

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

As earlier noted, the *Prevailing Wage Determination Policy Guidance* issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

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

U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at

[http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf) (last visited May 6, 2014).

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

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

*Id.*

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

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

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

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

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

*Id.*

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

**Level IV** (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

*Id.*

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

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

## II. CONCLUSION AND ORDER

For the reasons discussed above, we conclude that the evidence of record does not satisfy 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.

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

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