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



U.S. Citizenship  
and Immigration  
Services

DATE: FEB 26 2015

OFFICE: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner:

Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg

Chief, Administrative Appeals Office

**DISCUSSION:** The 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 Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a 6-employee "recreational sporting goods wholesale and retail" company established in [REDACTED]. In order to employ the beneficiary in a full-time position to which it assigned the job title "Marketing Specialist" at a salary of \$52,000 per year, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

On July 22, 2014, the director denied the petition concluding that the petitioner failed to establish that the proffered position qualifies for classification as a specialty occupation in accordance with the applicable statutory and regulatory provisions.<sup>1</sup> On appeal, the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that it satisfied all evidentiary requirements.

The record of proceeding before this office 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) a Notice of Appeal or Motion (Form I-290B), a brief, and supporting documentation.

Upon review of the entire record of proceeding, we find that the evidence of record does not overcome the director's ground for denying this petition.<sup>2</sup> Accordingly, the appeal will be dismissed, and the petition will be denied.

## I. FACTUAL AND PROCEDURAL HISTORY

As noted above, the petitioner stated on the Form I-129 that it has been doing business as a recreational sporting goods wholesale and retail company since [REDACTED] that it currently employs 6 individuals, and that it has a gross annual income of \$500,000.

The Labor Condition Application (LCA) that the petitioner submitted in support of the petition was certified for use with a job prospect within the "Market Research Analysts and Marketing

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<sup>1</sup> Further, the director found that the beneficiary failed to maintain nonimmigrant status in the United States. On appeal, the petitioner asserts that the director erred in finding that the beneficiary did not maintain his nonimmigrant status. However, we do not have jurisdiction over this matter, as issues surrounding the beneficiary's maintenance of nonimmigrant status are within the sole discretion of the director. Accordingly, we will not address this issue.

<sup>2</sup> We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Specialists" occupational classification, SOC (O\*NET/OES) Code 13-1161, and at a Level I prevailing wage rate. The LCA also reflects that, as mentioned above, the petitioner assigned "Marketing Specialist" as the position's job title.

The petitioner's April 1, 2014 letter of support, which was filed with the Form I-129, described the duties of the proffered position as follows:

- Managing and coordinating new product development, and launching campaigns for new products with teams of employees;
- Conducting marketing research, evaluating customer needs, and implementing new market strategy plan as needed;
- Designing social media campaigns and developing internet marketing strategies in order to increase overall customer awareness, and build customer relationships;
- Ensuring effective branded marketing communications through all avenues (e.g., website, print, advertising, etc.);
- Researching and evaluating new product opportunities, demands for potential products, and customer needs and insights[.]

In essence, our company's Marketing Specialist will oversee all marketing, advertising, and promotion activities. The Marketing Specialist will establish and maintain effective working team relationships within the company, and utilize excellent problem solving skills and the ability to complete multiple tasks at once. The Marketing Specialist will also be expected to continuously increase productivity and motivate our marketing team.

The petitioner further states that in order to fill the position of Marketing Specialist, "an applicant must have attained at least a bachelor's degree in a specific field related to business administration or marketing, or a related field such as finance or economics."

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on July 10, 2014. The petitioner was asked, in part, to submit probative evidence to establish that the position required a bachelor's degree in a specific field of study in order to perform the duties of the position. Further, the petitioner was asked to submit additional information about the business. The director outlined some of the types of specific evidence that could be submitted.

In response to the RFE, the petitioner presented further explanation of the duties as follows:

Job Duty	Specific Description	% of Time Spent	Degree Requirement
Market research and implementation	<ul style="list-style-type: none"> <li>• Gather data relevant to company's marketing and advertising and organize data into reports to present to</li> </ul>	80%	Bachelor's degree in market research or

	<ul style="list-style-type: none"> <li>management;</li> <li>Evaluate customer research, market conditions, competitors' data, and implement new market strategy plans as needed;</li> <li>Develop and maintain social media sites and develop internet marketing strategies in order to increase overall customer awareness, and build and maintain customer relationships;</li> <li>Ensure effective brand marketing communication through all avenues such as website, print, advertisements, and etc.;</li> <li>Research and evaluate new product opportunities, demand for potential products, and customer needs and insights in order to continuously expand company's consumer base;</li> <li>Manage and coordinate new product development through market research;</li> <li>Work with creative employees and provide them with direction and focus through market research;</li> <li>Launch campaigns for new products.</li> </ul>		related disciplines.
Analyze effectiveness of marketing efforts	<ul style="list-style-type: none"> <li>Analyze the effectiveness of all marketing efforts and make necessary changes and revisions needed in order to attain company goals.</li> </ul>	20%	Bachelor's degree in market research or related disciplines

The director reviewed the petitioner's RFE response, but found it insufficient to establish eligibility for the benefit sought and denied the petition on July 22, 2014. The petitioner thereafter filed a timely appeal, which is the matter now before us for a decision.

## II. SPECIALTY OCCUPATION

We will now address the director's determination that the proffered position is not a specialty occupation. Applying the preponderance of the evidence standard and based upon a complete review of the record of proceeding, we agree with the director and find that the evidence of record fails to establish that the position as described constitutes a specialty occupation.

### A. Law

To meet the petitioner's burden of proof with regard to the proffered position's classification as an H-1B 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.

### B. Analysis

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

We recognize 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 petitioner submitted an LCA in support of this position certified for a job offer falling within the "Market Research Analysts and Marketing Specialists" occupational category.

We reviewed the chapter of the *Handbook* titled "Market Research Analysts" including the sections regarding the typical duties and requirements for this occupational category. However, as will now be discussed, the *Handbook* does not indicate that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into this occupational group. Accordingly, the proffered position's inclusion in this occupational group would not be in itself sufficient to satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), that is, by establishing that the particular position that is the subject of this petition is one that requires for entry at least a bachelor's degree, or its equivalent, in a specific specialty.

The *Handbook* states the following regarding the educational requirements for market research analysts:

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

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



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, at <http://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm#tab-4> (last visited on Feb. 25, 2015).

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. While the *Handbook* states that employees typically need a bachelor's degree in market research or a related field, it continues by indicating that many market research analysts have degrees in fields such as statistics, math, or computer science. According to the *Handbook*, other market research analysts have a background in fields such as business administration, social sciences, or communications.

In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as computer science and social sciences, 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).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," we do 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 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.

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." 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.

Moreover, the requirements as specified by the petitioner do not establish that the proffered position requires at least a bachelor's degree in a specific specialty. In this case, the petitioner claims that "to fill the position of Marketing Specialist within our company an applicant must have attained at least a bachelor's degree in a specific field related to business administration or marketing, or a related field such as finance or economics." As discussed, since there must be a close correlation between the required "body of highly specialized knowledge" and the position, 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. Here, while the petitioner indicates that a bachelor's degree in business administration, marketing or a related field such as finance or economics is required for the proffered position, the petitioner does not indicate how each field is directly related to the duties and responsibilities of the proffered position. Further, as mentioned, 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.<sup>4</sup>

In response to the RFE and also on appeal, the petitioner states that O\*NET assigns the market research analysts and marketing specialists occupation a Job Zone Four rating. According to O\*NET, "[m]ost of these occupations require a four-year bachelor's degree, but **some do not**" (emphasis added). Notably, the term "most" is not indicative that a particular position within the wide spectrum of marketing research analyst jobs normally requires at least a bachelor's degree.<sup>5</sup>

<sup>4</sup> 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. at 560 (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.*

<sup>5</sup> For instance, the first definition of "most" in *Webster's New Collegiate College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of the positions require at least a bachelor's degree in a specific specialty, it could be said that

Furthermore, O\*NET OnLine is not particularly useful in determining whether a baccalaureate degree in a specific specialty, or its equivalent, is a requirement for a given position, as O\*NET OnLine's Job Zone designations make no mention of the specific field of study from which a degree must come. As was noted previously, we interpret 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. Thus, a designation of Job Zone Four does not demonstrate that at least a bachelor's degree in a *specific specialty* is normally the minimum requirement for entry, and does not, therefore, demonstrate that a position so designated qualifies as a specialty occupation as defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).

Finally, the petitioner submitted an LCA certified for a job prospect with a wage-level I. This designation is indicative of a comparatively low, entry-level position relative to others within the occupation.<sup>6</sup> That is, in accordance with the relevant DOL explanatory information on wage levels, this Level I wage rate is only appropriate for a position in which the beneficiary is required to have a basic understanding of the occupation and would be expected to perform routine tasks that require limited, if any, exercise of judgment. This wage rate also indicates that the beneficiary would be

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"most" of the positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner (which as noted above is designated as a Level I entry position in the LCA). 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." Section 214(i)(1) of the Act.

<sup>6</sup> The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is describes as follows:

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

See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results.

When, as here, the *Handbook* does not support the proposition that the proffered position satisfies this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise satisfies the criterion, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that supports a favorable finding with regard to this criterion. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

In support of the assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted a letter on appeal, dated August 5, 2014, from [REDACTED] Assistant Professor of Marketing, [REDACTED]. [REDACTED] stated, "[i]t is my opinion that the position of Marketing Specialist is clearly a specialty position, and requires the services of someone with advanced training through a Bachelor's program in Marketing or a closely related field." We reviewed the letter in its entirety. However, as discussed below, the letter from [REDACTED] is not persuasive in establishing that the proffered position qualifies as a specialty occupation position.

[REDACTED] provided a bullet point list of the job duties, which is virtually verbatim from the petitioner's description of job duties provided in response to the RFE. Upon review of the opinion letter, there is no indication that [REDACTED] possesses any knowledge of the petitioner's proffered position and its business operations beyond the information provided by the petitioner. [REDACTED] does not demonstrate or assert in-depth knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise. For instance, there is no evidence that [REDACTED] has visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job.

[REDACTED] asserts a general industry educational standard for marketing specialist positions without referencing any supporting authority or any empirical basis for the pronouncement. Likewise, he does not provide a substantive, analytical basis for his opinion and ultimate conclusion. His opinion does not relate his conclusion to specific, concrete aspects of the petitioner's business operations to demonstrate a sound factual basis for the conclusion about the educational requirements for the particular position here at issue. Accordingly, the very fact that he attributes a degree requirement to such a generalized treatment of the proffered position undermines the credibility of his opinion.

In the opinion letter, [REDACTED] does not cite specific instances in which his past opinions have been accepted or recognized as authoritative on this particular issue. There is no indication that he has

published any work or conducted any research or studies pertinent to the educational requirements for such positions (or parallel positions) in the petitioner's industry for similar organizations, and no indication of recognition by professional organizations that he is an authority on those specific requirements.

Furthermore, there is no indication that the petitioner advised [REDACTED] that the petitioner characterized the proffered position as a low, entry-level marketing specialist, for a beginning employee who has only a basic understanding of the occupation (as indicated by the wage-level on the LCA). The wage-rate indicates that the beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results. It appears that [REDACTED] would have found this information relevant for his opinion letter. Without this information, the petitioner has not demonstrated that [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately determine the educational requirements based upon the job duties and responsibilities.

In summary, and for each and all of the reasons discussed above, we conclude that the opinion letter rendered by [REDACTED] is not probative evidence to establish the proffered position as a specialty occupation. The conclusion reached by [REDACTED] lacks the requisite specificity and detail and is not supported by independent, objective evidence demonstrating the manner in which he reached such conclusion. There is an inadequate factual foundation established to support the opinion and the opinion is not in accord with other information in the record. Therefore, the letter from [REDACTED] does not establish that the proffered position is a specialty occupation.

We may, in our discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). As a reasonable exercise of our discretion we discount the advisory opinion letter as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). For efficiency's sake, we hereby incorporate the above discussion and analysis regarding the opinion letter into each of the bases in this decision for dismissing the appeal.

Upon review of the totality of the evidence in the entire record of proceeding, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is normally required for entry into the occupation. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that this particular position proffered by the petitioner is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common for positions sharing all three characteristics of being (1) within the petitioner's industry, (2) parallel to the proffered position, and also (3) 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 objective, authoritative source), reports a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter. Also, there are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement. Furthermore, the petitioner did not submit any letters or affidavits from similar firms or individuals in the petitioner's industry attesting that such firms "routinely employ and recruit only degreed individuals."

Further, we also find that the job-vacancy announcements submitted by the petitioner do not satisfy this alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). That is, neither the job-vacancy announcements themselves, nor any other evidence within the record of proceeding, establish that those advertisements pertain to positions that meet all of the criterion's elements of being in the petitioner's industry, in organizations similar to the petitioner, and also parallel to the proffered position, as required for evidence to merit consideration under this first alternative prong. In this regard, we make several specific findings.

When determining whether the petitioner and the 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 the organizations are similar and in the same industry without providing a legitimate basis for such an assertion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190).

In the Form I-129, the petitioner stated that it is a "recreational sporting goods wholesale and retail" business, with 6 employees, that was established in [REDACTED]. On the Form I-129, the petitioner designated its business operations under the North American Industry Classification System (NAICS) code 423910, which is described as "Sporting and Recreational Goods and Supplies Merchant Wholesalers." See U.S. Dep't of Commerce, U.S. Census Bureau, 2012 NAICS Definition, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited February 25, 2015).



We reviewed the job advertisements submitted by the petitioner. Notably, the petitioner did not provide any independent evidence of how representative these job advertisements are of the particular advertising employer's recruiting history for the type of job advertised. Further, as they are only solicitations for hire, they are not evidence of what qualifications were ultimately required for the positions. Moreover, upon review of the documents, we find that they do not establish that a requirement for a bachelor's degree, in a specific specialty, is common to the petitioner's industry in similar organizations for parallel positions to the proffered position.

For example, the advertisements include positions with [REDACTED] (financial services company); [REDACTED] (automotive, building and energy storage industry with 170,000 employees); [REDACTED] (brand experience and marketing agency); [REDACTED] (agri-business specific application provider); and [REDACTED] (wireless services). 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. Further, the petitioner provided an advertisement for [REDACTED] which does not contain any information regarding the company's industry and business operations. Consequently, the record lacks sufficient information regarding the advertising employer to conduct a legitimate comparison of the organization 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. That is, the petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organizations.

Further, we note that it is not the position title but the nature of the duties comprising the advertised positions that would determine whether those positions are in fact parallel to the proffered position. However, we see that the duty descriptions of the advertised positions and their constituent duties are not substantially similar to the proffered position's duties as stated in the petitioner's letters. For example, the advertisement for [REDACTED] states that the responsibilities for their proffered position include "day-to-day project management of multiple accounts including, but not limited to client handling, budget management, production logistics, supervision of creative process, client status meetings, and account billing." Also, although the petitioner has designated the proffered position as a Level I position, indicating that it is an entry-level position, it has provided several job announcements for positions requiring extensive experience. For example, several of the job announcements require 2 to 5 years of related experience ([REDACTED]). Further, [REDACTED] requires "5+ years" of experience. Thus, the job-vacancy advertisements do not establish that the advertised positions are "parallel" to the proffered position.

Additionally, contrary to the purpose for which the advertisements were submitted, some of the employers ([REDACTED]) indicate that a general-purpose degree, i.e., a degree in business 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.

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.<sup>7</sup>

Thus, the petitioner has not satisfied the first of the two alternative prongs of 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 (2) for positions that are both: (a) parallel to the proffered position, and (b) located in organizations that are similar to the petitioner.

Next, 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."

Upon review of the proffered duties, the record of proceeding presents the duties comprising the proffered position in terms of relatively abstract and generalized functions. More specifically, 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 require within the context of the petitioner's particular business operations. For example, the beneficiary will be responsible for "managing and coordinating new product development, and launching campaigns for new products with teams of employees"; "conducting market research, evaluating customer needs, and implementing new market strategy plan"; and "designing social media campaigns." The evidence of record contains neither substantive explanation nor documentation showing the substantive nature of the work and associated applications of specialized knowledge that would be involved in the referenced tasks. The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. That is, the petitioner failed to establish how the beneficiary's responsibilities and day-to-day duties are so

<sup>7</sup> It must be noted that even if all of the job postings indicated that a bachelor's degree in a specific specialty, or its equivalent, is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what 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. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995).

As such, even if the job announcements supported the finding that the position required a bachelor's or higher degree in a specific specialty, or its equivalent (for organizations in the same industry that are similar to the petitioner), it cannot be found that such a limited number of postings that appear to have been consciously selected outweigh the 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.

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.

In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted information regarding the proffered position and documents regarding its business operations, including corporate documents, business plan, brochure, advertisements, photographs and more. While the business documents provide some insights into the petitioner's business activities, the evidence does not establish that the proffered 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.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. The LCA indicates a wage level at a Level I (entry level) wage, which is the lowest of four assignable wage levels. As previously mentioned, the wage-level of the proffered position indicates that (relative to other positions falling under this occupational category) the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

On appeal, the petitioner refers to [REDACTED] letter to state that the duties of the proffered position are so complex that its particular position requires at least a bachelor's degree or its equivalent in a specific specialty. However, as previously noted, [REDACTED] letter is not probative evidence. The petitioner also provided a copy of the beneficiary's marketing report to demonstrate the complexities of the duties. However, the marketing report in the record of proceeding appears to have been written in 2012 for the beneficiary's previous employer, [REDACTED] and does not establish that the petitioner's *particular position* is so complex or unique.

The petitioner further claims that the beneficiary's academic credentials and work experience in marketing will assist him in carrying out the duties of the proffered position. However, as previously mentioned, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires at least a bachelor's degree in a specific specialty, or its equivalent. The petitioner does not explain or clarify 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. Consequently, as the petitioner fails to demonstrate how the proffered position is so complex or unique relative to other marketing specialist positions that can be performed by a person without at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

We turn 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.

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>8</sup>

While a petitioner may assert that a proffered position requires a specific degree, that statement 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 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* § 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.

The petitioner stated in the Form I-129 petition that it has 6 employees and it was established in 2013. On appeal, the petitioner asserts that marketing duties for the petitioner has been handled by its marketing director, [REDACTED]. The petitioner claims that [REDACTED] has over twenty years of experience in marketing management. However, the petitioner did not submit documentation to establish that [REDACTED] has a bachelor's degree or its equivalent in a specific specialty. Moreover,

<sup>8</sup> Any such assertion would be undermined in this particular case by the fact that the petitioner's submission of an LCA certified for a Level I prevailing-wage signifies assessment of the proffered position as a comparatively low, entry-level position relative to others within the same occupation.

the petitioner did not submit documentary evidence such as pay statements or Form W-2, Wage and Tax statements, to establish that [REDACTED] is employed by the petitioner. We note 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. 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

While the petitioner repeatedly asserts that a bachelor's degree in marketing or a related academic discipline is the minimum requirement for the proffered position, 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. In fact, based on the petitioner's statements with regard to its own claimed educational requirement for the position, a bachelor's degree in business administration is also sufficient to perform the duties of the position. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly 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, 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).

Thus, the evidence does not support the assertion that the petitioner normally requires at least a bachelor's degree in a specific specialty directly related to the duties of the position (or its equivalent) for the position. The petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, 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.

For context, we again refer the petitioner to the *Handbook* and the pertinent sections that we have quoted from it. The *Handbook's* information does not indicate that the performance requirements of the duties of market research analysts occupational group are usually associated with attainment of at least a bachelor's degree in a specific specialty.

As reflected in this decision's earlier comments and findings with regard to the proposed duties as presented in the record - which we here incorporate into the present analysis - the evidence of record does not establish the nature of the proposed duties as so specialized and complex that their performance would require knowledge usually associated with a particular level of education in a specific specialty. While the petition relates many and varied duties and functions that the beneficiary would have to perform, it does not show that even the aggregate of such duties is usually associated with a particular level of educational attainment in any specific specialty. Thus, 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).

Additionally, we find 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. By virtue of this submission the petitioner effectively attested that the proffered position is a low-level, entry position relative to others within the 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).

### III. CONCLUSION AND ORDER

For the reasons discussed above, we conclude that the evidence of record does not establish that the proffered position qualifies for classification as a specialty occupation.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative 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, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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