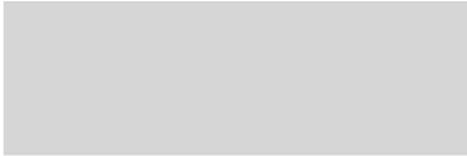




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE:

JUL 08 2015

PETITION RECEIPT #:



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:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, and the petition will be denied.

I. PROCEDURAL HISTORY

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center. In the Form I-129 petition, the petitioner describes itself as a wholesale distributor that was established in [REDACTED]. In order to employ the beneficiary in what it designated as a marketing development manager position, the petitioner sought 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, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The Director denied the petition, finding that the evidence of record did not establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, the petitioner asserts that the Director's ground for denying the petition was erroneous and contends that it satisfied all evidentiary requirements.

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

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

II. SPECIALTY OCCUPATION

The primary issue is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position.

A. Legal Framework

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

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

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

In the Form I-129, the petitioner stated that it wishes to employ the beneficiary as a marketing development manager on a full-time basis. The petitioner submitted a description of the proffered position. More specifically, the petitioner provided the following "primary responsibilities" for the proffered position:

Primary Responsibilities (Medical Market Research Analyst)

Research market conditions in local, regional, or national areas, or gather information to determine potential sales of a product or service, or create a marketing campaign. Will gather information on competitors, prices, sales, and methods of marketing and distribution.

Tasks

- Prepare reports of findings, illustrating data graphically and translating complex findings into written text.
- Seek and provide information to help companies determine their position in the marketplace.
- Gather data on competitors and analyze their prices, sales, and method of marketing and distribution.
- Collect and analyze data on customer demographics, preferences, needs, and buying habits to identify potential markets and factors affecting product demand.
- Devise and evaluate methods and procedures for collecting data, such as surveys, opinion polls, or questionnaires, or arrange to obtain existing data.
- Monitor industry statistics and follow trends in trade literature.
- Measure and assess customer and employee satisfaction.
- Measure the effectiveness of marketing, advertising, and communications programs and strategies.
- Forecast and track marketing and sales trends, analyzing collected data.
- Attend staff conferences to provide management with information and proposals concerning the promotion, distribution, design, and pricing of company products or services.

We observe that these "primary" duties as designated by the petitioner are copied virtually verbatim from the Occupational Information Network (O*NET) Code Connector for the occupational category "Market Research Analysts and Marketing Specialists – SOC code 13-1161."¹ This type of description may be appropriate when defining the range of duties that may be performed within an occupational category, but it does not adequately convey the substantive work that the beneficiary will perform within the petitioner's business operations and, thus, generally cannot be relied upon by a petitioner when discussing the duties attached to specific employment.

In establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in the context of the petitioner's business operations, as well as demonstrate a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition.

In response to the RFE, the petitioner provided the following description of the proffered position:

Job Duties	% of Time Spent	Ave. Hours/Week (40 Hours/Wk.)
Research and track market position of [the	10%	4 Hours

¹ For additional information, see O*NET Code Connector, available on the Internet at <http://www.onetcodeconnector.org/ccreport/13-1161.00?redir=19-3021.00>.

petitioner] versus competitors and use data to recommend ways & marketing programs to increase market share		
Devise and evaluate methods and procedures for customer research such as surveys, opinion polls, or questionnaires	2%	.8 Hour
Collect and analyze data on customer demographics, preferences, needs, and buying habits and what they use (TV stations, radio stations, types of print etc.) to recommend ways to increase market share using pharmaceutical product templates and protocols and recommend marketing strategies based on the research	30%	12 Hours
Document the universe of Potential customers broken down by group and recommend ways to communicate to each group separately – retail, wholesale hospitals, public health agencies, and medical clinics	10%	4 Hours
Identify [the petitioner's] customers (customer profile) and what influences their purchase decisions and visit frequency	20%	8 Hours
Monitor industry statistics both on Guam and in the US and follow trends in trade literature	2%	.8 Hours
Measure and assess customer and employee satisfaction	2%	.8 Hours
Measure the effectiveness of marketing, advertising, and communication programs and strategies	10%	4 Hours
Research acceptability of potential and new products through focus group and other surveys	5%	2 Hours
Analyze USDA Infant Formula Market Research Report and adapt and apply it's finding to [REDACTED] Markets	7%	2.8 Hours

The petitioner submitted the following as an "[e]xplanation why the work to be performed requires the services of a person who has a college degree":

- a. Complexity of [the petitioner's] research protocols and templates as they relate [to] pharmaceutical products in [redacted].²
- b. Has to have a deep understanding of the market management and research processes, which can only be obtained by having a baccalaureate degree with training and experience in research.

On appeal, the petitioner states that the petition and supporting documents explained that the purpose of hiring the beneficiary was a "onetime market research event."³ The petitioner states that the event is related to the U.S. Department of Agriculture (USDA) research report for the infant formula market in the United States.⁴

B. Analysis

A baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position

We will now discuss the proffered position in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

We recognize the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁵ The petitioner asserted in the Labor Condition Application (LCA) that the proffered position falls under the occupational category "Market Research Analysts and Marketing Specialists."⁶

² The record of proceeding does not establish the nature of these "research protocols and templates."

³ The petitioner requested that the H-1B petition be granted for a three-year period. It did not previously state that the beneficiary would provide services for a "onetime market research event."

⁴ We observe that the USDA report provided by the petitioner was published in 2011, thus, three years before the H-1B petition was filed with USCIS.

⁵ All of our references are to the 2014-15 edition of the *Handbook*, which can be accessed on the Internet at <http://www.bls.gov/ooh/>. The *Handbook's* pertinent chapter, "Market Research Analysts," may be accessed on the Internet at <http://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm>.

⁶ The occupational category designated by a petitioner is considered as an aspect in establishing the general tasks and responsibilities of a proffered position, and USCIS regularly reviews the *Handbook* on the duties and

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

Education

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

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

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

Other Experience

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

Licenses, Certifications, and Registrations

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

educational requirements of the wide variety of occupations that it addresses. However, to satisfy the first criterion, the burden of proof remains on the petitioner to submit sufficient evidence to support a finding that its particular position would normally have a minimum, specialty degree requirement or its equivalent for entry.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Market Research Analysts, on the Internet at <http://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm#tab-4> (last visited July 6, 2015).

The *Handbook* reports that market research analysts have degrees and backgrounds in a wide-variety of disparate fields.⁷ That is, while the *Handbook* states that employees typically need a bachelor's degree in market research or a related field, it continues by specifying 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 backgrounds in fields such as business administration, the social sciences, or communications. This passage of the *Handbook* identifies various courses as essential to this occupation, including statistics, research methods, and marketing. It further states that courses in communications and social sciences (such as economics, psychology, and sociology) are also important. Therefore, although the *Handbook* indicates that market research analysts typically need an advanced degree, it also indicates that degrees and backgrounds in various fields are acceptable for jobs in this occupation – including computer science and the social sciences, as well as statistics and 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 disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties.⁸ Section 214(i)(1)(B) of the Act (emphasis added).

⁷ The petitioner submitted an Internet printout entitled "Best Business Jobs." The document states that a "range of majors" is acceptable for market research analyst positions. The printout does not support the petitioner's assertion that at least a bachelor's degree *in a specific specialty*, or its equivalent, is normally the minimum requirement for entry.

⁸ Whether read with the statutory "the" or the regulatory "a," both readings denote a singular "specialty." Section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Still, 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. This also includes even seemingly disparate specialties provided the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

The petitioner cites to *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985 (S.D. Ohio 2012) for the proposition that "[t]he knowledge and not the title of the degree is what is important. Diplomas rarely come bearing occupation-specific majors. What is required is an occupation that

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 147.⁹

requires highly specialized knowledge and a prospective employee who has attained the credentialing indicating possession of that knowledge."

We agree with the court's proposition that, for H-1B specialty occupation determinations, "[t]he knowledge and not the title of the degree is what is important." We note, however, that in the instant case, the petitioner has not met its burden to establish that the particular position offered in this matter requires a bachelor's or higher degree in a specific specialty, or its equivalent, directly related to its duties in order to perform those tasks.

Further, the petitioner has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*. It is noted that the district judge's decision in that case appears to have been based largely on the many factual errors made by the service center in its decision denying the petition. We further note that the service center director's decision was not appealed to us. Based on the district court's findings and description of the record, if that matter had first been appealed through the available administrative process, we may very well have remanded the matter to the service center for a new decision for many of the same reasons articulated by the district court if these errors could not have been remedied by us in our *de novo* review of the matter.

We also note that, in contrast to the broad precedential authority of the case law of a United States circuit court, we are not bound to follow the published decision of a United States district court in matters arising even within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before us, the analysis does not have to be followed as a matter of law. *Id.* at 719.

⁹ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

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

Id.

That is, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty (or its equivalent) that is directly related to the proposed position. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). 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.

The narrative of the *Handbook* further reports that some employees obtain professional certification to demonstrate a level of professional competency. It continues by outlining the requirements for market research analysts to achieve the Professional Researcher Certification (PRC), and states that candidates qualify based upon their experience and knowledge. According to the *Handbook*, the credential is granted by the Marketing Research Association to those who pass an exam and have at least three years of experience working in opinion and market research.¹⁰

We reviewed the Marketing Research Association's Internet site, which confirms the accuracy of the *Handbook's* statement regarding the requirements for professional certification (i.e., passage of an exam and three years of relevant industry experience), and further specifies that the "Education" necessary to apply for professional certification is "12 industry-related education hours within the two preceding years." The Market Research Association website provides the following information about the Professional Researcher Certification program:

The Professional Researcher Certification program (PRC) is designed to recognize the qualifications and expertise of marketing and opinion research professionals. The goal of PRC is to encourage high standards within the survey profession to raise competency, establish an objective measure of an individual's knowledge and proficiency and to encourage professional development. Achieving and maintaining PRC validates the knowledge of the market research industry and puts researchers in a select group of like-minded professionals.

* * *

Because PRC indicates to the public your ability to conduct marketing research, the PRC Board requires [a candidate] to have experience in the survey and opinion process. Three years of relevant experience is required. . . . A total of 12 industry-related education hours within the two preceding years are required at time of application. Conferences, seminars, webinars, etc., must be added to [the candidate's]

¹⁰ The Marketing Research Association website states that the association was founded in 1957 and is the leading and largest association of opinion and marketing research professions. For additional information, see <http://www.marketingresearch.org/information> (last visited July 6, 2015).

record.

* * *

The benefits of a Certification program are both industry-wide and individual. For the individual, it is a means of differentiating oneself, a "badge" of competence in the given areas and an assurance that the individual is current in knowledge and experience. For the profession/industry as a whole, it provides a vehicle for developing a pool of well-trained, competent marketing researchers, thereby improving both perceived and substantive standards.

Market Res. Ass'n, <http://marketingresearch.org/prc-faq> (last visited July 6, 2015).

The Market Research Association emphasizes that the credentialing program recognizes the qualifications and expertise of marketing and opinion research professionals, encourages high standards within the profession, and establishes an objective measure of an individual's knowledge and proficiency. According to the association's website, the credential indicates to the public an individual's ability to conduct market research. The narrative continues by stating that the credential provides a vehicle for developing a pool of well-trained, competent marketing researchers, thereby improving both perceived and substantive standards. The website does not indicate that the market research analyst positions have any particular academic requirements for entry, nor does it indicate that these positions require any particular level of education to be identified as qualified and possessing a level of expertise/competence. Instead, the Market Research Association highlights the importance of professional experience and industry-related professional courses (through conferences, seminars, and webinars).

Thus, the *Handbook* and the Market Research Association website, as well as the documentation provided by the petitioner, do not support the claim that the occupational category "Market Research Analysts" is one for which normally the minimum requirement for entry is a baccalaureate degree (or higher) in a specific specialty, or its equivalent.¹¹ Even if it did (which it does not), to satisfy the first criterion, the petitioner must provide evidence to support a finding that the particular position proffered would normally have such a minimum, specialty degree requirement or its equivalent.

¹¹ When the *Handbook* does not support the proposition that a proffered position is one that meets the statutory and regulatory provisions of a specialty occupation, it is incumbent upon the petitioner to provide persuasive evidence that the proffered position more likely than not satisfies this or one of the other three criteria, notwithstanding the absence of the *Handbook*'s support on the issue. It is the petitioner's responsibility to provide probative evidence (e.g., documentation from other objection, authoritative sources) that supports a finding that the particular position in question qualifies as a specialty occupation. Whenever more than one authoritative source exists, an adjudicator will consider and weigh all of the evidence presented to determine whether the particular position qualifies as a specialty occupation.

In the instant case, the duties and requirements of the 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 has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The requirement of a baccalaureate or higher degree in a specific specialty, or its equivalent, is common to the industry in parallel positions among similar organizations

Next, we will review the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common for positions that are identifiable as being (1) in 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 at 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 independent, authoritative source) reports a standard industry-wide requirement for 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. In addition, the petitioner has not submitted letters, affidavits or other materials establishing the industry requirements in organizations similar to the petitioners for parallel positions.

The petitioner submitted copies of job advertisements in support of the assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations. However, as will be discussed, the petitioner's reliance on the job announcements is misplaced.

The petitioner describes itself as a wholesale distributor with 86 employees. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 424400.¹² This NAICS code is designated for "Grocery and Related Product

¹² According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity and, each establishment is classified to an industry according to the primary business activity taking place there. See

Merchant Wholesalers." U.S. Dep't of Commerce, U.S. Census Bureau, 2012 NAICS Definition, 4244 – Grocery and Related Product Merchant Wholesalers, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsreh> (last viewed July 6, 2015).

Upon review of the job advertisements, we will briefly note that some of the postings do not appear to be from organizations that are similar to the petitioner and in the same industry. More specifically, the advertisements include:

- [REDACTED] – global specialty pharmaceutical and medical imaging business with approximately 5,500 employees worldwide, a commercial presence in 65 countries, with fiscal revenues of \$2.2 billion.
- [REDACTED] – on behalf of a custom market research firm in the advertising and public relations services industry.
- [REDACTED] – global medical device leader.
- [REDACTED] – designated under the placement industry, with no information regarding the client.
- [REDACTED] – world's largest provider of biopharmaceutical development and commercial outsourcing services, with 29,000 employees, in 100 countries.
- Confidential employer – leading biotechnology firm.
- [REDACTED] – on behalf of a client in the pharmaceutical industry. No further information regarding the client was provided.

The petitioner did not state which aspects or traits (if any) it shares with the advertising organizations.¹³ For the petitioner to establish that an organization is similar under this criterion of the regulations, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such information, evidence submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner.

Moreover, some of the advertisements do not appear to be for parallel positions. For example, [REDACTED] requires a degree and 8 to 12 years of experience for its market research manager

<http://www.census.gov/eos/www/naics/> (last viewed July 6, 2015).

¹³ 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 an organization is 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. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

position. Similarly, [REDACTED] requires a degree and 6 to 9 years of experience. More importantly, the petitioner has not sufficiently established that the primary duties and responsibilities of these advertised positions are parallel to the proffered position.

Some postings do not indicate that a bachelor's degree in a directly related specific specialty (or its equivalent) is required. For instance, the following educational credentials are required:

- [REDACTED] – a bachelor's degree (no specific specialty);
- [REDACTED] – BA/BS (no specific specialty);
- [REDACTED] – BA/BS and/or an advanced degree, preferably in life sciences, healthcare, applied research, or business. A "preference" does not indicate a requirement for the advertised position.

The degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but one in a specific specialty that is directly related to the specialty occupation claimed in the petition. See 214(i)(1)(b) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). Further, requiring a general-purpose bachelor's 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 job postings suggest, at best, that a bachelor's degree is sometimes required but not at least a bachelor's degree in a *specific specialty* (or its equivalent).¹⁴

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.¹⁵ That is, not every deficit of every job posting has been addressed.

The petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are (1) in the

¹⁴ 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 does not 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.

¹⁵ The petitioner did not provide any independent evidence of how representative the job postings are of the particular advertising employers' recruiting history for the type of job advertised. As the advertisements are only solicitations for hire, they are not evidence of the actual hiring practices of these employers.

petitioner's industry, (2) parallel to the proffered position, and also (3) located in organizations that are similar to the petitioner. For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The particular position is so complex or unique that it can be performed only by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent

We will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner shows that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

As a preliminary matter, we note that while necessary, showing a position's complexity or uniqueness is not sufficient to satisfy this alternative. For whatever complexity or uniqueness it has shown for the position, a petitioner must also show such a level of complexity or uniqueness as would require a person who has attained at least a bachelor's degree in a specific specialty or the equivalent.

In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner described the proffered position and its business operations. The petitioner submitted information regarding [REDACTED] a 2011 report published by the U.S. Department of Agriculture, a slide presentation regarding malnutrition, documents regarding the petitioner's finances and organization, as well as documents attributed to the beneficiary. In addition, the petitioner submitted documentation regarding [REDACTED] and [REDACTED] supply chain manager position. The petitioner did not explain the relevancy of these documents and they appear to be unrelated to the instant matter.

Upon review, we find that the petitioner has not sufficiently developed relative complexity or uniqueness as an aspect of the proffered position. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it may claim are so complex and unique. While a few related courses may be beneficial in performing certain duties of the position, the petitioner has not demonstrated how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position. 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.

Further, the record does not establish 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. The evidence of record does not demonstrate that this position is significantly different from other positions in the occupational category such that it refutes the *Handbook's* information that a bachelor's degree in a specific specialty, or its equivalent, is not required for the proffered position.

The petitioner claims that the beneficiary is well qualified for the position, and references his qualifications. However, the test to establish a position as a specialty occupation is not the education or experience 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 has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The employer normally requires a baccalaureate or higher degree in a specific specialty, or its equivalent, for the position

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

To merit approval of the petition under this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. 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 petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty, or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent, to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in 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 86 employees and that it was established in [REDACTED] (approximately 40 years prior to the filing of the H-1B petition). The petitioner did not provide the total number of people it has employed to serve in the proffered position. It appears that it may be a new position.

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

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 in a specific specialty, or its equivalent

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

We reviewed the petitioner's statements regarding the proffered position and its business operations, as well as all of the evidence in the record of proceeding. However, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent.

Although the petitioner asserts that the nature of the specific duties is specialized and complex, the record lacks sufficient evidence to support this claim. Thus, the petitioner has submitted inadequate probative evidence to satisfy the criterion of the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

III. CONCLUSION

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.

(b)(6)



Page 19

NON-PRECEDENT DECISION

ORDER: The appeal is dismissed.