



U.S. Citizenship
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Services

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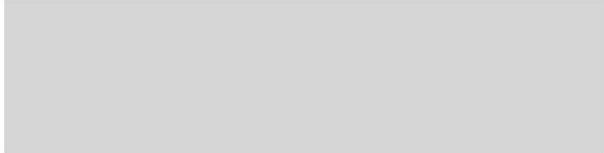


DATE: JUL 10 2015

PETITION RECEIPT #: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(H)(15)(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 on appeal. The appeal will be dismissed.

I. PROCEDURAL BACKGROUND

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a 48-employee "Software & Hardware Solutions" company established in [REDACTED]. In order to employ the beneficiary in a position it designates as a "Market Research Analyst," the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The Director denied the petition determining that the record of evidence did not establish that the proffered position qualifies for classification as a specialty occupation. On appeal, the petitioner asserts that the Director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding includes: (1) the petitioner's Form I-129 and supporting documentation; (2) the service center's Request for Evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Notice of Appeal or Motion (Form I-290B), a brief, and additional documentation. We reviewed the record in its entirety before issuing our decision.¹

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

II. THE PROFFERED POSITION

The petitioner identified the proffered position as a "Market Research Analyst" on the Form I-129, and attested on the required Labor Condition Application (LCA) that the occupational classification for the position is "Market Research Analysts and Marketing Specialists," SOC (ONET/OES) Code 13-1161, at a Level I wage.

In the petitioner's letter submitted in support of the petition, dated March 29, 2014, the petitioner stated that it "is a global software and hardware solution provider specializing in Wi-Fi, Embedded Systems, VoIP and Residential Gateway for multiple industry verticals." The petitioner noted that it provides services to clients, is involved in development of software IP components, and has developed products including [REDACTED] and [REDACTED]. The petitioner listed the job duties of the position as follows:

¹ We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

- Conduct activities of gathering, compiling and analyzing company, financial, market, customer and competitive information from various sources. – 20%
- Work with data from economic and industry information sources, synthesizing and analyzing data to create reports and provide assistance to executive, sales and marketing managers for long range (strategic) and operating (budget) plans, customer line reviews, category management initiatives, and other sales and marketing projects[.] – 15%
- Work with project teams to define requirements around market and instrument data. – 10%
- Work closely with FP&A/Accounting teams to help produce correct, accurate, reliable internal financials, including customer-level revenues and volumes. – 10%
- Analysis and Managing of Project Costing and Margins. – 10%
- Review collected data for appropriateness, relevance and accuracy, and organize data in a logical manor [*sic*] to communicate findings and enhance accessibility. – 10%
- Produce high quality reports, including quarterly economic updates summarizing the industry environment, white papers and quarterly decision-level insight presentations entailing comprehensive qualitative and quantitative deep dives into topical business issues and questions. – 10%
- Research on Competitors Product, Services and Solution data through primary and secondary source[.] – 5%
- Work closely with Engineers team on analyzing research data and come [up] with strategy. – 5%
- Assist in defining future metrics to identify critical business drivers and identify and communicate future trends in embedded industry.

[Bullet points added.]

The petitioner also stated: "[t]he position of Market Research Analyst requires a Bachelor's degree in Business administration or related field, or the equivalent."

III. SPECIALTY OCCUPATION

A. Legal Framework

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. 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 first address the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). This criterion 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 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.² The petitioner asserts on the Form I-129 that the proffered position is a market research analyst and attests on the LCA that the proffered position corresponds to SOC code and title 13-1161, Market Research Analysts and Marketing Specialists.

² All of the references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>. The excerpts of the *Handbook* regarding the duties and requirements of the referenced occupational category are hereby incorporated into the record of proceeding.

We reviewed the section of the *Handbook* regarding the occupational category "Market Research Analysts," including the section entitled "How to Become a Market Research Analyst," which describes the following preparation for the occupation, in pertinent part:

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

Education

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

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

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

Other 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.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Market Research Analysts," <http://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm#tab-4> (last visited July 1, 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. The *Handbook* states that employees typically need a bachelor's degree in market research or a related field, but the *Handbook* continues by indicating that many market research analysts have degrees in fields such as statistics, math, or computer science. According to the *Handbook*, other market research analysts have a background in fields such as business

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

In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum requirement 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. Section 214(i)(1)(B) of the Act (emphasis added).

Here, although the *Handbook* indicates that an advanced degree is typically needed for these positions, it also indicates that baccalaureate degrees in various fields are acceptable for entry into the occupation. In addition to recognizing degrees in disparate fields and backgrounds (i.e., social science and computer science) as acceptable for entry into this occupation, the *Handbook* also states that "others have a background in business administration." 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.

When reviewing the *Handbook*, it also must be noted that the petitioner designated the proffered position as a Level I (entry level) position on the LCA. The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is described 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.

Thus, in designating the proffered position at a Level I wage, the petitioner has indicated that the proffered position is a comparatively low, entry-level position relative to others within the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that he would be 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. As noted above, according to DOL guidance, a statement that the job offer is for a research fellow, worker in training or an internship is indicative that a Level I wage should be considered.

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

In certain instances, the *Handbook* is not determinative. 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. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other objective, 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.

We have reviewed the petitioner's reference to O*NET's report on the occupational group of "Market Research Analysts and Marketing Specialists" which indicates that the occupational group is in the SVP range of 7.0 to < 8.0 and is assigned a Job Zone "Four" rating. However, an SVP rating of 7.0 for "market research analysts and marketing managers simply indicates that the

occupation requires "[o]ver 2 years up to and including 4 years" of training. Moreover, a Job Zone "Four" rating groups this occupation among occupations of which "most," but not all, "require a four-year bachelor's degree." Further, O*NET does not indicate that four-year bachelor's degrees required by Job Zone Four occupations must be in a specific specialty directly related to the occupation. Therefore, the SVP and Job Zone information is not probative of the proffered position being a specialty occupation.

The petitioner contends on appeal that "the right analysis for qualifying a specialty occupation is not the field of study required, but rather *whether the job requires a professional to apply a highly specialized body of knowledge* which can only be acquired only after having gone through a Bachelor's program or after gaining work experience." The petitioner cites to *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985 (S.D. Ohio 2012) and *Tapis Int'l v. INS*, 94 F. Supp. 2d 172 (D. Mass. 2000) in support of this contention.

We note that in *Tapis Int'l v. INS*, the U.S. district court found that while the former Immigration and Naturalization Service (INS) was reasonable in requiring a bachelor's degree in a specific field, it abused its discretion by ignoring the portion of the regulations that allows for the equivalent of a specialized baccalaureate degree. According to the U.S. district court, INS's interpretation was not reasonable because then H-1B visas would only be available in fields where a specific degree was offered, ignoring the statutory definition allowing for "various combinations of academic and experience based training." *Tapis Int'l v. INS*, 94 F. Supp. 2d at 176. The court elaborated that "[i]n fields where no specifically tailored baccalaureate program exists, the only possible way to achieve something equivalent is by studying a related field (or fields) and then obtaining specialized experience." *Id.* at 177.

We agree with the district court judge in *Tapis Int'l v. INS*, that in satisfying the specialty occupation requirements, both the Act and the regulations require a bachelor's degree in a specific specialty or its equivalent, and that this language indicates that the degree does not have to be a degree in a single specific specialty. 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, for example, 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) (emphasis added).

Moreover, we also agree that, if the requirements to perform the duties and job responsibilities of a proffered position are a combination of a general bachelor's degree and experience such that the standards at both section 214(i)(1)(A) and (B) of the Act have been satisfied, then the proffered position may qualify as a specialty occupation. We do not find, however, that the U.S. district court

is stating that any position can qualify as a specialty occupation based solely on the claimed requirements of a petitioner.

Instead, USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of a baccalaureate or higher degree in a specific specialty as the minimum for entry into the occupation as required by the Act.

In addition, the district court judge does not state in *Tapis Int'l v. INS* that, simply because there is no specialty degree requirement for entry into a particular position in a given occupational category, USCIS must recognize such a position as a specialty occupation if the beneficiary has the equivalent of a bachelor's degree in that field. In other words, we do not find that *Tapis Int'l v. INS* stands for either (1) that a specialty occupation is determined by the qualifications of the beneficiary being petitioned to perform it; or (2) that a position may qualify as a specialty occupation even when there is no specialty degree requirement, or its equivalent, for entry into a particular position in a given occupational category.

First, USCIS cannot determine if a particular job is a specialty occupation based on the qualifications of the beneficiary. A beneficiary's credentials to perform a particular job are relevant only when the job is first found to qualify as a specialty occupation. USCIS is required instead to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether an alien beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].").

Second, in promulgating the H-1B regulations, the former INS made clear that the definition of the term "specialty occupation" could not be expanded "to include those occupations which did not require a bachelor's degree in the specific specialty." 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991). More specifically, in responding to comments that "the definition of specialty occupation was too severe and would exclude certain occupations from classification as specialty occupations," the former INS stated that "[t]he definition of specialty occupation contained in the statute contains this requirement [for a bachelor's degree in the specific specialty or its equivalent]" and, therefore, "may not be amended in the final rule." *Id.*

We have also reviewed the petitioner's citation to *Residential Fin. Corp. v. USCIS*, for the proposition that "[t]he knowledge and not the title of the degree is what is important. Diplomas rarely come bearing occupation-specific majors. What is required is an occupation that requires highly specialized knowledge and a prospective employee who has attained the credentialing indicating possession of that knowledge."

We agree with the aforementioned proposition that "[t]he knowledge and not the title of the degree is what is important." However, upon review of the totality of the record, the petitioner here has not met its burden and established 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 the duties it describes in order to perform those duties. We recognize that the petitioner here desires an employee with a business background. However, the petitioner does not substantiate that only a bachelor's degree in a specific specialty would provide the specialized knowledge to perform the duties it ascribes to the proffered position. Here, the petitioner asserts that its minimum requirement for the proffered position is a bachelor's degree in a field of general application, business administration. As noted above, requiring a general-purpose 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 (1st Cir. 2007). Here, the petitioner's statement alone indicates that the proffered position is not in fact a specialty occupation.

We also observe that the petitioner has not furnished evidence to establish that the facts of the instant petition are analogous to those in *Tapis Int'l v. INS* or *Residential Fin. Corp. v. USCIS*.³ 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 this office, the analysis does not have to be followed as a matter of law. *Id.* at 719.

The *Handbook* does not support the claim that the occupational category of 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. Even if it did (which it does not), the record lacks sufficient evidence to support a finding that the particular position proffered here, an entry-level market research analyst position (as indicated on the LCA), would normally have such a minimum, specialty degree requirement or its equivalent. 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)(I).

³ It is noted that the district judge's decision in the *Residential Fin. Corp. v. USCIS* 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 this office. 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 our *de novo* review of the matter.

*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 of proceeding regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common 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)).

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other 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.

In response to the service center's RFE, the petitioner submitted three advertisements to demonstrate that its competitors normally require degrees in a specific specialty for closely related positions. The petitioner did not, however, provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

Additionally, we note that for the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics (for example, the nature or type of organization, the particular scope of operations, and the level of revenue and staffing). 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. 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. Here, other than the petitioner's assertion that these three companies are its competitors, the record does not include evidence of what characteristics, if any, it believes it shares with these organizations.⁴

⁴ The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 541511. According to the U.S. Census Bureau, 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 <http://www.census.gov/eos/www/naics/>

Further, the petitioner has not established that the positions in the advertised job positions are parallel to the proffered position. For example: (1) the [REDACTED] job posting indicates that it requires 3-5 years of related experience and that a BS in Marketing, Industrial Engineering, Business Management or Business Administration is preferred; (2) the [REDACTED] job posting indicates that a BS in Marketing, Mathematics, or related field and 3 years of experience is required; and (3) the [REDACTED], Inc. job posting indicates that a BS/BA or master's degree in business, social science, statistics or other business-related field is a minimum requirement. We note that both the [REDACTED] and [REDACTED] organizations require experience and thus appear to be more senior to the position proffered here which the petitioner has designated as a Level I, entry-level position; thus these positions do not appear to be parallel to the proffered position. Additionally, the [REDACTED] organization indicates that it prefers applicants with a BS in Marketing, Industrial Engineering, Business Management or Business Administration. A preference is not synonymous with a requirement for a bachelor's degree in a specific specialty. Finally, both [REDACTED] and [REDACTED] find a business, business administration, or business management degree acceptable to perform the duties of their advertised positions. As set out above, a general-purpose bachelor's degree, such as a degree in business administration, 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. 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 Assoc.*, 19 I&N Dec. 558 (Comm'r 1988). Thus, advertisements that request a general-purpose degree are not probative to the issue of whether 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.

Finally, the petitioner has not demonstrated what statistically valid inferences, if any, can be drawn from these advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.⁵

(last visited July 1, 2015). The NAICS code specified by the petitioner is designated for "Custom Computer Programming Services," and is defined by the U.S. Department of Commerce, Census Bureau as follows:

This industry comprises establishments primarily engaged in writing, modifying, testing, and supporting software to meet the needs of a particular customer.

U.S. Dep't of Commerce, U.S Census Bureau, 2012 NAICS Definition, 541511 – Customer Computer Programming Services, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited July 1, 2015).

The job postings submitted do not include information relating to the advertisers business or industry. Thus, they do not include sufficient probative information to conclude that they are similar to the petitioner or in the same industry.

⁵ *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining

As set out above, we do not find, based upon a complete review of the record of proceeding, that the petitioner has established that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is (1) common to the petitioner's industry (2) in parallel positions (3) among organizations similar to the petitioner. Thus, for the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The 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.

In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted various documents, including evidence regarding its business operations. For example, the petitioner submitted its 2012 federal tax return, product brochures, and brief synopses of its company's products. However, upon review of the record of proceeding, the evidence of record does not credibly demonstrate that the duties the beneficiary will be responsible for or perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty, or its equivalent.

Specifically, the evidence does not demonstrate how the duties that collectively constitute the proffered position require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While a few related courses may be beneficial, or even required, in performing certain duties of the proffered 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

that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

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

particular position here. That is, the petitioner here does not discuss what particular aspects of its company products elevate the proffered position to one that is complex or unique.

Further, as was also noted above, the LCA submitted in support of the visa petition is approved for a wage Level I employee, an indication that the proffered position is an entry-level position for an employee who has only a basic understanding of the occupation.⁶ This does not support the proposition that the proffered position is so complex or unique relative to other positions in the same occupation that it can only be performed by a person with a specific bachelor's degree, especially as the *Handbook* suggests that some market research analyst positions do not require such a degree.⁷

Upon review of the totality of the record, the evidence does not establish that this position is significantly different from other positions in the occupation such that it refutes the *Handbook's* information to the effect that there is a spectrum of degrees acceptable for such positions, including degrees not in a specific specialty. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent. As the evidence of record does not demonstrate how the proffered position is so complex or unique relative to other positions within the same occupational category that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be concluded that the petitioner has 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, USCIS reviews the petitioner's past recruiting and hiring practices, information regarding

⁶ 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.

⁷ The issue here is that the petitioner's designation of this position as a Level I, entry-level position undermines its claim that the position is particularly complex, specialized, or unique compared to other positions *within the same occupation*. Nevertheless, it is important to note that a Level I wage-designation does not preclude a proffered position from classification as a specialty occupation. In certain occupations (doctors or lawyers, for example), an entry-level position would still require a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor's degree in a specific specialty or its equivalent. That is, a position's wage level designation may be a consideration but is not a substitute for a determination of whether a proffered position meets the requirements of section 214(i)(1) of the Act.

employees who previously held the position, as well as 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. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. Again, 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. According to the Court in *Defensor*, "To interpret the regulations any other way would lead to an absurd result." *Id.* at 388. 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 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.*

The petitioner asserts that "it needs a Market Research Analyst, who will support Sales, Marketing and Engineering team." The petitioner claims that all of its "market analysts" have a minimum of a bachelor's degree in business administration or equivalent degrees or experience in the field. The evidence of record, however, does not contain documentary evidence substantiating the employment and degrees of any of the petitioner's previously-employed market research analysts.⁸

Upon review of the record, the petitioner has not provided sufficient probative evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. 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)).

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

⁸ It is not clear if the petitioner is suggesting that the proffered position is similar to its previously-employed "market analysts" or whether these positions perform the same duties as a market research analyst.

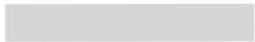
The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent. Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. In other words, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than market research analyst positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent. We have considered the petitioner's information on its products but do not find that the petitioner has demonstrated that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. The petitioner has not submitted evidence or analysis of why its products require a bachelor's degree in a specific specialty. Rather, as observed above, the petitioner avers that the proffered position may be performed by an individual with a general business degree. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business 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).

We again refer to our earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four assignable levels) wage. That is, the Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category, and hence one not likely distinguishable by relatively specialized and complex duties. Upon review of the totality of the record, the petitioner has not established that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

For the reasons discussed above, the evidence of record does not satisfy the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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



IV. CONCLUSION

As set forth above, we find that the evidence of record does not sufficiently establish that the proffered position qualifies for classification as a specialty occupation. Accordingly, the appeal will be dismissed and the petition denied.

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.