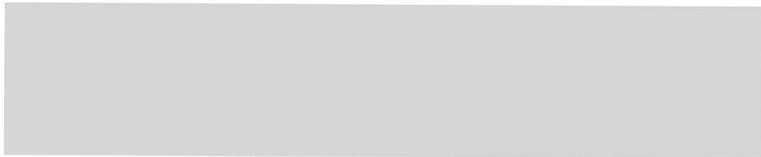
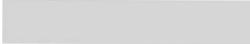




U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **MAR 26 2015** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

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

## I. PROCEDURAL HISTORY

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as an investment business, with two employees, that was established in [REDACTED].<sup>1</sup> In order to employ the beneficiary in what it designates on the Form I-129 as a "Market Research Analyst" position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, concluding that the petitioner 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 basis for denial of 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 response to the RFE; (4) the notice of decision; and (5) the Notice of Appeal or Motion (Form I-290B) and supporting materials. 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. THE PROFFERED POSITION

In the Form I-129, the petitioner indicated that it is seeking the beneficiary's services in a position it designates as a market research analyst. In the March 29, 2014 letter of support, the petitioner's managing director stated that the beneficiary was currently participating in the Optional Practical Training (OPT) program with the petitioner. In the same letter, he provided the following information regarding the duties of the proffered position:

This position will be primarily responsible for planning, developing and coordinating the execution of business and marketing plans of [the petitioner], designing and distributing materials for investment projects, EB-5 Programs and other marketing materials of [the petitioner] including website and brochures, establishment of [the petitioner's] Chinese investor database, identifying opportunities, etc.

The detailed duties and responsibilities of this position include:

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<sup>1</sup> The petitioner stated that its gross annual income is \$125,000 and that its net annual income is \$100,000.

- Managing all monthly and daily marketing activities including press releases, social medial and newsletter marketing;
- Conduct research on the local, regional, national, and international markets for investment opportunities in restaurant industry, using a variety of methods for research and analysis, such as internet research, literature reviews, market analysis, surveys, phone calls, interviews, questionnaires, focus groups, etc.;
- Gather, classify and synthesize large quantities of market data (such as competitions, service catalogues, project feedbacks, etc.) of the restaurant industry and EB-5 investment programs in Southern California Region. Use computer programs and other effective means to feed, save and maintain all data gathered;
- Analyze market conditions, requirements, policy changes, and potential investment opportunities, monitor statistics of restaurant industry and EB-5 investment projects;
- Prepare analytical reports, illustrate data graphically, translate complex findings into written texts and deliverable presentations;
- Based on market research results and written reports, compile and format information and design presentation, and presents reports to [the petitioner's] management team or affiliated business partners;
- Develop and deliver market intelligence reports to internal stakeholders on a consistent basis, to help the company determine its marketplace position and feasible marketing strategies and plans;
- Design and improve marketing plans and strategies of [the petitioning company], prepare marketing materials to promote [the petitioner's] Brand and its investment services;
- Work in coordination with business partners, investors, and other affiliates to effectively execute marketing plans and promotional activities;
- Coordinate networking functions for the company, attend public programs and networking events to building business relations and connections;
- Assist company's principals and directors to oversee investment projects and EB-5 programs, maintain up-to-date notes for all ongoing transactions;
- Identify new business opportunities, develop and review excel investment

models;

- Handle all communications between [the petitioner] and its Chinese investors, design program materials in both Chinese and English for communication and marketing purposes.

[The beneficiary] is the only market research analyst that [the petitioner] hired so far. Therefore, she bears a high level of responsibility and accountability to the company. She will be responsible for most of the market research work and preparing reports. She will report directly to the management (essentially me) and assist us in making the necessary corporate level decisions on the company's marketing activities, and client relations.

The petitioner's managing director stated the following regarding the requirements for the position:

We have offered the market research analyst position to [the beneficiary] based on her unique educational and professional background. Her intensive in-school studies and extensive practical experience in marketing and business analysis prepared her very well for this position.

In the letter of support, the petitioner did not state that there were any particular academic requirements for the proffered position.<sup>2</sup>

Thereafter, in response to the director's RFE, the petitioner submitted an undated and unsigned document entitled "Job Description for Market Research Analyst at [the petitioning company] 2014-2017." The document provided the following information regarding the position:

The position requires an International Masters in Business Administration degree because the position calls for a solid background in international business and international marketing. Not only is the Market Research Analyst in charge of planning, developing and implementing [the petitioner's] marketing plans, but this person will also be tasked with (1) finding potential investment opportunities both in the U.S. and on the international front; and (2) marketing [the petitioner's] services to international investors looking to invest in the U.S. As such, the Market Research Analyst must be familiar with the intricacies of international business and possess knowledge of how to best market [the petitioner's] services to potential foreign clients.

<sup>2</sup> While the petitioner states that the beneficiary has and will serve in a market research analyst position (with a job title of "Market Research Analyst"), other documents in the record provide a different job title. More specifically, the petitioner indicated that the beneficiary was in F-1 Optional Practical Training program when the petition was filed and that "[the beneficiary] started working for [the petitioner] as a market research analyst in July 2013, using her Optional Practical Training." We observe: (1) that printouts included in the record from the petitioner's website indicate that the beneficiary serves as an "Associate"; and (2) that the beneficiary's resume indicates under the heading "Professional Experience" that she serves as a "Private Equity Associate" for the petitioner. No explanation for the variance was provided by the petitioner.

The document further provided the following description of the proffered position:

25% of time

- Manage all monthly and daily marketing activities including press releases, social medial and newsletter marketing;
- Work in coordination with business partners, investors, and other affiliates to effectively execute marketing plans and promotional activities;
- Design and improve marketing plans and strategies of [the petitioning company], prepare marketing materials to promote [the petitioner's] Brand and its investment services;

30% of time

- Conduct research on the local, regional, national, and international markets for investment opportunities in restaurant industry, using a variety of methods for research and analysis, such as internet research, literature reviews, market analysis, surveys, phone calls, interviews, questionnaires, focus groups, etc.;
- Analyze market conditions, requirements, policy changes, and potential investment opportunities, monitor statistics of restaurant industry and EB-5 investment projects;
- Identify new business opportunities, develop and review excel investment models;
- Gather, classify and synthesize large quantities of market data (such as competitions, service catalogues, project feedbacks, etc.) of the restaurant industry and EB-5 investment programs in Southern California Region. Use computer programs and other effective means to feed, save and maintain all data gathered;

20% of time

- Prepare analytical reports, illustrate data graphically, translate complex findings into written texts and deliverable presentations;
- Based on market research results and written reports, compile and format information and design presentation, and presents reports to [the petitioner's] management team or affiliated business partners;

- Develop and deliver market intelligence reports to internal stakeholders on a consistent basis, to help the company determine its marketplace position and feasible marketing strategies and plans;

10% of time

- Assist company's principals and directors to oversee investment projects and EB-5 programs, maintain up-to-date notes for all ongoing transactions;

10% of time

- Handle all communications between [the petitioner] and its Chinese investors, design program materials in both Chinese and English for communication and marketing purposes.

5% of time

- Coordinate networking functions for the company, attend public programs and networking events to building business relations and connections.

Subsequently, with the appeal, the petitioner submitted another undated and unsigned document entitled "Job Description for Market Research Analyst at [the petitioning company]." The document provided the following information regarding the position:

25% of time

- Develop marketing strategies and marketing budgets for the companies in [the petitioner's] portfolio, while keeping in mind the trends and developments in the restaurant industry as well as the EB-5 investment arena.
- Create a framework for the strategic marketing plan of portfolio companies by specifying vision, corporate values, business objectives, major goals, strategic action programs and resources.
- Develop marketing budgets for [the petitioner's] portfolio companies that will allow for maximum growth potential, while keeping costs low.
- Draft newsletters in English and Mandarin to inform clients and potential clients of newsworthy events happening at [the petitioner], as well as the restaurant industry in general.
- Create marketing flyers and press releases intended to attract clients and investors, particularly Chinese investors in the EB-5 program, highlighting the advantages of [the petitioner's] projects and restaurant brands in comparison to

those of its competitors.

30% of time

- Follow trends in the restaurant industry and among EB-5 investors in order to find investment opportunities for [the petitioner] that have the potential to increase the value of [the petitioner's] holdings, while having the ability to attract new investors and clients for [the petitioner's] investment services.
- Meet with management and marketing representatives of [the petitioner's] portfolio companies in order to analyze the strengths and weaknesses of the particular company. This type of assessment is performed by using business analytical models including SWOT analysis to evaluate the company's potential for growth.
- Review sources such as [redacted] book by [redacted], [redacted], and [redacted] all of which require a solid understanding of how to analyze and interpret complex financial data and business statistics in order to present these findings to [the petitioner's] management and board.
- Research current events in the restaurant industry by consulting sources like [redacted], [redacted], [redacted], [redacted], [redacted], and [redacted] and be able to discern which events are relevant to promoting [the petitioner's] interests and the growth of its portfolio in order to use findings as material for newsletters and marketing flyers.
- Conduct research into the EB-5 investment industry, investigating EB-5 project investment trends among Chinese EB-5 investors in order to better create marketing material aimed at this demographic.
- Research and assess investment opportunities in the restaurant industry with an eye towards increasing the value of [the petitioner's] portfolio and gaining a competitive advantage in the private equity industry. Review and understand various financial data and materials related to investments, as well as track Private Equity (PE) deals in the restaurant industry and review offering memorandums for potential deals.

20% of time

- Create tasks lists designated to help ensure each portfolio company adheres to their strategic marketing plan.
- Build Excel models for potential acquisition targets and communicate with potential investment partners/investors.

- Gather and input all income statement data from a target's historical financials, make proper assumptions about growth rates and margins to project the target's income statement for the next few years.
- Make proper assumptions on capex (Capital Expenditures), different types of debts (e.g., Term loan A, term loan B, mezzanine debt, Senior debt), debt rates, Weighted Average Cost of Debt (WACD) to project and report Free Cash Flow to Firm (FCFF).
- Create pie charts and use SmartArt to create graphs presenting information gathered during research in an appealing and easy-to-understand way for presentation using PowerPoint to potential investors.

10% of time

- Assist company's principals and directors to oversee investment projects and EB-5 programs, maintain up-to-date notes for all ongoing transactions.

10% of time

- Handle all communications between [the petitioner] and its Chinese investors, design program materials in both Chinese and English for communication and marketing purposes.

5% of time

- Coordinate networking functions for the company, attend public programs and networking events to building business relations and connections.

Thus, the record of proceeding contains multiple descriptions of the proffered position.

### III. LEGAL FRAMEWORK

The issue on appeal is whether the petitioner provided 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 also meet one of the following criteria:

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

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

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

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

Thus, a crucial aspect of this matter is whether the petitioner has adequately described the proffered position, such that USCIS may discern the nature and duties of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge, and 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.

#### IV. ANALYSIS

Upon review, we note that the record of proceeding contains discrepancies between what the petitioner claims about the level of responsibility and requirements inherent in the proffered position set against the contrary level of responsibility and requirements conveyed by the wage level indicated in the Labor Condition Application (LCA) submitted in support of petition.

More specifically, the petitioner submitted an LCA in support of the instant petition that designated the proffered position under the occupational category of "Market Research Analysts and Marketing Specialists" – SOC (ONET/OES Code) 13-1161 at a Level I (entry) wage level. The prevailing wage source is listed in the LCA as the OES (Occupational Employment Statistics) - OFLC (Office

of Foreign Labor Certification) Online Data Center.<sup>3</sup> The LCA was certified on March 24, 2014 and signed by the petitioner's managing director on the same day. We note that by completing and submitting the LCA, and by signing the LCA, the petitioner attested that the information contained in the LCA was true and accurate.

Wage levels should be determined only after selecting the most relevant Occupational Information Network (O\*NET) occupational code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.<sup>4</sup>

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) position after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.<sup>5</sup> The U.S. Department of Labor (DOL) emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is described as follows:

<sup>3</sup> The Occupational Employment Statistics (OES) program produces employment and wage estimates for over 800 occupations. See Bureau of Labor Statistics, U.S. Dep't of Labor, on the Internet at <http://www.bls.gov/oes/>. The OES All Industries Database is available at the Foreign Labor Certification (OFLC) Data Center, which includes the Online Wage Library for prevailing wage determinations and the disclosure databases for the temporary and permanent programs. The Online Wage Library is accessible at <http://www.flcdatacenter.com/>.

<sup>4</sup> For additional information regarding prevailing wage determinations, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

<sup>5</sup> A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

**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.

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

In the instant case, the petitioner emphasizes the importance of foreign language skills for the proffered position. For example, the petitioner repeatedly states that the beneficiary will "[h]andle all communications between it and its Chinese investors, design program materials in both Chinese and English for communication and marketing purposes." Further, in the appeal brief, the petitioner reports that it "requires that its Market Research Analyst be fluent in English and Mandarin." The petitioner further indicates the duties of the position include drafting newsletters in English and Mandarin to inform clients and potential clients of newsworthy events happening at the company, as well as in the restaurant industry in general. According to the petitioner, the position also involves gathering information on investment trends among Chinese EB-5 investors.

In accordance with the guidance provided by DOL, a language requirement other than English in a petitioner's job offer generally is considered a special skill for all occupations, with the exception of "Foreign Language Teachers and Instructors," "Interpreters," and "Caption Writers." *Id.* In the instant case, the petitioner designated the proffered position under the occupational category "Market Research Analysts and Marketing Specialists" at a Level I (the lowest of four assignable wage levels). Therefore, it has not established that the foreign language requirement was reflected in the wage-level for the proffered position.

Moreover, we observe that in the initial submission, the petitioner did not provide any specific requirements for the proffered position. In response to the RFE, however, the petitioner stated that the position requires an International Masters in Business Administration degree. In the appeal brief, the petitioner claims that it "submitted the petition on the assertion that the position of Market Research Analyst requires at least a Bachelor of Business Administration Degree, and that the specific position offered to [the beneficiary at the petitioner's business] requires a Master of Business Administration (MBA)." According to the petitioner, the proffered position involves complex, unique and/or specialized duties. The petitioner continues by stating, "While many of the Market Research Analyst position's duties at [the petitioner's business] are similar to the duties listed for Market Research Analysts in the OOH the duties at [the petitioner's business] are far more specialized and complex and require knowledge usually associated with the attainment of a MBA

degree." The petitioner further attests that "the duties to be performed by the Market Research Analyst at [its business] are more specialized and complex than those reported by the OOH."

Throughout the record, the petitioner emphasizes that the beneficiary's work will be essential to the growth of the company. The petitioner further clarified that the beneficiary "bears a high level of responsibility and accountability to the company." According to the petitioner, it will be relying heavily on the beneficiary's work product and expertise to make critical decisions regarding the company's business and operations. Such reliance on the beneficiary's work appears to surpass the expectations of a Level I position, as described above, where (relative to others within the occupation) the employee works under close supervision, performing routine tasks that require only a basic understanding of the occupation and limited exercise of judgment. In the instant case, rather than the beneficiary's work being "monitored and reviewed for accuracy," it appears that the petitioner will depend upon the beneficiary's work with regard to the growth of its operations, as well as important business decisions for the company.

Upon review of the assertions regarding the proffered position, we must question the stated requirements for the job, as well as the level of complexity, independent judgment and understanding that are actually needed to perform the work as the LCA is certified for a Level I entry-level position. That is, the claimed level of education, knowledge and special skills required to perform the duties of the proffered position as stated by the petitioner is at odds with the wage-rate selected by the petitioner on the LCA, which is indicative of a comparatively low, entry-level position relative to others within the same occupation. Notably, if the proffered position had been designated at a higher level, the prevailing wage at that time (for the claimed occupational category "Market Research Analysts and Marketing Specialists") would have been \$50,544 per year for a Level II position, \$65,104 per year for a Level III position, and \$79,685 per year for a Level IV position.<sup>6</sup>

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. *See* section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A); *Patel v. Boghra*, 369 Fed.Appx. 722, 723 (7th Cir. 2010). The LCA serves as the critical mechanism for enforcing section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). *See* 65 Fed. Reg. 80110, 80110-80111 (indicating that the wage protections in the Act seek "to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers" and that this "process of protecting U.S. workers begins with [the filing of an LCA] with [DOL]").

<sup>6</sup> When a petitioner's job opportunity is a combination of occupations, it should select the relevant occupational category for the highest paying occupation. *See* U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct wage level in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different wage level at a lower prevailing wage than the one that it claims it is offering to the beneficiary. Therefore, if the proffered position were found to qualify as a specialty occupation on the basis that it was a higher-level and more complex position, as claimed elsewhere in the petition, the petition could still not be approved as the petitioner has not established that it would pay the wage required for that level of work as required under the Act.<sup>7</sup>

As noted below, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) specifies that certification of an LCA does not constitute a determination that an occupation is a specialty occupation:

Certification by the Department of Labor [DOL] of a labor condition application in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. The director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. The director shall also determine whether the particular alien for whom H-1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation . . . and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports

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<sup>7</sup> Here, provided the proffered position was in fact found to be a higher-level and more complex position (which requires special skills) as asserted by the petitioner elsewhere in the petition, the petitioner would not have submitted a valid LCA that corresponds to the claimed duties and requirements of the proffered position; that is, specifically, the LCA submitted in support of the petition would then fail to correspond to the level of work, responsibilities and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work, responsibilities and requirements in accordance section 212(n)(1)(A) of the Act and the pertinent LCA regulations. Implemented through the LCA certification process, section 212(n)(1) is intended to protect U.S. workers' wages by eliminating economic incentives or advantages in hiring temporary foreign workers. *See, e.g.*, 65 Fed. Reg. 80,110, 80,110-111, 80,202 (2000).

the H-1B petition filed on behalf of the beneficiary.<sup>8</sup>

As such, a review of the enclosed LCA indicates that the information provided therein does not correspond to the level of work and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and requirements, which if accepted as accurate would result in the beneficiary being paid a salary below that required by law. As a result, even if it were determined that the proffered position were a higher-level and more complex position as described and claimed elsewhere in the petition in support of the petitioner's assertions that this position qualifies as a specialty occupation, the petition could still not be approved for this additional reason.

For the reasons discussed above, the petitioner (1) has not established that it will pay the beneficiary an adequate salary for her work in accordance with the applicable statutory and regulatory provisions; and (2) not submitted an LCA that supports the instant petition.<sup>9</sup> These grounds for denial of the petition render the remaining issues in this proceeding moot.<sup>10</sup>

Further, this aspect of the LCA undermines the credibility of the petition and, in particular, the credibility of the petitioner's assertions regarding the demands, level of responsibilities and requirements of the proffered position. Consequently, the petitioner has not established the nature of the proffered position and in what capacity the beneficiary will actually be employed. We are, therefore, precluded from finding that the proffered position satisfies any criterion at 8 C.F.R.

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<sup>8</sup> To promote the U.S. worker protection goals of a statutory and regulatory scheme that allocates responsibilities sequentially between DOL and the U.S. Department of Homeland Security (DHS), a prospective employer must file an LCA and receive certification from DOL before an H-1B petition may be submitted to USCIS. 8 C.F.R. § 214.2(h)(4)(i)(B)(1); 20 C.F.R. § 655.700(b)(2). Upon receiving DOL's certification, the prospective employer then submits the certified LCA to USCIS with an H-1B petition on behalf of a specific worker. 8 C.F.R. § 214.2(h)(2)(i)(A), (2)(i)(E), (4)(iii)(B)(1). DOL reviews LCAs "for completeness and obvious inaccuracies," and will certify the LCA absent a determination that the application is incomplete or obviously inaccurate. Section 212(n)(1)(G)(ii) of the Act. In contrast, USCIS must determine whether the attestations and content of an LCA correspond to and support the H-1B visa petition, including the specific place of employment. 20 C.F.R. § 655.705(b); *see generally* 8 C.F.R. § 214.2(h)(4)(i)(B).

<sup>9</sup> Fundamentally, it appears that (1) the petitioner previously claimed to DOL that the proffered position is a Level I, entry-level position to obtain a lower prevailing wage; and (2) the petitioner is now claiming to USCIS that the position is a higher-level and more complex position (which requires special skills) in order to support its claim that the position qualifies as a specialty occupation. The petitioner cannot have it both ways. Either the position is a more senior and complex position that involves special skills (based on a comparison of the petitioner's job requirements to the standard occupational requirements) and thereby necessitates a higher required wage, or it is an entry-level position for which a lower wage would be acceptable. To permit otherwise would be directly contrary to the U.S. worker protection provisions contained in section 212(n)(1)(A) of the Act and its implementing regulations.

<sup>10</sup> Thus, while we need not address the director's decision that the proffered position does not qualify as a specialty occupation, we will nevertheless discuss this issue as it is the basis of the director's decision.

§ 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Finally, in the appeal brief the petitioner claims that the occupation of market research analyst qualifies as a specialty occupation in the present case under *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985 (S.D. Ohio 2012). We note, however, that the petitioner has not established that the facts of the instant petition are analogous to those in *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*.<sup>11</sup>

Moreover, if the petitioner meant to suggest that any position classified under the occupational category "Market Research Analysts" would qualify as a specialty occupation, we must disagree. The occupational category designated by a petitioner is considered as an aspect in establishing the general tasks and responsibilities of a proffered position. However, the burden of proof remains on the petitioner to submit sufficient evidence to support a finding that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. Further, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title or designated occupational category. 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 beneficiary, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F.3d 384. Here, as previously discussed, the petitioner has not met its burden to establish the nature or requirements of the particular position as the record contains materially inconsistent information with regard to the claimed level of education, knowledge and special skills required to perform the duties of the proffered position.<sup>12</sup>

<sup>11</sup> 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.

<sup>12</sup> The petitioner also cites [REDACTED] 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

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), 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.

#### V. BENEFICIARY'S QUALIFICATIONS

A beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner has not established that the proffered position requires a baccalaureate or higher degree in a specific specialty or its equivalent. Therefore, we need not and will not address the beneficiary's qualifications.

#### VI. CONCLUSION AND ORDER

An application or petition that does not comply with the technical requirements of the law may be denied by us even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of the enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1037, *aff'd*, 345 F.3d 683; *see also BDPCS, Inc. v. Fed. Communications Comm'n*, 351 F.3d 1177, 1183 (D.C. Cir. 2003) ("When an agency offers multiple grounds for a decision, we will affirm the agency so long as any one of the grounds is valid, unless it is demonstrated that the agency would not have acted on that basis if the alternative grounds were unavailable.").

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of

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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." 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. Section 214(i)(1)(B) of the Act (emphasis added).

(b)(6)



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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.