



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF RSOC-, INC.

DATE: OCT. 1, 2015

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a marketing firm, seeks to employ the Beneficiary as a market research analyst and to classify her as a nonimmigrant worker in a specialty occupation. *See* 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, California Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Director denied the petition, finding that the evidence of record did not establish that the proffered position qualifies as a specialty occupation.

The record of proceeding before us contains the following: (1) the Form I-129 and supporting documentation; (2) the Director's request for additional evidence (RFE); (3) the Petitioner's response to the RFE; (4) the Director's letter denying the petition; and (5) the Form I-290B, Notice of Appeal or Motion, and supporting documentation.

Upon review of the entire record of proceeding, we find that the evidence of record does not overcome the Director's basis for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

I. SPECIALTY OCCUPATION

The issue is whether the evidence of record has demonstrated by a preponderance of the evidence that the Petitioner will employ the Beneficiary in a specialty occupation position.¹

¹ The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)).

A. Legal Framework

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

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

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

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

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

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

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that 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 387. 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 foreign nationals 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 foreign national, 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. The Proffered Position

In its support letter, the Petitioner provided the following information regarding the duties of the proffered position:

- 30% of [the Beneficiary's] time will be devoted to customer acquisition. This is not a position that requires her to consult with clients on projects but rather to inform the clients of the types of services available, keyword campaigns and SEO strategies and investments.
- 20% of [the Beneficiary's] time will be devoted to conversion and retention strategies, the purpose of which is to drive improvement on behalf of customer's websites and to increase and optimize all elements of customer acquisitions. Along with this she will develop a metric tracking and strategic evaluation of marketing initiatives.
- 50% of her time will be new online/viral marketing efforts geared towards maximizing traffic and sales.

The Petitioner stated that a "Bachelor's in Business Administration and experience in online media communications" is required to qualify for the proffered position.

In its RFE response letter, the Petitioner revised the duties of the proffered position as follow:

- 3% Identify market segments, measure demand, analyze consumer markets, detect perceived psychological processes using primary and secondary market research for our product[.]
- 2% Track and measure studies using linear regression, factor analysis, multivariate analysis and structural equation modeling, crosstabs and t-tests[.]
- 5% Collaborate closely with analytics to identify site improvements which optimize conversion and enhance the customer's experience[.]
- 5% Provide statistical analysis research support for each individual project[.]
- 3% Direct and coordinate activities concerned with gathering, recording and analyzing data about current and potential customers, competitors and the market for purposes of creating product feasibility for the customer and demand measurements.
- 4% Interpret statistical output and present it to customers in a way that they can understand.
- 5% Analyze, create, administer and interpret surveys through focus groups, phone calls and e-mail.
- 5% Conduct in-depth research and make recommendations to management based on research and findings.

- 8% Conduct regular performance reporting, competitive analysis and market research.
- 2% Customer acquisition.
- 12% Create conversion and retention strategies. The purpose of which is to drive improvement on behalf of customer's websites and to increase and optimize all elements of customer acquisitions. Along with this [the Beneficiary] will develop a metric tracking and strategic evaluation of market initiatives[.]
- 5% Online/viral marketing efforts geared towards maximizing traffic and sales.
- 8% Managing search engine marketing campaigns with responsibility of maximizing return on investment by managing media cost and bidding on keywords[.]
- 5% Integrate new data solutions that will improve the quality and depth of our company's research and analysis.
- 10% Analyze collected data regarding marketing trends[.]
- 8% Present marketing trends and online marketing results to stakeholders[.]
- 5% Monitor industry statistics[.]
- 5% Illustrate data graphically and translate complex findings into text[.]

The Petitioner also changed the educational requirements of the proffered position to "at least, a bachelor's degree and experience in online media communications."

C. Analysis

As a preliminary matter, it is noted that the Petitioner has provided inconsistent information regarding the duties of the proffered position. For example, while the Petitioner stated in its support letter that the Beneficiary would devote 50 percent of her time to "online/viral marketing efforts geared towards maximizing traffic and sales," in its RFE response letter, the Petitioner significantly lowered the time the Beneficiary would spend on this task to five percent. Furthermore, the Petitioner added duties associated with a more senior role, such as directing and coordinating data gathering activities, as well as managing marketing campaigns. The Petitioner provided no explanation for these inconsistencies. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

Furthermore, the evidence of record does not establish the depth, complexity, or level of specialization, or substantive aspects of the matters upon which the Petitioner claims that the Beneficiary will engage. Rather, the duties of the proffered position, and the position itself, are described in relatively generalized and abstract terms that do not relate substantial details about either the position or its constituent duties. The abstract level of information provided about the proffered position and its constituent duties is exemplified by the Petitioner's assertion that the Beneficiary will be involved in "customer acquisition." However, the Petitioner provides no insight into the Beneficiary's actual tasks associated with customer acquisition. The abstract nature of the proposed duties is further illustrated by the Petitioner's statement that the Beneficiary will "[c]ollaborate closely with analytics." The Petitioner does not explain the Beneficiary's specific tasks associated with "collaborat[ing] closely" nor does it identify the individuals or the entities with whom the Beneficiary would interact. Again, the generalized nature of the duties is exemplified by the Petitioner's statement, "[o]nline/viral marketing efforts geared towards maximizing traffic and sales," which provides no details as to how the Beneficiary would perform such duties. Notably, the Petitioner does not explain how the performance of the proffered duties, as described in the record, would require the attainment of a bachelor's or higher degree in a specific specialty, or its equivalent. This type of generalized description may be appropriate when defining the range of duties that may be performed within an occupational category, but it does not adequately convey the substantive work that the Beneficiary will perform within the Petitioner's business operations and, thus, cannot be relied upon by the Petitioner when discussing the duties attached to specific employment.

In the instant case, the Petitioner has not described the proffered position with sufficient detail to determine that the minimum requirements are a bachelor's degree in a specialized field of study. It is incumbent on the Petitioner to provide sufficient evidence to establish that the particular position that it proffers would necessitate services at a level requiring both the theoretical and practical application of a body of highly specialized knowledge and the attainment of at least a bachelor's degree in a specific specialty, or its equivalent. When "any person makes an application for a visa or any other document required for entry, or makes an application for admission, [. . .] the burden of proof shall be upon such person to establish that he is eligible" for such benefit. Section 291 of the Act; *see also Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972).

Without a meaningful job description, the record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires a specialty occupation's level of knowledge in a specific specialty. The tasks as described do not communicate (1) the actual work that the Beneficiary would perform, (2) the complexity, uniqueness and/or specialization of the tasks, and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. The Petitioner's assertion with regard to the educational requirement for the position is conclusory and unpersuasive, as it is not supported by the job description or probative evidence. 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'l Comm'r 1972)).

Furthermore, it is reasonable to assume that the size of an employer's business has or could have an impact on the duties of a particular position. *See EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a Petitioner² may be considered as a component of the nature of the Petitioner's business, as the size impacts upon the duties of a particular position. In matters where a Petitioner's business is relatively small, we review the record for evidence that its operations, are, nevertheless, of sufficient complexity to indicate that it would employ the Beneficiary in position requiring the theoretical and practical application of a body of highly specialized knowledge that may be obtained only through a baccalaureate degree or higher in a specific specialty, or its equivalent. Additionally, when a petitioner employs relatively few people, it may be necessary for the Petitioner to establish how the Beneficiary will be relieved from performing non-qualifying duties. The record of proceeding does not contain credible documentation explaining how the Beneficiary will be relieved from performing non-qualifying duties.

Nevertheless, we will analyze the duties as described and the evidence of record to determine whether the proffered position as described would qualify as a specialty occupation. To that end and to make our determination as to whether the employment described above qualifies as a specialty occupation, we turn first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

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

USCIS recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.³ The Petitioner asserted in the LCA that the proffered position falls under the occupational category "Market Research Analysts and Marketing Specialists."

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

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

² On the Form I-129, the Petitioner stated that it has two employees.

³ All of our 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.

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.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Market Research Analysts," available at <http://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm#tab-4> (last visited Sept. 29, 2015).

The *Handbook* reports that market research analysts have degrees and backgrounds in a wide-variety of disparate fields. That is, while the *Handbook* states that employees typically need a bachelor's degree in market research or a related field, it continues by specifying that many market research analysts have degrees in fields such as statistics, math, or computer science. According to the *Handbook*, other market research analysts have backgrounds in fields such as business administration, the social sciences, or communications. This passage of the *Handbook* identifies various courses as essential to this occupation, including statistics, research methods, and marketing. It further elucidates that courses in communications and social sciences (such as economics, psychology, and sociology) are also important. Therefore, although the *Handbook* indicates that market research analysts typically need an advanced degree, it also indicates that degrees and backgrounds in various fields are acceptable for jobs in this occupation – including computer science and the social sciences, as well as statistics and communications.

In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the Petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of

highly specialized knowledge is essentially an amalgamation of these different specialties.⁴ Section 214(i)(1)(B) of the Act (emphasis added).

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 147.⁵

That is, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty (or its equivalent) that is directly related to the proposed position. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm’r 1988). Therefore, the *Handbook*’s recognition that a general, non-specialty “background” in business administration is sufficient for entry into the occupation strongly suggests that a bachelor’s degree *in a specific specialty* is not normally the minimum entry requirement for this occupation.⁶

The narrative of the *Handbook* further reports that some employees obtain professional certification to demonstrate a level of professional competency. It continues by outlining the requirements for market research analysts to achieve the Professional Researcher Certification (PRC), and states that candidates qualify based upon their experience and knowledge. According to the *Handbook*, the

⁴ Whether read with the statutory “the” or the regulatory “a,” both readings denote a singular “specialty.” Section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Still, we do not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. This also includes even seemingly disparate specialties provided the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

⁵ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

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

Id.

⁶ The Petitioner’s requirement of a bachelor’s degree without indicating a specialty or a bachelor’s degree in business also underscores our finding that the proffered position is not a specialty occupation.

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credential is granted by the [REDACTED] to those who pass an exam and have at least three years of experience working in opinion and market research.⁷

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

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

* * *

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

* * *

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

[REDACTED]

⁷ [REDACTED] website states that the association was founded in [REDACTED] and is the leading and largest association of opinion and marketing research professions. For additional information, see [REDACTED]

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

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

The Petitioner also submitted an advisory opinion letter from _____, a professor of marketing at _____. We reviewed the opinion letter in its entirety. However, the letter is not persuasive in establishing the proffered position as a specialty occupation position.

In his letter, _____ asserts that the proffered position requires "a bachelor's-level Degree in Marketing; Business Administration, with coursework in marketing; or a related field." _____ states that he reviewed the duties provided in the Petitioner's support letter and in its RFE response letter. However, he does not discuss the duties of the proffered position in any substantive detail. There is no indication that he possesses any knowledge of the Petitioner's proffered position beyond this information. He does not demonstrate or assert in-depth knowledge of the Petitioner's specific business operations or how the duties of the position would actually be performed in the context of the Petitioner's business enterprise. For instance, there is no indication that _____ visited the Petitioner's business, observed the Petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. _____ opinion does not relate his conclusion to specific, concrete aspects of this Petitioner's business operations so as to demonstrate a sound factual basis for his conclusions about the educational requirements for the particular position here at issue.

Accordingly, the very fact that he attributes a degree requirement to such a generalized treatment of the proffered position undermines the credibility of his opinion. Importantly, his statements are not supported by copies or citations of research material that may have been used. He has not provided sufficient facts that would support the contention that the proffered position requires at least a bachelor's degree in a specific specialty.

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Finally, there is no indication that [REDACTED] was aware of the fact that the Petitioner designated the proffered position as an entry-level position relative to others within the occupational category. We consider this a significant omission, in that it indicates an incomplete review of the position.

We may, in our discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). As a reasonable exercise of our discretion we discount the advisory opinion letter as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The Petitioner cites to *Unical Aviation, Inc. v. INS*, 248 F.Supp.2d 931 (C.D. Cal. 202) and states that the court concluded that job duties in that case were indistinguishable from the Market Research Analyst position described in the *Handbook*. First, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Unical Aviation, Inc. v. INS*. Furthermore, as we discussed above, the information contained in the *Handbook* does not support a finding that the positions within the market research analysts occupational category are specialty occupation. Counsel further states the Beneficiary in that case, like the Beneficiary of this case, had a bachelor's degree in business administration with courses in marketing. However, the test to establish a position as a specialty occupation is not the education or experience of a proposed beneficiary, but whether the position itself requires at least a bachelor's degree in a specific specialty, or its equivalent. Therefore, we find counsel's reliance on *Unical Aviation, Inc. v. INS* is misplaced.

Finally, the Petitioner also cites *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985 (S.D. Ohio 2012) as relevant to this matter. The employer in that case sought to hire an individual for a position it designated as market research analyst. Counsel references the case for the proposition that the degree need not be in a "single academic discipline."

As we discussed earlier, provided the specialties are closely related, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, would not meet the statutory requirement that the degree be "in the specific specialty (or its equivalent)," unless the Petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

In any event, the Petitioner has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*.⁸ 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. It is important to note that in a subsequent case that was reviewed in the same jurisdiction, the court agreed with our analysis of *Residential Fin. Corp.* See *Health Carousel, LLC v. U.S. Citizenship & Immigration Services*, No. 1:13-CV-23, 2014 WL 29591 (S.D. Ohio 2014).

It is incumbent upon the Petitioner to provide persuasive evidence that the proffered position qualifies as a specialty occupation under this criterion, notwithstanding the absence of *Handbook* support on the issue. 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.” Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

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

*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

⁸ 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.

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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 his October 14, 2014 letter, [REDACTED] VP of Business Development at [REDACTED] states that his company has 22 employees and that some of those employees are marketing analysts and consultants who have bachelor's or master's degrees in marketing or business with specialization in marketing or a closely related field. [REDACTED] further states that his company is in the business of developing music videos. We first note that the Petitioner does not provide sufficient evidence to demonstrate that [REDACTED] conducts business in the same industry as the Petitioner. We further find that [REDACTED] letter lacks specificity regarding what factors render the marketing specialist position he discusses a specialty occupation. For example, [REDACTED] does not provide the duties of a marketing specialist in the Petitioner's industry. Nor does he support his assertions with independent and objective evidence. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Furthermore, there is no evidence that the duties of the positions referenced in this letter parallel those of the proffered position.

Therefore, [REDACTED] letter is insufficient to demonstrate that 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.

We will next address the job advertisements submitted by the Petitioner. Upon review of the documents, we find that the Petitioner's reliance on the job advertisements is misplaced.

For the Petitioner to establish that an organization in its industry is also similar to it, it must demonstrate that the Petitioner and the organization share the same general characteristics. Without such evidence, documentation submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the Petitioner. When determining whether the Petitioner and the advertising organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the Petitioner to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

Upon review, we find that these advertisements do not demonstrate 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 (3) located in organizations that are similar to the Petitioner.⁹

⁹ See 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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For example, the Petitioner submitted advertisements from, among others, [REDACTED] (a communications and health information technology firm), [REDACTED] Inc. (a software consulting firm), [REDACTED] (an electric supplier), [REDACTED] (a roofing and sheet metal fabrication company), [REDACTED] (an agribusiness corporation), [REDACTED] (a staffing company), [REDACTED] (a nutritional research company), [REDACTED] (a financial services company), and [REDACTED] (a global information technology company). The Petitioner did not state which aspects or traits (if any) it shares with the advertising organizations. Without further information, the advertisements do not appear to involve organizations that operate in the Petitioner's industry that are also similar to it, and the Petitioner has not provided any probative evidence to suggest otherwise. The Petitioner did not supplement the record of proceeding to establish that the advertising organizations are similar to it.

While some of the advertisements appear to be from marketing consulting firms, the Petitioner did not state what characteristics the Petitioner shares with these companies other than offering services in market analysis. For example, the Petitioner stated that it employs two individuals without providing any information regarding its gross or net income. Some of these advertisements are, however, from larger companies such as [REDACTED] (global operations with offices in three continents); [REDACTED] (51-200 employees with focus the on food industry); [REDACTED] (51-200 employees); and [REDACTED] (global operations with worldwide property management services). It is unclear how similar these companies are to the Petitioner.

Moreover, these advertisements do not appear to involve parallel positions. For example, the positions with [REDACTED] require a bachelor's degree with three to five years of experience, or an equivalent amount of additional education; the position with [REDACTED] requires one to four years of experience; the position with [REDACTED] requires two to five years of experience in a web-focused environment and a minimum of two years of paid search experience; the position with [REDACTED] requires three to five years of experience with commodity trading, research and technical analysis; the position with [REDACTED] requires three to five years of experience, or an equivalent amount of additional education; and the position with [REDACTED] requires a minimum of a master's degree and six or more years of experience in financial services marketing. However, the Petitioner designated the proffered position on the LCA as a Level I position.¹⁰ As noted,

¹⁰ The "Prevailing Wage Determination Policy Guidance" issued by the U.S. Department of Labor (DOL) provides a description of the wage levels. A Level I wage rate is described by DOL 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

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individuals occupying positions at this wage level are expected to have only a basic understanding of the occupation and perform routine tasks that require limited, if any, exercise of judgment. The advertised positions appear to involve more senior positions than the proffered position. More importantly, the Petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to those of the proffered position.

Furthermore, we note that [REDACTED] would find acceptable a high school diploma and seven years of experience in lieu of a bachelor's degree, which undermines the Petitioner's assertion that the proffered position is a specialty occupation requiring at least a bachelor's degree in specific specialty.

As the documentation does not establish that the Petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, as the evidence does not establish that similar organizations in the same industry routinely require at least a bachelor's degree in a specific specialty, or its equivalent, for parallel positions, not every deficit of every job posting has been addressed.¹¹

Thus, based upon a complete review of the record, we find that the Petitioner has not established that a requirement for at least a bachelor's 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. 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*

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.

¹¹ It must be noted that even if all of the job postings indicated that a requirement of a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the Petitioner does not demonstrate what statistically valid inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). 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 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").

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 the instant case, the Petitioner did not sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of marketing specialist. Specifically, the record does not demonstrate how the market research analyst position described requires 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.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. The LCA indicates a wage level at a Level I (entry) wage, which is the lowest of four assignable wage levels.¹² Without further evidence, the evidence does not demonstrate that the proffered position is complex or unique as such a position falling under this occupational category would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage.¹³ For example, a Level IV (fully competent) position is designated by DOL for employees who “use advanced skills and diversified knowledge to solve unusual and complex problems.”¹⁴ The evidence of record does not establish that this position is significantly different from other positions in the occupational category such that it refutes the *Handbook's* information that a bachelor's degree in a specific specialty, or its equivalent is not required for the proffered position.

The Petitioner claims that the Beneficiary is well qualified for the position, and references her qualifications. However, the test to establish a position as a specialty occupation is not the education

¹² As previously mentioned, the wage-level of the proffered position indicates that (relative to other positions falling under this occupational category) the Beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

¹³ 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.

¹⁴ For additional information regarding wage levels as defined by DOL, 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.

or experience of a proposed beneficiary, but whether the position itself requires at least a bachelor's degree in a specific specialty, or its equivalent. The Petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

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

To merit approval of the petition under this criterion, the record must establish that a Petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. While a Petitioner may assert that a proffered position requires a specific degree, that statement alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the Petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty, or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388.

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. 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.

The Petitioner submitted several of its employees' and independent contractors' degrees, and the agreements it executed with them. We find that information contained in these documents is not sufficient to demonstrate the positions held by these individuals were the same as, or even similar to, the position proffered to the Beneficiary. We also finds that the varying salaries paid to these individuals and the master's degrees held by some of them raise questions as to whether the positions held by these individuals were in fact the same as the one proffered here. Moreover, the Petitioner's own assertions regarding the acceptability of a bachelor's degree in business

administration demonstrate that a bachelor's degree in a specific specialty, or the equivalent, is not required.

The Petitioner also submitted petition approval notices for other nonimmigrant workers. However, the Petitioner submitted insufficient evidence to demonstrate that the positions held by these individuals were the same as the proffered position. Furthermore, we are not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). If any of the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, they would constitute material and gross error on the part of the Director. It would be "absurd to suggest that [USCIS] or any agency must treat acknowledged errors as binding precedent." *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the Petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, we would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Therefore, the Petitioner has not demonstrated that it 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).

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

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

The Petitioner claims that the nature of the specific duties of the position in the context of its business operations is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. We reviewed the Petitioner's statements regarding the proffered position and its business operations. However, relative specialization and complexity have not been sufficiently

developed by the Petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent.

We further incorporate our earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a Level I position (of the lowest of four assignable wage-levels) relative to others within the occupational category. Without more, the position is one not likely distinguishable by relatively specialized and complex duties. That is, without further evidence, the Petitioner has not demonstrated that its proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a substantially higher prevailing wage.¹⁵

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

For the reasons related in the preceding discussion, the Petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied.

II. CONCLUSION AND ORDER

The petition will be denied and the appeal dismissed for the above stated reasons.¹⁶ 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.

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¹⁵ As previously discussed, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems" and requires a significantly higher wage

¹⁶ As the grounds discussed above are dispositive of the Petitioner's eligibility for the benefit sought in this matter, we will not address and will instead reserve our determination on the additional issues and deficiencies that we observe in the record of proceeding with regard to the approval of the H-1B petition.