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

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

MATTER OF K-P-, LLC

DATE: OCT. 6, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a lumber wood treatment business, seeks to employ the Beneficiary as a senior business development specialist (market research analyst) under the classification of 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, Vermont Service Center denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

I. PROCEDURAL BACKGROUND

In the Petition for a Nonimmigrant Worker (Form I-129), the Petitioner describes itself as a business engaged in the lumber wood treatment industry, with eight employees, established in [REDACTED]. In order to employ the Beneficiary in what it designates as a senior business development specialist (market research analyst) position, the Petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

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

The record of proceeding contains: (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 Notice of Appeal or Motion (Form I-290B) and supporting documentation. We reviewed the record in its entirety before issuing our decision.¹

For 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.

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

II. SPECIALTY OCCUPATION

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

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 of a specialty occupation.

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

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

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

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

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

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or

- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

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

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing “a degree requirement in a specific specialty” as “one that relates directly to the duties and responsibilities of a particular position”). Applying this standard, USCIS regularly approves H-1B petitions for qualified 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.

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B. The Proffered Position

As noted above, the Petitioner describes itself as a lumber wood treatment business established in [REDACTED] which employs eight people. In the Form I-129, the Petitioner indicated that it wishes to employ the Beneficiary as a senior business development specialist (market research analyst) on a full-time basis. With respect to the proffered position, the Petitioner states:

[The Beneficiary] will support the firm in executing industry and product search mandates and will exercise personal accountability for project success and client satisfaction. More specifically, he will analyze and seek information on our clients' to develop research plans, target profiles, project pipelines, qualifications analysis and customized competency vetting process.

Additionally, he will gather data on our competitors and analyze their operations, service and marketing policies, sale and pricing strategies, to ensure market competitiveness. Accordingly, in the performance of his duties, he will work to develop new techniques for conducting market and business research and generation in a cost-effective manner.

Furthermore, [the Beneficiary] will monitor market and industry specific trends and statistics to create market behavior projection matrix and predict effects market and industry trend changes will have on our industry. He will further manage our marketing and promotional efforts and will measure effectiveness of these efforts. [The Beneficiary] will also conduct follow up analysis to measure clients' satisfaction.

This will include conducting research on our clients and their own customers' opinions. Finally, he will prepare bi-weekly and monthly reports concerning his market analysis (including industry analysis and projects trends and opportunities), for presentation to the firm's president.

***Approximate time spent on these duties* 85%**

[The Beneficiary] will also provide insight, market intelligence and council regarding financial and other industry developments and will build granular knowledge base of industries and field-specific organizations structures, products, processes and human capital. He will thus enhance market position of firms as thought leader and raise profile of firm.

***Approximate time spent on these duties* 10%**

Miscellaneous related duties.

***Approximate time spent on these duties* 5%**

The Petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B. The Petitioner indicates that the proffered position corresponds to the occupational category “Market Research Analysts and Marketing Specialists”-SOC (ONET/OES Code) 13-1161, at a Level II (qualified) wage.

In response to the Director's RFE, the Petitioner provided a more detailed job description for the proffered position, including the percentage of time devoted to each duty. The Petitioner states:

[N]ote that the Beneficiary will generally be in charge of gathering and analyzing data on consumers and competitors. He will also study market conditions to examine potential sales of the company's very specialized set of products. His goal will be to assist the company market its products and open new markets. More specifically, the Beneficiary will exercise the following duties on a daily basis:

- (A) Analyze and seek information on clients to develop research plans, target profiles, project pipelines, qualifications analysis and customized competency vetting process: 10%
- (B) Gather data on competitors and analyze their operation, service and marketing policies, sale and pricing strategies, to ensure market competitiveness: 10%
- (C) Work to develop new techniques for conducting market and business research and generation in a cost-effective manner: 10%
- (D) Monitor market and industry specific trends and statistics to create market behavior projection matrix and predict effects market and industry trend changes will have on industry: 10%
- (E) Manage our marketing and promotional efforts and will measure the effectiveness of these efforts. Conduct follow up analysis to measure clients' satisfaction: 15%
- (F) Conduct research on clients and their customers' opinions. Prepare bi-weekly and monthly reports concerning market analysis (including industry analysis and projected trends and opportunities), for presentation to the firm's senior management: 10%
- (G) Provide insight, market intelligence and counsel regarding financial and other industry developments and build knowledge base of industries and field specific organization structures, products, processes and human capital: 15%
- (H) Enhance market position of firms as thought leader and raise profile of firm: 10%
- (I) Miscellaneous related duties: 10%

In the RFE response, the Petitioner described two different minimum requirements for the position. The petitioner initially states that the “position requires at a minimum a Bachelor's Degree or a foreign equivalent,” but later asserts that the “complexity of these duties require the Petitioner to seek candidates with at least a Bachelor's degree in Business Administration.”

C. Analysis

A baccalaureate or higher degree in a specific specialty, or its equivalent, is

normally the minimum requirement for entry into the particular position

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

USCIS recognizes the U.S. Department of Labor *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.² The Petitioner asserts in the LCA that the proffered position is located within the “Market Research Analysts” occupational category.

We reviewed the section of the *Handbook* covering “Market Research Analysts,” including the section entitled “How to Become a Market Research Analyst,” which states the following:

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

Education

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

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

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

Other Experience

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

² All 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.

Licenses, Certifications, and Registrations

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

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Market Research Analysts, available on the Internet at <http://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm> (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.³ Section 214(i)(1)(B) of the Act (emphasis added).

³ 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.

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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 147.⁴

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

The narrative of the *Handbook* further reports that some employees obtain professional certification to demonstrate a level of professional competency. It continues by outlining the requirements for market research analysts to achieve the Professional Researcher Certification (PRC), and states that candidates qualify based upon their experience and knowledge. According to the *Handbook*, the credential is granted by the Marketing Research Association to those who pass an exam and have at least three years of experience working in opinion and market research.⁵

⁴ 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.

In his letter submitted by the Petitioner as an expert opinion, [REDACTED] arrives at the same conclusion as that reached by DOL in the *Handbook* – that a bachelor's degree in business administration would provide adequate preparation to perform the duties of the proffered position. However, for the reasons discussed above and as confirmed by the court in *Royal Siam*, that requirement is not sufficient to classify a proffered position as a specialty occupation.

⁵ The Marketing Research Association website states that the association was founded in 1957 and is the leading and largest association of opinion and marketing research professions. For additional information, see <http://www.marketingresearch.org/information> (last visited Sept. 29, 2015).

We reviewed the Marketing Research Association's 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." The Market Research Association website provides the following information about the Professional Researcher Certification program:

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

* * *

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

* * *

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

Market Res. Ass'n, <http://marketingresearch.org/prc-faq> (last visited Sept. 29, 2015).

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

possessing a level of expertise/competence. Instead, the Market Research Association highlights the importance of professional experience and industry-related professional courses (through conferences, seminars, and webinars).

Thus, the *Handbook* and the Market Research Association website do not support the claim that the “Market Research Analysts” occupational category 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.

We further note that while the Petitioner requires a bachelor's degree for the proffered position, it does not indicate that a bachelor's degree in a specific specialty is required. If we accept, *arguendo*, the amended requirements, the Petitioner indicates that a bachelor's degree in business administration is acceptable. Again, the requirement of a bachelor's degree in any specialty or a bachelor's degree in business administration is inadequate to establish that a position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Assocs.*, 19 I&N Dec. at 558. In addition to demonstrating that a job requires the theoretical and practical application of a body of specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must also establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As explained above, USCIS interprets the supplemental degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) as requiring a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, or a degree in any discipline 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 139, 147 (1st Cir. 2007).

We will turn next to DOL's Occupational Information Network (O*NET OnLine), an alternative authoritative source cited by the Petitioner. We find that O*NET OnLine does not establish that the proffered position qualifies as a specialty occupation under the first criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A), either. In general, O*NET OnLine is not particularly useful in determining whether a baccalaureate degree in a specific specialty, or its equivalent, is a standard entry requirement for a given position, as O*NET OnLine's Job Zone designations make no mention of the specific field of study from which a degree must come. Again, we interpret the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proposed position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147. Furthermore, the Specialized Vocational Preparation (SVP) ratings, which are cited within O*Net OnLine's Job Zone designations, are meant to indicate only the total number of years of vocational preparation required for a particular position. The SVP ratings do not

describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require.

Finally, we note that the Petitioner cites to *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985 (S.D. Ohio 2012), for its proposition that “[t]he knowledge and not the title of the degree is what is important. Diplomas rarely come bearing occupation-specific majors. What is required is an occupation that requires highly specialized knowledge and a prospective employee who has attained the credentialing indicating possession of that knowledge.”

We agree with the aforementioned proposition that “[t]he knowledge and not the title of the degree is what is important.” As mentioned, since there must be a close correlation between the required “body of highly specialized knowledge” and the position, a minimum entry requirement of a degree in two 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). For the aforementioned reasons, however, the Petitioner has not met its burden to establish that the particular position offered in this matter requires a bachelor's or higher degree in a specific specialty, or its equivalent, directly related to its duties in order to perform those tasks.

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*.⁶ 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).

In the instant case, the Petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the Petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

⁶ 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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The requirement of a baccalaureate or higher degree in a specific specialty, or its equivalent, is common to the industry in parallel positions among similar organizations

Next, we will review the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a Petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common for positions that are identifiable as being (1) in the Petitioner's industry, (2) parallel to the proffered position, and also (3) located in organizations that are similar to the Petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As previously discussed, the Petitioner has not established that its proffered position is one for which the *Handbook* (or other independent, authoritative source) reports a standard industry-wide requirement for at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter.

The Petitioner further submitted copies of job advertisements in support of the assertion that the degree requirement is common to its industry in parallel positions among similar organizations. However, upon review of the documents, we find that the Petitioner's reliance on the job announcements is misplaced.

In the Form I-129 petition, the Petitioner states that it is a lumber wood treatment business, established in [REDACTED] with eight employees. The Petitioner states that it has annual gross revenue of \$516,508 and a net annual income of \$68,779. The Petitioner designated its business operations under the North American Industry Classification System (NAICS) code 32199, which corresponds to "All Other Wood Product Manufacturing."⁷

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.

⁷ According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity and each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last visited Sept. 29, 2015).

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We will briefly note that, without more, the job postings do not appear to be from organizations within the Petitioner's industry that are also similar to the Petitioner.⁸ 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.

More specifically, the advertisements submitted with the initial petitioner include, among others, positions with USIC, a company conducting business in the energy, utilities, gas, and electric industry; [REDACTED], an independent sales organization in the payment processing industry; [REDACTED], a provider of tenant based commercial real estate services; [REDACTED], an [REDACTED] company delivering mobile and cloud based computing services; [REDACTED], an engineering and consulting services provider in the automotive and aerospace industries; [REDACTED], a legal staffing company; [REDACTED], a private law firm; and [REDACTED], a provider of financial and banking services. The Petitioner also submitted additional job advertisements in response to the RFE, from, among others, [REDACTED], a publically traded business in the crude oil industry; [REDACTED], an international law firm with over 1,000 attorneys; [REDACTED], the creator of major greeting card lines found in retail stores worldwide, which generates over \$1.9 billion in annual revenue; [REDACTED], a company providing solutions for local, regional, and national infrastructure projects; and [REDACTED], an information technology consulting company. Without further information, these advertisements do not appear to involve organizations that conduct business in the Petitioner's industry and that are also similar to it.

Further, the Petitioner has not established that the advertisements involve parallel positions. For example, the position with [REDACTED] requires "5 to 8 years of experience." The posting from [REDACTED] specifies "10+ years' experience in business development" while the posting from [REDACTED] specifies "4 to 8 years of experience," and the posting from [REDACTED] specifies "5-10 years of business development, marketing and events experience." As previously discussed, the Petitioner designated the proffered position on the LCA as a Level II (qualified) position relative to others within the occupation.⁹ The advertised positions appear to involve more senior positions than

⁸ Moreover, the petitioner did not provide any independent evidence of how representative the job postings are of the particular advertising employers' recruiting history for the type of job advertised. As the advertisements are only solicitations for hire, they are not evidence of the actual hiring practices of these employers.

⁹ 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. The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level II wage rate is described as follows:

Level II (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that

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the proffered position. More importantly, the Petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions parallel those of the proffered position.

In addition, some job postings do not indicate that a bachelor's degree in a directly related specific specialty is required. For example, the postings from [REDACTED] and [REDACTED] specify a four year degree, but do not require that such a degree be in a specific field.

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.¹⁰ 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.

The Petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the Petitioner's industry in positions that are (1) in the petitioner's industry, (2) parallel to the proffered position, and also (3) located in organizations that are similar to the petitioner. For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

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

are generally required as described in the O*NET Job Zones.

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.

¹⁰ Even if all of the job postings indicated that a bachelor's degree in a specific specialty, or its equivalent, is common to the industry in parallel positions among similar organizations (which they do not), the Petitioner does not demonstrate what inferences, if any, can be drawn from these advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995).

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

Although the Petitioner does not assert that the proffered position would meet this prong, we have reviewed the record in its entirety, including evidence regarding the Petitioner's operations (incorporation documents, lease agreements, business plan, quarterly and annual federal tax returns, bank statements, and W-2 and payroll information), and we find that the description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record also lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions within the occupational category that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

Furthermore, the LCA provides a Level II wage-level, which is the second-lowest of the four assignable wage levels. This wage-level indicates that the Beneficiary is only required to perform moderately complex tasks that require only limited judgment. 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.¹¹ 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."

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. However, the test to establish a position as a specialty occupation is not the education or experience of a proposed Beneficiary, but whether the position itself requires at least a bachelor's degree in a specific specialty, or its equivalent. The Petitioner did not establish that its particular position is so complex or unique that it can only be performed by an individual with at least a bachelor's degree in a specific specialty, or its equivalent. Therefore, 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

¹¹ The issue here is that the Petitioner's designation of this position as a Level II 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 II wage-designation does not preclude a proffered position from classification as a specialty occupation. In certain occupations such a 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.

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

To merit approval of the petition under this criterion, the record must establish that a Petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. While a Petitioner may assert that a proffered position requires a specific degree, that statement alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a Petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the Petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty, or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. In other words, if a Petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent, to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

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

In response to the Director's RFE, the Petitioner states that it "has not yet employed any other individual in this position nor publicized this position." As such, the Petitioner has not asserted that it has a history of recruiting and hiring only persons with at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Additionally, we have reviewed the record and find no evidence that the Petitioner normally requires a baccalaureate or higher degree in a specific specialty, or its equivalent, for the proffered position. Therefore, the Petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

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

The Petitioner asserts “that a considerable amount of work related skill, knowledge or experience is also needed for this job and the specific duties assigned to the “Senior Business Development Specialist” are quite specialized.” The Petitioner further contends that the proliferation of bachelor degree programs in business administration “is a reflection of the growing complexity of the field as well as an indication of how important Business Development Specialists are in business growth.”

Upon review of the record of the proceeding, we find that the Petitioner has not provided sufficient evidence to satisfy this criterion of the regulations. In the instant case, 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 II position 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 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 substantially higher prevailing wage.¹²

The Petitioner has submitted insufficient evidence to satisfy this criterion of the regulations. We, therefore, conclude that the Petitioner did not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Finally, we are not persuaded by the case law the Petitioner cites on appeal. In *Tapis Int'l v. INS*, 94 F. Supp. 2d 172 (D. Mass. 2000) the U.S. district court found that while the former Immigration and Naturalization Service (INS) was reasonable in requiring a bachelor's degree in a specific field, it abused its discretion by ignoring the portion of the regulations that allows for the equivalent of a specialized baccalaureate degree. According to the U.S. district court, INS's interpretation was not reasonable because then H-1B visas would only be available in fields where a specific degree was offered, ignoring the statutory definition allowing for “various combinations of academic and experience based training.” *Tapis Int'l v. INS*, 94 F. Supp. 2d at 176. The court elaborated that “[i]n

¹² 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.

fields where no specifically tailored baccalaureate program exists, the only possible way to achieve something equivalent is by studying a related field (or fields) and then obtaining specialized experience.” *Id.* at 177.

We agree with the district court judge in *Tapis Int'l v. INS*, that in satisfying the specialty occupation requirements, both the Act and the regulations require a bachelor's degree in a specific specialty or its equivalent, and that this language indicates that the degree does not have to be a degree in a single specific specialty. Moreover, we also agree that, if the requirements to perform the duties and job responsibilities of a proffered position are a combination of a general bachelor's degree and experience such that the standards at both section 214(i)(1)(A) and (B) of the Act have been satisfied, then the proffered position may qualify as a specialty occupation. We do not find, however, that the U.S. district court is stating that any position can qualify as a specialty occupation based solely on the claimed requirements of a petitioner.

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

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

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

Second, in promulgating the H-1B regulations, the former INS made clear that the definition of the term “specialty occupation” could not be expanded “to include those occupations which did not require a bachelor's degree in the specific specialty.” 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991). More specifically, in responding to comments that “the definition of specialty occupation was too

severe and would exclude certain occupations from classification as specialty occupations,” the former INS stated that “[t]he definition of specialty occupation contained in the statute contains this requirement [for a bachelor's degree in the specific specialty or its equivalent]” and, therefore, “may not be amended in the final rule.” *Id.*

The Petitioner also cites *Augut, Inc. v. Tabor*, 719 F. Supp. 1158 (D. Mass. 1989), for the proposition that Immigration and Naturalization Service (INS, now USCIS), had not used an absolute degree requirement in applying the “profession” standard at 8 U.S.C. § 1101(a)(32) for determining the merits of an 8 U.S.C. § 1153(a)(3) third-preference visa petition. That proposition is not relevant here, because the H-1B specialty occupation statutes and regulations, not in existence when INS denied the *Augut, Inc.* third-preference petition, mandate not just a baccalaureate or higher degree, or its equivalent, but a degree “in the specific specialty.” Section 214(i)(1) of the Act; *see also* 8 C.F.R. § 214.2(h)(4)(ii).

In any event, the Petitioner has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Tapis Int'l v. INS* or *Augut, Inc. v. Tabor*. 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.

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.

III. CONCLUSION AND ORDER

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.¹³

ORDER: The appeal is dismissed.

Cite as *Matter of K-P-, LLC*, ID# 13865 (AAO Oct. 6, 2015)

¹³ Since the identified bases for denial are dispositive of the Petitioner's appeal, we will not address other grounds of ineligibility we observe in the record of proceeding.