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

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

MATTER OF S-B-C-, LLC

DATE: OCT. 7, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a beverage distributor, seeks to employ the Beneficiary as a market research analyst and 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, 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 distributor of fine wines, spirits, beers, bottled water and other beverages, with 234 employees, established in [REDACTED]. The Petitioner states that it wishes to employ the Beneficiary in what it designates as a market research analyst position.

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. SPECIALITY 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 aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, directly related to the duties and responsibilities of the particular position; fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer’s self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the

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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

As noted above, the Petitioner describes itself as a distributor of fine wines, spirits, beers, bottled water and other beverages, employing 234 individuals. In the Form I-129, the Petitioner indicated that it wishes to employ the Beneficiary as a market research analyst on a part-time basis of 30 hours per week. With respect to the proffered position, the Petitioner states that the market research analyst “will be responsible for planning, managing and implementing marketing and brand development activities for [REDACTED] beverage portfolio. Her specific duties will include:”²

- Formulate and develop [REDACTED] marketing and brand development policies, strategies and operations in order to generate public interest in the company and its products.
- Develop and manage programs to educate U.S. consumers on [REDACTED] products and attributes; develop media and special events promotions, including tastings and seminars; represent [REDACTED] at promotional events.
- Manage social media activities and operations; utilize social media internet marketing, e-mail marketing and event planning to increase product and brand recognition and consumer base.
- Direct communications of marketing and brand development plans to sales teams; ensure that brand advertising materials are strategically distributed in account territories.
- Build and manage business relationships with key accounts in the U.S.; identify new target accounts and industry opportunities; establish and maintain client relationships with management and executives in the beverage industry.
- Analyze and evaluate regional brand information and category performance data, consumer dynamics, trade channel structure, consumption trends, economic influences, regional distribution networks, brand portfolio and brand positioning; draft brand strategies and market analysis reports.

The Petitioner also states that “[t]he qualifications for this position consist of a bachelor’s degree in marketing, marketing management, business administration, or a related field.”

The Petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The Petitioner states that the proffered position corresponds to the occupational category “Market Research Analysts and Marketing Specialists”-SOC (ONET/OES) Code 13-1161, at a Level I (entry level) wage.³

² It appears that the Petitioner, [REDACTED] is an affiliate of a larger conglomerate, known as [REDACTED]. In the support letter, the Petitioner states that “[REDACTED] and its affiliated companies (collectively, “[REDACTED]) operates in 14 states and the [REDACTED] and employs approximately 7,000 individuals nationwide.”

³ We note that the duties presented by the petitioner encompass duties described in several occupational categories in the *Handbook*, including “Advertising and Promotions Manager”-SOC (ONET/OES) Code 11-2011. See <http://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm#tab-1> (last visited Sept. 25,

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

	% of time spent
<ul style="list-style-type: none">• Formulating and developing [the Petitioner's] marketing and brand development policies, strategies and operations in order to generate public interest in the company and its products.• Developing and managing programs to educate U.S. consumers on [the Petitioner's] products and attributes.	30%
<ul style="list-style-type: none">• Developing media and special events promotions, including tastings and seminars.• Representing [the Petitioner] at promotional events.• Managing social media activities and operations.• Utilizing social media internet marketing, e-mail marketing and event planning to increase product and brand recognition and consumer base.	10%
<ul style="list-style-type: none">• Directing communications of marketing and brand development plans to sales teams.• Ensuring that brand advertising materials are strategically distributed in account territories.	10%
<ul style="list-style-type: none">• Building and managing business relationships with key accounts in the U.S.• Identifying new target accounts and industry opportunities.• Establishing and maintaining client relationships with management and executives in the beverage industry.	10%
<ul style="list-style-type: none">• Analyzing and evaluating regional brand information and category performance data, consumer dynamics, trade channel structure, consumption trends, economic influences, regional distribution networks, brand portfolio	30%

2015). Notably, the prevailing wage for advertising and promotions managers at Level I in [REDACTED], New York is \$67,828.80 per year, which is higher than the salary for the proffered position at \$44,824 per year. See [http://www.flcdatacenter.com/OesQuickResults.aspx?code=11-2011&\[REDACTED\]&year=14&source=1](http://www.flcdatacenter.com/OesQuickResults.aspx?code=11-2011&[REDACTED]&year=14&source=1) (last visited Sept. 25, 2015).

According to the Department of Labor's "Prevailing Wage Determination Policy Guidance," when a proffered position is a combination of occupations, the petitioner should select the relevant occupational code for the highest paying occupational category. 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.

and brand positioning.	
• Drafting brand strategies and market analysis reports.	10%

The Petitioner reiterates that in order to perform the duties listed, “the incumbent must possess theoretical understanding of, and practical skills in, complex business concepts and techniques that can only be gained through the completion of at least a Bachelor’s degree in Marketing, Marketing Management, Business Administration, or a related field.”

C. Analysis

As a preliminary matter, we find that the Petitioner’s claim that a bachelor’s degree in “business administration” is a sufficient minimum requirement for entry into the proffered position is inadequate to establish that the proposed 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 Associates*, 19 I&N Dec. 558 (Comm’r 1988).

To establish that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor’s or higher degree in a specialized field of study or its equivalent. As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. 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 139, 147 (1st Cir. 2007).⁴

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.*

Again, the Petitioner in this matter claims that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree, i.e., a bachelor's degree in business administration. Without more, this assertion alone indicates that the proffered position is not in fact a specialty occupation. The director's decision must therefore be affirmed and the appeal dismissed on this basis alone.

Moreover, it also cannot be found that the proffered position is a specialty occupation because the Petitioner has not satisfied any of the supplemental, additional criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). These criteria are discussed in detail below.

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

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

USCIS recognizes the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁵ The Petitioner asserts in the LCA that the proffered position falls under the occupational category "Market Research Analysts."

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.

⁵ 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.

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

Other Experience

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

Licenses, Certifications, and Registrations

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

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> (last visited Sept. 25, 2015).

Here, although the *Handbook* indicates that a bachelor's or higher degree is required, it also indicates that baccalaureate degrees in various fields are acceptable for entry into the occupation. To demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specific specialty, or its equivalent. USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. In addition to recognizing degrees in disparate fields, i.e., social science and computer science as acceptable for entry into this field, the *Handbook* also states that "others have a background in business administration." As noted above, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147. Therefore, the *Handbook's* recognition that a general, non-specialty "background" in business administration is sufficient for entry into the occupation strongly suggests that a bachelor's degree *in a specific specialty* is not a standard, minimum entry requirement for this occupation. Accordingly, as the *Handbook* indicates that working as a market research analyst does not normally require at least a bachelor's degree in a specific specialty or its equivalent for entry into the occupation, it does not support the particular position proffered here as being a specialty occupation.

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In response to the Director's RFE, the Petitioner submits a letter from [REDACTED] Ph.D., Associate Dean-Academic Affairs, School of Business, [REDACTED] to refute the information found in the *Handbook*. Dean [REDACTED] states, among other things, that "[e]mployers with openings for Market Research Analysts and similar professional positions have recruited at our campus, always seeking graduates with the minimum of a Bachelor's Degree." This statement does not support the proposition that the position of market research analyst would be considered to be a specialty occupation; rather it indicates that the general position of market research analyst requires a minimum of a bachelor's degree, without identifying the need for any specific field of study.

Regarding the specific position here proffered, Dean [REDACTED] addresses the requirements of a market research analyst within the Petitioner's particular industry, stating:

It is standard for a company such as [the Petitioner] to hire a Market Research Analyst and require that individual to have attained at least a Bachelor's Degree in Marketing, Business Administration, or a related area. It is typical for a national distributor of alcoholic and nonalcoholic beverages that seeks to maintain its leading role in the competitive market to hire a Market Research Analyst or someone in a similar professional position, and require the minimum attainment of a Bachelor's Degree in Marketing, Business Administration, or a related area for the position.

We find no indication in the record of proceeding that Dean [REDACTED] possesses knowledge of the proffered position beyond the generalized job description the Petitioner has presented to USCIS. For example, he did not discuss the duties of the proffered position in any meaningful detail; to the contrary, he listed the duties in the same bullet-pointed fashion as provided in the Petitioner's letter. Thus, the extent to which he analyzed these duties prior to formulating this letter is not apparent. Further, Dean [REDACTED] does not reference or discuss any studies, surveys, industry publications, authoritative publications, or other sources of empirical information which he may have consulted in the course of whatever evaluative process he may have followed. Dean [REDACTED] provides a brief, general description of the Petitioner's business activities; however, 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 no evidence that he has any in-depth knowledge of the Petitioner's business operations gained through such means as visiting the Petitioner's premises, observing the Petitioner's employees, interviewing them about the nature of their work, or documenting the knowledge that they apply on the job. His 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 the conclusion about the educational requirements for the particular position here at issue. Moreover, he did not support his conclusions by providing copies or citations of any research material used. He has not provided sufficient facts that would support the assertion that the proffered position requires at least a bachelor's degree in a specific specialty, or its equivalent.

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Furthermore, there is no indication that Dean [REDACTED] considered, or was even aware of, the fact that the Petitioner characterized the proffered position as a low, entry-level position relative to others within the “Market Research Analysts and Marketing Specialists” occupational category. As will be discussed below, DOL guidance indicates that a Level I position should be considered for positions in which the employee will serve as a research fellow, a worker in training, or an intern. Given Dean [REDACTED]’ comments regarding the position’s “complex responsibilities” and the “highly specialized knowledge” involved, it seems likely he would have found this information useful. We consider this a significant omission, as it indicates an incomplete review of the proffered position.

Moreover, as noted previously, the assertion that the proffered position can be filled by an individual with a bachelor’s degree in “Business Administration” is inadequate to establish that the proposed 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 Associates*, 19 I&N Dec. 558 (Comm’r 1988). Dean [REDACTED] therefore arrives at a conclusion similar to the one made by DOL in the *Handbook*, that a bachelor’s degree in a specific specialty, or its equivalent, is not required to perform the duties of the proffered position. His letter therefore affirms our finding that the proffered position is not a specialty occupation.⁶

We may, in our discretion, use advisory opinion statements submitted by the Petitioner as expert testimony. *Matter of Caron International*, 19 I&N Dec. 791 (Comm’r 1988). 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. *Id.*

On appeal, the Petitioner cites to a recent district court case, *Raj and Company v. U.S. Citizenship and Immigration Services*, 85 F. Supp. 3d 1241(W.D. Wash. 2015), and claims that it is relevant here.⁷ In the district court case, the employer designated the position as a “Marketing Analyst & Specialist” position.⁸ We reviewed the decision; however, there is no indication that aspects of the work such as the duties and responsibilities, level of judgment, complexity of the job duties, supervisory duties, independent judgment required or the amount of supervision received are analogous to the proffered position here.⁹ Accordingly, aside from the claimed job title, there is no indication that the positions are similar.

⁶ For reasons of efficiency, we incorporate these findings into our analysis of each criterion below.

⁷ 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.

⁸ It is important to note and distinguish within the court’s decision that “Marketing Analyst & Specialist” refers to the employer’s particular position, whereas “Market Research Analysts” refers to a general occupational category.

⁹ We note that the service center director’s decision was not appealed to our office. Based on the district court’s findings

Further, in *Raj*, the court stated that a specialty occupation requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent. The court confirmed that this issue is well-settled in case law and with USCIS's reasonable interpretation of the regulatory framework. In the decision, the court noted that "permitting an occupation to qualify simply by requiring a generalized bachelor degree would run contrary to congressional intent to provide a visa program for specialized, as opposed to merely educated, workers." The court stated that the regulatory provisions do not restrict qualifying occupations to those for which there exists a single, specifically tailored and titled degree program; but rather, the statute and regulations contain an equivalency provision.¹⁰

In *Raj*, the court concluded that the employer met the first criterion. We must note, however, that the court stated that "[t]he first regulatory criterion requires the agency to examine the generic position requirements of a market research analyst in order to determine whether a specific bachelor's degree or its equivalent is a minimum requirement for entry into the profession." Thus, the decision misstates the regulatory requirement. That is, the first criterion requires the Petitioner to establish that a baccalaureate or higher degree (in a specific specialty) or its equivalent is normally the minimum requirement for entry into the particular position.

Consequently, if the court meant to suggest that any position classified under the occupational category "Market Research Analysts" would, as it stated, "come within the first qualifying criteria" – we must disagree.¹¹ The occupational category designated by a Petitioner is considered as an aspect in establishing the general tasks and responsibilities of a proffered position, and USCIS regularly reviews the *Handbook* on the duties and educational requirements of the wide variety of occupations that it addresses. However, to satisfy the first criterion, the burden of proof remains on the Petitioner to submit sufficient evidence to support a finding that its particular position would normally have a minimum, specialty degree requirement or its equivalent for entry. That is, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title or designated occupational category. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the beneficiary, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000).

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 in our *de novo* review of the matter.

¹⁰ We agree with the court that a specialty occupation is one that requires the attainment of a bachelor's or higher degree in a specific specialty or its equivalent. We further note that a petitioner must also demonstrate that the position requires the theoretical and practical application of a body of highly specialized knowledge in accordance with section 214(i)(1)(B) of the Act and 8 C.F.R. § 214.2(h)(4)(ii), and satisfy one of the four criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

¹¹ In *Raj*, the court quoted a brief excerpt from the *Handbook*; however, the quotation is from the 2012-2013 edition rather than the current 2014-2015 edition (which contains several revisions). Further, we observe that the court did not address the section of the *Handbook* indicating that there are no specific degree requirements to obtain the Professional Researcher Certification credential – and therefore to work as a market research analyst.

Nevertheless, it is important to note that the court in *Raj* determined that the evidence in the record demonstrated that the particular position proffered required a bachelor's degree in market research or its equivalent as a minimum for entry. Further, the court noted that "[t]he patently specialized nature of the position sets it apart from those that merely require a generic degree." The position in *Raj* can, therefore, be distinguished from the instant position. Here, the duties and requirements of the position as described in the record of proceeding do not indicate that this particular position proffered by the petitioner is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

On appeal, the Petitioner also cites to *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985 (S.D. Ohio 2012) as relevant here. As in *Raj*, the H-1B petition in *Residential Fin. Corp.* was never appealed to our office through the available administrative process. Nevertheless we note that the district judge's decision in *Residential Fin. Corp.* appears to have been based largely on the many factual errors made by the service center in its decision denying the petition. Had we been afforded the opportunity to do so, based on that court's findings, we may very well have remanded the matter to the service center for a new decision for many of the same reasons articulated by the district court if these errors could not have been remedied by our *de novo* review of the matter. 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).

*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)).

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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.

There are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement. We note that the Petitioner does submit letters from three beverage distribution companies which purport to be in the Petitioner's industry. The letters are from [REDACTED] and [REDACTED]. The letters from [REDACTED] and [REDACTED] state that each company requires individuals employed in market research analyst positions, or related positions, to possess at a minimum a Bachelor's degree in Marketing, Marketing Management, Business Administration, or a related field. The letter from [REDACTED] states that it requires individuals employed in market research analyst or comparable positions to have completed a "four-year university program at the Bachelor's degree level in a business discipline, such as Marketing or Finance." Each company also provided educational information for an individual who is currently employed in a market research analyst or comparable position with their company.

We find that these letters are not dispositive that 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. Specifically, these three companies, according to their letterhead and publically available information, are all affiliates of the [REDACTED], the conglomerate that owns the Petitioner. As these companies are owned by the same parent as the Petitioner, analysis of their hiring requirements is not appropriate under this criteria and their letters will be properly addressed under the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Therefore, 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.

To support its assertion that the proffered position is so unique and complex that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its

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equivalent, the Petitioner once again relies on the letter from Dean [REDACTED]. We reviewed the record in its entirety and find that the Petitioner has not provided sufficient documentation to support a claim that it satisfies the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Specifically, even though the Petitioner claims that the proffered position's duties are so complex and unique that a bachelor's degree is required, the Petitioner does not demonstrate how the market research analyst duties described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree *in a specific specialty* or its equivalent is required to perform them. For instance, the Petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it claims are so complex and unique.

While a few courses in marketing may be beneficial in performing certain duties of a market research analyst, the Petitioner has not demonstrated how an established curriculum of such courses leading to a baccalaureate or higher degree *in a specific specialty* or its equivalent is required to perform the duties of the particular position here proffered.

Therefore, the evidence of record does not establish that this position is significantly different from other market research analyst positions such that it refutes the *Handbook's* information to the effect that there is a spectrum of preferred degrees acceptable for market research analyst positions, including degrees not in a specific specialty. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than similar positions within the same occupational category that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent. Consequently, as the Petitioner does not demonstrate how the proffered position of market research analyst is so complex or unique relative to other market research analyst positions that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be concluded that the Petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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 record of proceeding does not indicate that the

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

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship

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 Again, 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

are indicators that a Level I wage should be considered.

U.S. Dep’t of Labor, Emp’t & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

Thus, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that she would be closely supervised; that her work would be closely monitored and reviewed for accuracy; and that she would receive specific instructions on required tasks and expected results. DOL guidance indicates that a Level I designation should be considered for positions in which the employee will serve as a research fellow, worker in training, or an intern.

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.

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 a history of hiring only degreed individuals for the proffered position. The Petitioner asserts that its position of Sales and Marketing Coordinator is "substantially similar" to the proffered position of market research analyst, and that the hiring history for the Sales and Marketing Coordinator can thereby be used as evidence that the Petitioner 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. In support of this claim the Petitioner submits a description of the Sales and Marketing Coordinator position and the educational credentials and employment information for two individuals who have held the Sales and Marketing Coordinator position at the Petitioner. However, the regulation requires that the Petitioner establish that it normally requires a baccalaureate or higher degree in a specific specialty, or its equivalent, for *the* position, not for positions the Petitioner may deem to be similar. Additionally, we note that the

two individuals who have held the Sales and Marketing Coordinator position are paid significantly more than the wages offered to the Beneficiary in the proffered position.¹⁵ The difference in the wages indicates that the position of Sales and Marketing Coordinator and Market Research Analyst are not in fact similar positions with substantially similar duties. Furthermore, as noted by the Director, one of the individuals has a bachelor's degree in finance and the Petitioner has not shown how such a degree would fit within the purported requirements for the proffered position, and one individual has a Bachelor of Business Administration, which is further evidence that a degree in a specific specialty is not required.

As noted previously, the Petitioner also submitted letters from three affiliate companies discussing their purported minimum requirements for market research analyst positions. We note that each letter states that the companies in question would accept an applicant with a bachelor's degree in business or business administration. Again, a petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

Moreover, the Petitioner has not provided sufficient evidence to substantiate the claim that these companies each require a bachelor's degree in a specific specialty, or the equivalent, for the position. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Furthermore, as noted by the director, providing the credentials for one individual for each of three companies does not establish a pattern of hiring within each company, nor does it serve as a representative sample across the Petitioner's industry as a whole, from which we can draw the conclusion that such a requirement is in fact common.¹⁶

¹⁵ The two individuals' employment records submitted by the petitioner show that they are paid \$27.56 per hour and \$37.14 per hour, while the proffered position's salary is \$21.55 per hour.

¹⁶ Although the size of the relevant study population is unknown, the petitioner does not demonstrate what statistically valid inferences, if any, can be drawn from the letters with regard to 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").

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

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.

Upon review of the record of the proceeding, we find that the Petitioner has not provided probative 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 I position (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 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.¹⁷

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).

The Petitioner's reference to an unpublished decision in which we determined that the position of market research analyst proffered in that matter qualified as a specialty occupation is noted. However, the Petitioner has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that our

¹⁷ 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.

precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

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. BENEFICIARY QUALIFICATIONS

We do not need to examine the issue of the Beneficiary's qualifications, because the Petitioner has not provided sufficient evidence to demonstrate that the proffered position is a specialty occupation. In other words, the Beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.

As discussed in this decision, the Petitioner did not submit sufficient evidence regarding the proffered position to determine whether it will require a baccalaureate or higher degree in a specific specialty or its equivalent. Absent this determination that a baccalaureate or higher degree in a specific specialty or its equivalent is required to perform the duties of the proffered position, it also cannot be determined whether the Beneficiary possesses that degree or its equivalent.

IV. 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.¹⁸

ORDER: The appeal is dismissed.

Cite as *Matter of S-B-C-, LLC*, ID# 13672 (AAO Oct. 7, 2015)

¹⁸ 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.