



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

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

MATTER OF R-, LLC

DATE: SEPT. 21, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a manufacturer of sports equipment, seeks to employ the Beneficiary as a market research analyst and to classify her as a nonimmigrant worker in a specialty occupation. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(H)(i)(b), 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

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

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

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

II. THE PROFFERED POSITION

The Petitioner identified the proffered position as a "Market Research Analyst" on the Form I-129, and attested on the required Labor Condition Application (LCA) that the occupational classification

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

(b)(6)

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for the position is “Market Research Analysts and Marketing Specialists,” SOC (ONET/OES) Code 13-1161, at a Level I wage.

In the Petitioner’s letter submitted in support of the petition, dated March 24, 2014, the Petitioner stated that it “is a wholesale manufacturer of outdoor sports equipment” and that it produces “specialty sports equipment such as golf practice nets, driving practice mats, and pop-up net goals as well as a clothing line.” The Petitioner described the proffered position as follows:

The Market Research Analyst for [the Petitioner] will be responsible for creating an annual marketing proposal and budget based on market research and other collected data. She will also be responsible for helping to develop the company’s marketing and advertising strategy at the level of print, internet, television and radio and evaluating its effectiveness. The Marketing Research Analyst will work with [redacted] and on-line retail teams as well as with [redacted] and internal warehousing to ensure the effectiveness of marketing and distribution methods. She will provide marketing support to [the Petitioner’s] trade show team and marketing assistance to vendors and consultants. The Marketing Research Analyst will gather data through the customer service department to measure and assess customer satisfaction as well as customer demographics and needs. She will gather data on and analyze competing products and pricing as well as monitor trade literature and provide feedback.

In order to perform these duties, a qualified applicant must have at least a Bachelor’s degree in Marketing, Business, or a related field.

In response to the RFE, the Petitioner allocated the time spent on the duties of the proffered position as ten percent developing the Petitioner’s marketing and advertising strategy in print, Internet, Social Media, television, radio and tradeshow; ten percent developing tradeshow exhibitions, promotional and display materials; ten percent interfacing with [redacted] and internal warehousing; ten percent planning events; ten percent marketing assistance to vendors and consultants; five percent preparing annual marketing proposal; five percent preparing annual marketing budget; five percent evaluating effectiveness of marketing and advertising strategy; five percent interfacing with [redacted] and other online retail teams; five percent analyzing and evaluating distribution methods; and 24 percent of time on various other described duties.²

III. SPECIALTY OCCUPATION

A. Legal Framework

To meet its burden of proof, the Petitioner must establish that the employment it is offering to the Beneficiary meets the following statutory and regulatory requirements.

² The Petitioner did not include an allocation for one percent of the Beneficiary’s time.

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

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

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

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A)

should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

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

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

B. Analysis

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

We will first address the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). This criterion requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position. We recognize the Department of Labor’s (DOL)

Occupational Outlook Handbook (Handbook) as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.³ The Petitioner asserts on the Form I-129 that the proffered position is a market research analyst and attests on the LCA that the proffered position corresponds to SOC code and title 13-1161, Market Research Analysts and Marketing Specialists.

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

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

Education

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

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

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

Other Experience

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

U.S. Dep’t of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., “Market Research Analysts,” <http://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm#tab-4> (last visited Aug. 31, 2015).

³ All of the references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>. The excerpts of the *Handbook* regarding the duties and requirements of the referenced occupational category are hereby incorporated into the record of proceeding.

The *Handbook* does not state that a baccalaureate or higher degree in a specific specialty, or its equivalent is normally the minimum requirement for entry into the occupation. This passage of the *Handbook* reports that market research analysts have degrees and backgrounds in a wide-variety of disparate fields. The *Handbook* states that employees typically need a bachelor's degree in market research or a related field, but the *Handbook* continues by indicating that many market research analysts have degrees in fields such as statistics, math, or computer science. According to the *Handbook*, other market research analysts have a background in fields such as business administration, one of the social sciences, or communications. The *Handbook* notes that various courses are essential to this occupation, including statistics, research methods, and marketing. The *Handbook* states that courses in communications and social sciences (such as economics, psychology, and sociology) are also important.

In response to the RFE, the Petitioner asserts that its proffered position could not be performed effectively or adequately by an individual with a degree in statistics, math, computer science, social sciences or communications, and reiterates that the proffered position requires a degree in Marketing or Business. On appeal, the Petitioner asserts that the *Handbook's* statement that “[m]arket research analysts typically need a bachelor’s degree in market research or a related field,” while leaving open alternative avenues of entry into the profession by people with degree in allied disciplines, “does not undermine the proffered position’s status as a ‘specialty occupation’.”

We find that it is the acknowledgement in the *Handbook* that there are a variety of fields of study in disparate disciplines that enable an individual to perform the duties of a market research analyst that demonstrates that a market research analyst position does not normally require at least a bachelor’s degree in a specific specialty, or its equivalent, for entry into the occupation. In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum requirement of a bachelor’s of 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 sociology and math, for example, would not meet the statutory requirement that the degree be “in *the* specific specialty (or its equivalent),” unless the Petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added). Here, the Petitioner emphasizes that its proffered position requires a degree in either Marketing or Business to effectively perform the duties of the position. While this may be the case for the Petitioner’s position, the *Handbook* is not determinative in establishing that the occupational category of a market research analyst meets the statutory and regulatory provisions of a specialty occupation.

Moreover, the Petitioner’s emphasis that its proffered position requires a degree in either Marketing or Business suggests that a bachelor’s degree *in a specific specialty* is not normally the minimum entry requirement for this occupation. Although a general-purpose bachelor’s degree, such as a

degree in business, 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.

Here, the Petitioner appears to rely on the Beneficiary's credentials, a bachelor's degree in marketing and a master's degree in business administration in marketing management, to perform the proffered position. However, 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 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 Assocs.*, 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].").

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

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

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

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

When the *Handbook* does not support the proposition that a proffered position is one that meets the statutory and regulatory provisions of a specialty occupation, it is incumbent upon the Petitioner to provide persuasive evidence that the proffered position more likely than not satisfies this or one of the other three criteria, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the Petitioner's responsibility to provide probative evidence (e.g., documentation from other objective, authoritative sources) that supports a finding that the particular position in question qualifies as a specialty occupation.

As the *Handbook* reports that the knowledge required to perform the duties of a market research analyst may be attained with a bachelor's degree in a number of different fields of study, it does not support the proffered position as qualifying as a specialty occupation. Even if it did (which it does not), the record lacks sufficient evidence to support a finding that the particular position proffered here, an entry-level market research analyst position (as indicated on the LCA), would normally have such a minimum, specialty degree requirement or its equivalent. The duties and requirements of the position as described in the record of proceeding do not indicate that this particular position proffered by the Petitioner is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the Petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

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

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

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

Here and as already discussed, the Petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter. Also, there are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement.

The record does not include other authoritative evidence refuting the *Handbook's* report that an industry-wide standard of a bachelor's or higher degree in a specific specialty, or its equivalent, is standard for parallel positions. Upon a complete review of the record of proceeding, the record does not establish that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is (1) common to the Petitioner's industry (2) in parallel positions (3) among organizations similar to the Petitioner. Thus, for the reasons discussed above, the Petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

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

In support of its assertion that the proffered position qualifies as a specialty occupation, the Petitioner submitted various documents, including evidence regarding its business operations. For example, the Petitioner submitted its 2013 federal tax return, product brochures, and brief synopses of its company's products. However, upon review of the record of proceeding, the evidence does not credibly demonstrate that the duties the Beneficiary will be responsible for or perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty, or its equivalent.

Specifically, the evidence does not demonstrate how the duties that collectively constitute the proffered position require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the Petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position.⁴ While a few related courses may be beneficial, or even required, in performing certain duties of the proffered position, the Petitioner has not demonstrated how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here. Although the Petitioner offers a conclusory opinion that the "level of product comprehension combined with the ability to gather, analyze and integrate customer feedback, to research sector opportunities and potential clients, to review and analyze industry data, to create Website content and monitor data" are associated with at least a bachelor's degree and specialized

⁴ The Petitioner when discussing the courses and educational background required to perform the duties of the proffered position, references the Beneficiary's credentials. Again, we point out that a Beneficiary's credentials do not establish a proffered position as a specialty occupation.

knowledge associated with a specialty in marketing, the Petitioner does not provide analysis of how these duties differ from those of any market research analyst, who has only a general bachelor's degree. That is, the Petitioner here does not discuss or offer any probative analysis of what particular aspects of its company products elevate the proffered position to one that is complex or unique.

Further, as was also noted above, the LCA submitted in support of the visa petition is approved for a wage Level I employee, an indication that the proffered position is an entry-level position for an employee who has only a basic understanding of the occupation.⁵ This does not support the proposition that the proffered position is so complex or unique relative to other positions in the same occupation that it can only be performed by a person with a specific bachelor's degree, especially as the *Handbook* suggests that some market research analyst positions do not require such a degree.⁶

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

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

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. To this end, USCIS reviews the Petitioner's past recruiting and hiring practices, information regarding

⁵ 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.

⁶ The issue here is that the Petitioner's designation of this position as a Level I, entry-level position undermines its claim that the position is particularly complex, specialized, or unique compared to other positions *within the same occupation*. Nevertheless, it is important to note that a Level I wage-designation does not preclude a proffered position from classification as a specialty occupation. In certain occupations (doctors or lawyers, for example), an entry-level position would still require a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor's degree in a specific specialty or its equivalent. That is, a position's wage level designation may be a consideration but is not a substitute for a determination of whether a proffered position meets the requirements of section 214(i)(1) of the Act.

employees who previously held the position, as well as any other documentation submitted by a Petitioner in support of this criterion of the regulations. The Petitioner noted in response to the RFE that this is a newly created position. Accordingly, USCIS cannot examine the Petitioner's past recruiting and hiring practices.

Nevertheless, we note that to merit approval of the petition under this criterion, the record must establish that a Petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. A Petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. Again, USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. According to the Court in *Defensor*, "To interpret the regulations any other way would lead to an absurd result." *Id.* at 388. If USCIS were constrained to recognize a specialty occupation merely because the Petitioner has an established practice of demanding certain educational requirements for the proffered position – and without consideration of how a bBeneficiary is to be specifically employed – then any alien with a bachelor's degree in specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.*

As the record of proceeding does not include probative evidence of the Petitioner's past recruiting and hiring practices for the proffered position, the Petitioner's normal practice regarding its requirements for the proffered position cannot be established. The record does not include evidence satisfying 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

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

Finally, the Petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent. Again, relative specialization and complexity have not been sufficiently developed by the Petitioner as an aspect of the proffered position. In other words, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than market research analyst positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent.

We have considered the Petitioner's information on its products and its indication that the Beneficiary's "degrees in Marketing and Business make her a perfect fit for this position." However, we do not find that the Petitioner has demonstrated with probative evidence that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Rather, as observed above, the Petitioner has not submitted probative evidence or analysis of why its products require a bachelor's degree in a specific specialty.

Upon review of the totality of the record, the Petitioner here has not met its burden and established that the particular position offered in this matter requires a bachelor's or higher degree in a specific specialty, or its equivalent, directly related to the duties it describes in order to perform those duties. We recognize that the Petitioner here desires an employee with a marketing or business background. However, the Petitioner does not substantiate that only a bachelor's degree in a specific specialty would provide the specialized knowledge to perform the duties it ascribes to the proffered position.

We again refer to our earlier comments and findings with regard to the implication of the Petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four assignable levels) wage. That is, the Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category, and hence one not likely distinguishable by relatively specialized and complex duties. Thus, it does not appear that the position is one with specialized and complex duties, as such a higher-level position would more likely or not, be classified as a Level III or Level IV position, requiring a significantly higher prevailing wage. Fundamentally, it appears that (1) the Petitioner previously claimed to DOL that the proffered position is a Level I, entry-level position to obtain a lower required wage; and (2) the Petitioner is now claiming to USCIS that the position is a higher-level and more complex position in order to support its claim that the position qualifies as a specialty occupation. The Petitioner cannot have it both ways. Either the position is more senior and complex (based on a comparison of the employer's job requirements to the standard occupational requirements) and thereby necessitates a higher required wage or it is an entry-level position for which the lower wage offered to the Beneficiary in this petition is acceptable. To permit otherwise would be directly contrary to the U.S. worker protection provisions contained in section 212(n)(1)(A) of the Act and its implementing regulations.

Upon review of the totality of the record, the Petitioner has not established that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. For the reasons discussed above, the evidence of record does not satisfy the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

IV. CONCLUSION

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

In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of R-, LLC*, ID# 13638 (AAO Sept. 21, 2015)