



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

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

MATTER OF F-H-, INC.

DATE: SEPT. 21, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a hospitality management firm, seeks to employ the Beneficiary as a marketing director 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 has 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 Notice of Appeal or Motion (Form I-290B), a brief, and additional documentation. We reviewed the record in its entirety before issuing our decision.<sup>1</sup>

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.

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

Also, in light of the Petitioner's references to the requirement that U.S. Citizenship and Immigration Services (USCIS) apply the "preponderance of the evidence" standard, we affirm that, in the exercise of our appellate review in this matter, as in all matters that come within our purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010).

(b)(6)

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## II. THE PROFFERED POSITION

The Petitioner identified the proffered position as a “Marketing Director” on the Form I-129, and attested on the required Labor Condition Application (LCA) that the occupational classification 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 hospitality management group, which manages full service Greek restaurants in [REDACTED] and [REDACTED]” The Petitioner identified the job duties of the position as follows:

- Evaluate economic and business trends to advise management and draft reports concerning potential marketing strategies[;]
- Formulate budgets connected with all new marketing and promotional initiatives[;]
- Review our financial statements in connection with each locations’ marketing campaigns to eliminate wasteful spending and advise [*sic*] on more profitable strategies[;]
- Maintain the monthly marketing budgets, including offsite events and charitable donations[;]
- Develop and manage relationships with vendors, clients, and industry contacts[; and]
- Measure the financial effectiveness and feasibility of our marketing programs and strategies.

[Bullet points added.]<sup>2</sup>

The Petitioner also stated: “[o]ur minimum prerequisite for the position of Marketing Director is a Bachelor’s degree in Finance, Business, or a related field.”

## 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.

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

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<sup>2</sup> In response to the RFE, the Petitioner provided the initially described duties in a bullet point list and added the coursework it believed necessary to perform the initially described duties.

- (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)(I). 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.<sup>3</sup> The Petitioner asserts on the Form

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<sup>3</sup> 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

I-129 that the proffered position is a marketing director 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 August 31, 2015).

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

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occupational category are hereby incorporated into the record of proceeding.

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* also notes that courses in communications and social sciences (such as economics, psychology, and sociology) are also important.

In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum requirement of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields, such as philosophy and engineering, 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, although the *Handbook* indicates that an advanced degree is typically needed for these positions, it also indicates that baccalaureate degrees in various fields are acceptable for entry into the occupation. In addition to recognizing degrees in disparate fields and backgrounds (i.e., social science and computer science) as acceptable for entry into this occupation, the *Handbook* also states that "others have a background in business administration." Although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147. Therefore, the *Handbook's* recognition that a general, non-specialty "background" in business administration is sufficient for entry into the occupation strongly suggests that a bachelor's degree *in a specific specialty* is not normally the minimum entry requirement for this occupation.

The Petitioner contends on appeal that USCIS did not consider its job description and did not consider that the Beneficiary successfully completed coursework described in the *Handbook* as essential for Market Research Analysts. First, the description of the duties for the proffered position provided initially and in response to the RFE, offers a broad overview of the Beneficiary's duties. Although the descriptions correspond generally to the duties of a Market Research Analyst, the record does not include evidence of the actual day-to-day tasks the Beneficiary will be expected to perform in relation to the Petitioner's business operations. Accordingly, the record does not include substantive evidence demonstrating that the proposed duties actually require 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.

Second, 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]."). In this matter, it appears that the Petitioner relies on the Beneficiary's credentials to establish that the proffered position is a specialty occupation. While the Beneficiary may be qualified to perform the duties of the proffered position, the record does not establish that the duties as generally described comprise duties that actually require 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.

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. We recognize that the Petitioner desires an employee with a finance 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. Rather, as the *Handbook* reports, the specialized knowledge required to perform the general duties of a Market Research Analyst may be attained with a bachelor's degree in a number of fields of study. Accordingly, as the *Handbook* indicates that working as a market research analyst, the category the Petitioner identifies as most closely corresponding to the proffered position, 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 proffered position as qualifying as a specialty occupation.

Further, 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

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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](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 "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.

The *Handbook* does not support the claim that the occupational category of market research analysts is one for which normally the minimum requirement for entry is a baccalaureate degree (or higher) in a specific specialty, or its equivalent. Even if it did, 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)(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 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 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 record does not establish that the 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.

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 copies of its webpages depicting the several restaurants it manages.<sup>4</sup> However, upon review of the record of proceeding, the evidence of record 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. Although the Petitioner, in response to the RFE, identified particular coursework useful to carrying out the generally described duties, the Petitioner did not demonstrate

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<sup>4</sup> Although the Petitioner reports that it earns \$10,000,000 in gross annual income, on the Form I-129 and in its letters in support of the petition, the record does not include independent evidence supporting this claim. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)).

how such courses are necessary to perform the duties of the proffered position. That is, the record includes the Petitioner's conclusory statements indicating that certain courses would be valuable in carrying out particular duties, but does not include the requisite analysis of how or why 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.<sup>5</sup> The Petitioner does not detail what particular aspects of its company's marketing activity, corroborated by independent evidence, elevate the proffered position to one that is complex or unique. Rather, the duties of the proffered position, as generally described, could be performed by an individual with any number of unrelated degrees, including degrees of general application, such as a bachelor's degree in business.

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.<sup>6</sup> 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* indicates that market research analyst positions do not require a degree in a specific specialty.<sup>7</sup>

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

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<sup>5</sup> Of note, the courses referenced by the Petitioner in its response to the RFE, are tailored to correspond directly to courses completed by the Beneficiary in obtaining her degree. Again, a Beneficiary's credentials do not establish that a particular position is a specialty occupation. 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].").

<sup>6</sup> See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

<sup>7</sup> 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.

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 Beneficiary 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 employees who previously held the position, as well as 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. 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 Beneficiary 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.*

The Petitioner in this matter did not submit evidence demonstrating that it had previously employed a marketing director. Accordingly, there are no records for USCIS to examine to establish this criterion.

Upon review of the record, the Petitioner has not provided probative evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered 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'l Comm'r 1972)).

As the record of proceeding does not demonstrate that the Petitioner normally requires at least a bachelor's degree in a specific specialty or its equivalent for the proffered position, it does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

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

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 management of several restaurants but do not find that the Petitioner has demonstrated that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. The Petitioner has not submitted evidence or analysis of why the marketing director for several restaurants requires a bachelor's degree in a specific specialty. Rather, the Petitioner appears to acknowledge that the proffered position may be performed by an individual with a general business degree. As observed above, 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 a general business degree, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558 (Comm'r 1988).

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.<sup>8</sup> 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.

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<sup>8</sup> We also find that this designation materially conflicts with counsel's assertions, in response to the RFE and on appeal, that "[t]he person filling the position of Marketing Director will exercise considerable discretion, autonomy, and decision making in a manner that will directly affect Petitioner's business." It is incumbent upon the Petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the Petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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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 F-H-, Inc.*, ID# 13734 (AAO Sept. 21, 2015)