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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: **APR 06 2015** OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

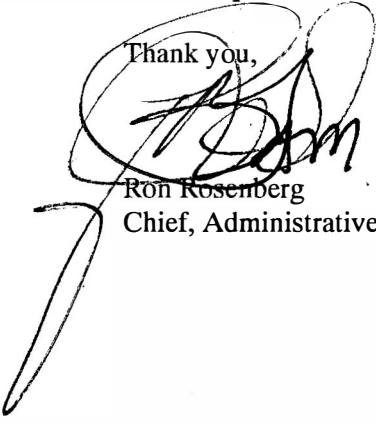
ON BEHALF OF PETITIONER:
[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director ("the director") denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a 150-employee "Building, Construction and Management" business established in [REDACTED]. In order to employ the beneficiary in what it designates as an "Estimator" position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition determining that the petitioner failed to establish that the duties of the proposed position comprise the duties of a specialty occupation.

The record of proceeding before this office contains: (1) the Form I-129 and supporting documentation; (2) the director'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), counsel's brief and additional documentation.

For the reasons that will be discussed below, we agree with the director that the petitioner has not established eligibility for the benefit sought. The appeal will be dismissed, and the petition will be denied.

I. FACTUAL AND PROCEDURAL HISTORY

In a letter, dated April 1, 2014, the petitioner stated that its "focus is on building and managing the construction of high-rise and podium residential, commercial and medical office, hotel and leisure, and retail projects while respecting the overall impact to the environment." The petitioner noted that it seeks to have the beneficiary "serve as an Estimator responsible for all aspects of estimating the most complex and large-scale jobs, including pre-construction, hard bids, negotiated bids, budgets, general conditions, systems studies and comparisons, value engineering, subcontractor relations and staying abreast of industry developments applicable to estimating." The petitioner stated that the beneficiary's responsibilities include:

- Preparing detailed quantity surveys and conceptual cost estimates from early conceptual phase through construction plans;
- Responsible for analyzing blueprints, specifications, proposals, and construction documents to match the Engineer's given quantities;
- Preparing variance summaries between estimates;
- Preparing budgets;
- Overseeing subcontracting process, preparing detailed bid package estimates by trade and assisting with preconstruction team to develop written bid packages;
- Preparing an in-house budget and GMP;

- Preparing quantity take-offs and apply unit pricing for material and labor to establish a value for the work;
- Understanding the full scope of the project through document review and asking questions of the design team and owner; and
- Managing Subcontractor solicitation & selection process.

The petitioner stated that it required a "Bachelor's Degree in Civil Engineering," a "Master's Degree in and/or Construction Management/Civil Engineering" and understanding of the principals of construction management as well as knowledge of certain computer programs and proficiency in computer applications. The petitioner noted the proposed salary for the proffered position is \$65,000 which had been accepted by the beneficiary.

The petitioner indicated that the beneficiary's skills are grounded upon his academic training and provided a copy of the beneficiary's diploma issued by [REDACTED] showing the beneficiary had earned a Master of Science in Construction Management. The petitioner also noted that the beneficiary had obtained a Bachelor of Engineering in Civil Engineering from [REDACTED] in India, although the beneficiary's foreign certificate, diploma, transcript, and evaluation of the beneficiary's foreign credentials were not provided.

The petitioner submitted the required Labor Condition Application (LCA) in support of the instant H-1B petition. The LCA designation for the proffered position corresponds to the occupational classification "Cost Estimator" - SOC (ONET/OES) code 13-1051. The LCA submitted is signed by the petitioner's representative but does not include page 3, the information relating to the wage level and work location. However, public records reveal that this LCA, as identified by its case number, shows the beneficiary's work location at the petitioner's offices in San Francisco, at a Level I (entry level) wage with the rate of pay at \$65,000 annually. See <https://icert.doleta.gov/index.cfm?event=ehLCJRExternal.dspQuickCertSearch> (last visited Mar. 25, 2015).

Upon review of the initial record, the director requested additional information including a more detailed description of the work to be performed to demonstrate the proffered position qualified as a specialty occupation, as well as the company's profile and tax information.

In a letter, dated July 14, 2014, in response to the director's RFE, the petitioner submitted the requested tax and company profile information. The petitioner also stated the following in regard to the proffered position:

Estimators are an essential part of all construction businesses. Estimators predict the cost, size, and duration of future construction projects which is vital to the survival of the business. Estimators analyze many inputs in order to determine how much time, money, and labor a project needs and how profitable it will be. These estimates take many factors into account, including allowances for wasted material, bad weather, shipping delays, and other factors that can increase costs and lower profitability.

The petitioner noted: "[c]onstruction cost estimators generally need a bachelor's degree in an industry-related field, such as construction management, building science, or engineering" and referenced the Department of Labor's (DOL) *Occupational Outlook Handbook's (Handbook)* chapter on cost estimators in support of this statement. The petitioner did not provide further detail regarding the beneficiary's proposed daily duties but added:

The beneficiary will be required to apply his knowledge of construction and project management, financial analysis and cost estimation to complete his duties. [The beneficiary] will be required to apply fundamental and diversified professional engineering concepts, theories, and practices to achieve the petitioner's engineering objectives with versatility, judgment, and perception. This position will require that the beneficiary adapt and apply methods and techniques of related scientific disciplines as well as organize, analyze, interpret, and evaluate scientific data to solve engineering problems.

The petitioner also submitted job postings to demonstrate that the industry requires at least a bachelor's degree to perform the duties of an estimator. The petitioner also submitted profiles of its estimators to demonstrate that these individuals all possess at least a bachelor's degree.

Upon review of the record, the director denied the petition, determining that the record did not include sufficient evidence to establish that the proffered position is a specialty occupation.

On appeal, the petitioner again references the *Handbook* to support the proposition that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. The petitioner asserts that it is the specialized knowledge and the attainment of the knowledge and not the title of the degree that is important, citing *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985 (S.D. Ohio 2012), and *Tapis Int'l v. INS*, 94 F. Supp. 2d 172 (D. Mass. 2000), in support. The petitioner contends that degrees in construction management, building science, engineering, architectural engineering, mechanical or electrical engineering, and drafting, share courses of study that teach fundamental and diversified engineering concepts, theories and practices, and that these degrees emphasize mathematics, engineering, management, concepts and methods of analyzing, designing, and planning. The petitioner avers that the curriculums for bachelor's degrees in construction management, architecture, and construction science share a series of courses common to fields of commercial construction, for example mathematics. The petitioner concludes that degrees normally required for the position of cost estimator in the construction industry are inter-related and provide a relation to the proffered position. The petitioner also notes that the nature of its business "compels its cost estimators to be familiar with a more advanced level of construction technology and engineering design and more complex construction codes and regulations."

The petitioner also contends that the degree requirement is common to the industry in parallel positions among similar organizations and references the previously submitted job postings in support of this contention. The petitioner also submits a letter prepared by [REDACTED] Ph.D., Program Manager-Industry Relations at [REDACTED] in support of its

contention that the industry requires at least a bachelor's degree to perform the duties of a construction cost estimator. The petitioner asserts that it normally requires a degree for the proffered position and notes that it provided documentation that its estimators have at least a bachelor's degree in a related field. The petitioner re-submits its cost estimators' profiles, as well as a letter prepared by its human resource manager explaining why the petitioner hires estimators with degrees.

Finally, the petitioner asserts that the duties of this position require specialized knowledge in concepts of engineering, architecture, and mathematics. The petitioner submits a letter prepared by the secretary of the corporation, [REDACTED] to demonstrate the complexity of the proffered position.

II. LAW

The issue here is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position.

To meet its burden of proof on this issue, 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:

- (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 also 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*, *supra*. To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing 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 ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a

petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

III. ANALYSIS

Turning to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), to determine whether the employment described above qualifies as a specialty occupation, we first examine 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 the normal minimum requirement for entry into the particular position. We recognize the DOL's *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹

In this matter, the petitioner identifies the proffered position as an estimator. In the chapter on cost estimators, the *Handbook* provides the following overview of the occupation:

Cost estimators collect and analyze data in order to estimate the time, money, materials, and labor required to manufacture a product, construct a building, or provide a service. They generally specialize in a particular industry or type of product.

The *Handbook* lists the typical duties of a cost estimator as:

- Identify and quantify cost factors, such as production time, materials, and labor expenses
- Travel to jobsites to gather information on materials needed, labor required, and other factors
- Read blueprints and technical documents in order to prepare estimates
- Collaborate with engineers, architects, clients, and contractors on estimates
- Consult with industry experts to discuss estimates and resolve issues
- Use computer software to calculate estimates
- Evaluate a product's cost-effectiveness or profitability
- Recommend ways to make a product more cost effective or profitable
- Work with sales teams to prepare estimates and bids for clients
- Develop project plans for the duration of the project

The *Handbook* reports:

¹ Our references to the *Handbook*, are references to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>. We hereby incorporate into the record of proceeding the chapter of the *Handbook* regarding "Cost Estimators."

Accurately predicting the cost, size, and duration of future construction and manufacturing projects is vital to the survival of businesses. Cost estimators' calculations give managers or investors this information.

When making calculations, estimators analyze many inputs in order to determine how much time, money, and labor a project needs and how profitable it will be. These estimates have to take many factors into account, including allowances for wasted material, bad weather, shipping delays, and other factors that can increase costs and lower profitability.

Cost estimators use computer software, including databases, to simulate building construction. Cost estimators often use a computer database with information on the costs of other, similar projects.

General contractors usually hire cost estimators for specific parts of a large construction project, such as estimating the cost of the electrical work or the excavation phase. In such cases, the estimator calculates the cost of the construction phase for which the contractor is responsible, rather than calculating the cost of the entire project. Construction companies will hire cost estimators that calculate the total project cost by analyzing the bids that the subcontractors' cost estimators prepared.

Some estimators are hired by manufacturers to analyze certain products or processes.

The *Handbook* also provides examples of types of cost estimators including a construction cost estimator, the occupation most closely aligned with the proffered position:

Construction cost estimators estimate the cost of construction work. They may, for example, estimate the total cost of building a bridge or commercial shopping center. They may identify direct costs, such as the cost of raw materials and the cost of labor, and set a timeline for how long the project will take. Although many work directly for construction firms, some work for contractors, architects, and engineering firms.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-2015 ed., "Cost Estimators," <http://www.bls.gov/ooh/business-and-financial/cost-estimators.htm#tab-2> (last visited Mar. 25, 2015).

The petitioner's general description of the proffered position tracks closely with the duties and responsibilities of a construction cost estimator as outlined in the *Handbook*. The *Handbook* states the following regarding the education and training of a cost estimator:

A bachelor's degree is generally required for someone to become a cost estimator. However, a few highly experienced construction workers may qualify without a bachelor's degree.

The *Handbook* reports:

Increasingly, employers prefer candidates who have a bachelor's degree. A strong background in mathematics is essential.

Construction cost estimators generally need a bachelor's degree in an industry-related field, such as construction management, building science, or engineering. Those interested in estimating manufacturing costs typically need a bachelor's degree in engineering, physical sciences, mathematics, or statistics. Some employers accept candidates with backgrounds in business-related disciplines, such as accounting, finance, and business.

The *Handbook* also notes that: "[n]ewly hired cost estimators may receive some on-the-job training based on their prior experience" and that "[t]raining often includes learning a company's cost-estimating software and techniques." The *Handbook* also points out the following:

Increasingly, employers prefer that cost estimators—particularly those without a bachelor's degree—have previous work experience in the construction industry. For example, experienced electricians and plumbers can become construction cost estimators if they have the necessary construction knowledge and math skills.

Candidates interested in becoming cost estimators also can gain experience through internships and cooperative education programs.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-2015 ed., "Cost Estimators," <http://www.bls.gov/oooh/business-and-financial/cost-estimators.htm#tab-4> (last visited Mar. 25, 2015).

Here, the *Handbook* indicates several paths are available to individuals entering into the occupation of a construction cost estimator. A candidate may have a general bachelor's degree and employers increasingly prefer candidates that have a bachelor's degree. A general preference for a degree, however, is not synonymous with a requirement for a degree. Additionally, as noted above, a general-purpose bachelor's degree does not establish a standard, minimum requirement of at least a bachelor's degree *in a specific specialty* or its equivalent for entry into the particular position. Further, the *Handbook* reports that experienced construction workers may enter into this occupation and that experience can be gained through internships and cooperative education programs.

To satisfy the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) the petitioner must demonstrate that a baccalaureate or higher degree in a specific discipline is normally the minimum requirement for entry into the particular position. The proffered position must require a precise and specific

course of study that relates directly and closely to the position in question. Although a general-purpose bachelor's degree, or a degree in a variety of fields, may be acceptable for a particular occupation, such general requirements do not establish a standard, minimum requirement of at least a bachelor's degree *in a specific specialty* or its equivalent for entry into the particular position. A normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. The *Handbook* does not set out limited exceptions to the required standard of a bachelor's degree in a specific discipline under this criterion, but instead provides a variety of potential means to enter this occupation. Accordingly, the *Handbook* does not identify a degree in a specific discipline as required to perform the duties of a construction cost estimator as here described.

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.² The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance."³ 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.

² Wage levels should be determined only after selecting the most relevant O*NET code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.

³ Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

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. 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 he would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results. Based upon the petitioner's designation of the proffered position as a Level I (entry) position, it does not appear that the beneficiary will be expected to serve in a senior or leadership role. 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. Given the *Handbook's* indication that cost estimator positions do not normally require at least a bachelor's degree in a specific specialty, or the equivalent, for entry, it is not credible that a position involving limited, if any, exercise of independent judgment, close supervision and monitoring, receipt of specific instructions on required tasks and expected results, and close review *would* contain such a requirement.⁴

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for these positions. Thus, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook* indicates that normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent. As the *Handbook* does not support the proposition that the proffered position is one that normally requires a minimum of a bachelor's degree in a specific specialty, or the equivalent, to satisfy this first alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise qualifies as a specialty occupation under this criterion, notwithstanding the absence of *Handbook* support on the issue. In this matter, the petitioner has not provided such evidence.⁵

We will now address the advisory opinion letter prepared by [REDACTED] Ph.D., Program Manager-Industry Relations at [REDACTED] which was submitted by the petitioner on appeal to support its claim that the proffered position qualifies as a specialty occupation. [REDACTED] writes regarding his perspective on entry-level estimating positions. [REDACTED] opines: "[t]he position is increasingly technical and the threshold for entry is an undergraduate degree." [REDACTED] does not specify a specific field for the undergraduate degree.

⁴ It is noted that the petitioner would have been required to offer a significantly higher wage to the beneficiary in order to employ him at a Level III (experienced) or a Level IV (fully competent) level. U.S. Dep't of Labor, Foreign Labor Certification Data Center, Online Wage Library, FLC Quick Search, "Cost Estimators," <http://flcdatacenter.com/OesQuickResults.aspx?code=13-1051&year=14&source=1> (last visited Mar. 25, 2015).

⁵ As will be discussed below, [REDACTED] opinion, submitted on appeal, also finds that a general bachelor's degree, and not a bachelor's degree in a specific discipline, is sufficient to perform the duties of a construction cost estimator.

His opinion supports the *Handbook's* report that the industry does not have a specific degree requirement for entry-level estimators.

As the evidence in the record of proceeding does not 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 that is the subject of this petition, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, we find that the petitioner has not satisfied 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 (1) to the petitioner's industry; and (2) for positions within that industry that are both: (a) parallel to the proffered position, and (b) located in organizations that are similar to the petitioner.

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

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other 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.

On the Form I-129, the petitioner stated that it is a building, construction and management company established in [REDACTED] with 150 employees. The petitioner stated its gross annual income is \$3,413,546 and its net annual income is \$980,415. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 236220. According to the U.S. Census Bureau, NAICS is used to classify business establishments according to type of economic activity and each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last visited Mar. 25, 2015). The NAICS code specified by the petitioner is designated for "Commercial and Institutional Building Construction," and is defined by the U.S. Department of Commerce, Census Bureau as follows:

This industry comprises establishments primarily responsible for the construction (including new work, additions, alterations, maintenance, and repairs) of commercial and institutional buildings and related structures, such as stadiums, grain elevators, and indoor swimming facilities. This industry includes establishments responsible for the on-site assembly of modular or prefabricated commercial and institutional buildings. Included in this industry are commercial and institutional building general contractors, commercial and institutional building for-sale builders, commercial and institutional building design-build

firms, and commercial and institutional building project construction management firms.

U.S. Dep't of Commerce, U.S Census Bureau, 2012 NAICS Definition, 236220 – Commercial and Institutional Building Construction, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited Mar. 25, 2015).

In response to the RFE, the petitioner provided printouts of 11 online job announcements. However, this documentation does not establish that the proffered position qualifies as specialty occupation. As a preliminary matter, we note that the petitioner did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

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

Upon review, none of the advertisements provide sufficient information regarding the advertising organizations to establish that the advertising organizations are similar to the petitioner. Although most of the advertisers appear to be involved in the construction industry, either as consulting companies or service providers, the advertisements do not provide the advertisers' revenue or level of staffing. Thus, it is not possible to conclude that the advertising organizations are similar to the petitioner. Additionally, the majority of the advertisements appear to be for positions that are more senior than the proffered position. Six of the eleven advertisements list between three and ten years of experience in addition to a bachelor's degree as required. As previously noted, the petitioner has characterized the proffered position as a Level I (entry-level) position on the LCA. DOL guidance states that Level I positions are appropriate for a worker-in-training or an individual performing an internship.⁶ Therefore, it is not possible to conclude that the positions proffered by the advertisers are parallel to the position proffered here.

Moreover, contrary to the purpose for which the advertisements were submitted, the postings do not establish that at least a bachelor's degree in a *specific specialty*, or its equivalent, is required

⁶ For additional information regarding wage levels, see DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

for the positions. The degrees listed as required include construction management, general engineering, civil engineering, architectural engineering, mechanical engineering, electrical engineering, drafting, construction sciences, or a technical field. The advertisement from [REDACTED] lists a preference for a degree in an engineering discipline, construction management or the equivalent but notes that relevant experience will be considered in lieu of a degree. Several advertisements note generally that an industry-related degree, with no specification, is acceptable. Again, 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 degree (such as a "technical" degree") 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).⁷ Thus, advertisements that request a general-purpose degree are not probative to the issue of whether the petitioner's proffered position requires a degree in a *specific specialty*.

The job advertisements do not establish that similar organizations to the petitioner routinely employ individuals with degrees in a specific specialty, in parallel positions in the petitioner's industry. Further, it must be noted that even if all of the job postings indicated that a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.⁸

⁷ 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.

⁸ The petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from these few job postings 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").

Thus, based upon a complete review of the record of proceeding, the petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common (1) to the petitioner's industry; and (2) for positions within that industry that are both: (a) parallel to the proffered position, and (b) 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).

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, its organizational structure, and a copy of its 2012 federal tax return.

However, a review of the record of proceeding indicates that the petitioner has failed to credibly demonstrate 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. Furthermore, the petitioner has not established why a few related courses or industry experience alone is insufficient preparation for the proffered position. Although the petitioner submitted the curriculum and degree requirements for a construction management bachelor's degree, a construction science degree, and a bachelor's of architecture degree, and highlighted various courses in the degree programs offered by three different universities, the petitioner failed to provide its analysis regarding how such a curriculum is necessary to perform the duties it may believe are so complex and unique. While a few related courses may be beneficial, or even required, in performing certain duties of the position, the petitioner has failed to demonstrate 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 proffered position. The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.⁹

As such, even if the job announcements supported the finding that the position (for organizations similar to the petitioner) required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings 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.

⁹ This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. More specifically, the LCA indicates a wage level at a Level I (entry level) wage. As previously mentioned, the wage-level of the proffered position indicates that the beneficiary is only required to have a basic

Consequently, as the petitioner fails to demonstrate how the proffered position is so complex or unique relative to other cost estimator 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).

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 hold or have 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. 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 a 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.*

understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

Upon review of DOL's instructive comments, we observe that the petitioner did not designate the proffered position as involving even "moderately complex tasks that require limited judgment" (the level of complexity noted for the next higher wage-level, Level II) when compared to other positions within the same occupation. *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.

In support of the petitioner's assertion that the proffered position qualifies as a specialty occupation under this criterion of the regulation, the petitioner provided profiles of its employees who hold the title "estimator" or "senior estimator." The petitioner provided copies of five of these employees' diplomas. Although the petitioner avers that the profiles submitted are of its employees in the role of estimator, it is not clear from two of the six profiles submitted that these two individuals perform primarily estimator duties. Moreover, the profiles submitted show that these employees have between seven and 25 years of experience. Thus, it does not appear that these are entry-level positions. Accordingly, the relevance of these profiles for the proffered position has not been substantiated.

On appeal, the petitioner submits a letter, dated August 20, 2014, prepared by its human resources manager, [REDACTED] asserts that it is the market that dictates who the petitioner should hire based on its competition for candidates for developing business needs. [REDACTED] notes that "[i]n order for [the petitioner] to obtain new contracts, Owner Developers hire [the petitioner] as the most qualified General Contractor based on the Professionals within [its] organization who they feel confident have superior credentials." Although this may be true, as noted above, the petitioner must still establish that the particular position proffered 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.

Also on appeal, in its discussion of the employees it normally hires, the petitioner lists the courses the beneficiary completed in obtaining his degrees and asserts that the beneficiary's studies have given him the complex, specialized knowledge needed to perform his duties with the petitioner. However, the petitioner's implication that the beneficiary's educational background establishes that the proffered position is a specialty occupation is misplaced. The test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area.

In this matter, the record does not include sufficient 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. Therefore, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.¹⁰ The petitioner, in the brief submitted on appeal, asserts that its business is in the more

¹⁰ We have reviewed the petitioner's letter, dated August 21, 2014, prepared by [REDACTED] the Secretary of the Corporation, which provides additional detail regarding the duties of the proffered

technical and sophisticated industry segment of commercial construction which requires an unspecified degree. The petitioner, in the letter prepared by [REDACTED] refers to mathematical skills, technology training in understanding building codes, as well as knowledge of design build and material requirements, and seismic specifications, as the requirements to perform the proffered position. However, again, the petitioner has not established why a few related courses or industry experience alone is insufficient preparation for the proffered position. In other words, the petitioner has failed to demonstrate that the position proffered here requires the theoretical and practical application of a body of highly specialized knowledge usually associated with the attainment of a baccalaureate or higher degree.

In addition, we again note that the petitioner has designated the proffered position as a Level I position on the submitted LCA, indicating that it is an entry-level position for an employee who has only basic understanding of the occupation.¹¹ Thus, the petitioner's assertions on appeal that the beneficiary must use judgment and perception is materially inconsistent with its designation of the proffered position as Level I (entry-level) wage. The record does not include sufficient consistent and probative evidence to establish that the position proffered here encompasses the performance of specialized and complex duties the nature of which requires knowledge usually associated with at least a bachelor's degree in a specific specialty.

Upon review of the totality of the record, the petitioner has failed to establish 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.

As a final matter, we note that the petitioner cites *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985 (S.D. Ohio 2012), and *Tapis Int'l v. INS*, 94 F. Supp. 2d 172 (D. Mass. 2000), to support its assertion that it is the specialized knowledge and the attainment of the knowledge and not the title of the degree that is important. We agree with the aforementioned proposition that "[t]he knowledge and not the title of the degree is what is important." Here, however, the petitioner contends that degrees in construction management, building science, engineering, architectural engineering, mechanical or electrical engineering, and drafting, share courses of study that teach fundamental and diversified engineering concepts, theories and practices, and that these degrees emphasize mathematics, engineering, management,

position. We note that the proposed position will be responsible for document review including completeness and compliance with building code requirements, preparing survey calculations using specific software, updating estimates and preparing bid packages, using specific mechanisms such as value engineering, design build and integrated project delivery, and critical path method scheduling with specific computer programs and software, and utilizing technical tools to implement the estimating duties. However, the petitioner has not shown that these duties are more specialized and complex than the duties of construction cost estimator positions that are not usually associated with the attainment of at least a bachelor's degree in a specific specialty or its equivalent.

¹¹ 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.

concepts and methods of analyzing, designing, and planning. While the degrees the petitioner cited may all involve some form of engineering, analysis, and mathematical methods and concepts, the same could be said for a variety of unrelated degrees, such as systems analysts or business operations managers. The petitioner, however, fails to establish that the degrees it references are all closely related fields, in that they require a precise and specific course of study. Different curriculums or fields of study, even if they share several common basic courses do not satisfy the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act.

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

In *Tapis Int'l v. INS*, the U.S. district court found that while the former Immigration and Naturalization Service (INS) was reasonable in requiring a bachelor's degree in a specific field, it abused its discretion by ignoring the portion of the regulations that allows for the equivalent of a specialized baccalaureate degree. According to the U.S. district court, INS's interpretation was not reasonable because then H-1B visas would only be available in fields where a specific degree was offered, ignoring the statutory definition allowing for "various combinations of academic and experience based training." *Tapis Int'l v. INS*, 94 F. Supp. 2d at 176. The court elaborated that "[i]n fields where no specifically tailored baccalaureate program exists, the only possible way to achieve something equivalent is by studying a related field (or fields) and then obtaining specialized experience." *Id.* at 177.

We agree with the district court judge in *Tapis Int'l v. INS*, that in satisfying the specialty occupation requirements, both the Act and the regulations require a bachelor's degree in a specific specialty or its equivalent, and that this language indicates that the degree does not have to be a degree in a single specific specialty. Here, however, as discussed above, the petitioner, who bears the burden of proof in this proceeding, fails to establish how the variety of degrees it references are all directly related to the duties and responsibilities of the particular position of a cost estimator, such that the required "body of highly specialized knowledge" would essentially be the same. That is, although the degrees the petitioner referenced may include similar generalized basic knowledge, the petitioner has not established how the degrees in the different disciplines, incorporate the same "body of highly specialized knowledge."

Moreover, we also agree that, if the requirements to perform the duties and job responsibilities of a proffered position are a combination of a general bachelor's degree and experience such that

the standards at both section 214(i)(1)(A) and (B) of the Act have been satisfied, then the proffered position may qualify as a specialty occupation. We do not find, however, that the U.S. district court is stating that any position can qualify as a specialty occupation based solely on the claimed requirements of a petitioner.

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

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

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

Second, in promulgating the H-1B regulations, the former INS made clear that the definition of the term "specialty occupation" could not be expanded "to include those occupations which did not require a bachelor's degree in the specific specialty." 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991). More specifically, in responding to comments that "the definition of specialty occupation was too severe and would exclude certain occupations from classification as specialty occupations," the former INS stated that "[t]he definition of specialty occupation contained in the statute contains this requirement [for a bachelor's degree in the specific specialty or its equivalent]" and, therefore, "may not be amended in the final rule." *Id.*

In any event, the petitioner has not furnished sufficient evidence to establish that the facts of the instant petition are analogous to those in *Residential Fin. Corp. v. U.S. Citizenship &*

Immigration Services or those in *Tapis Int'l v. INS*.¹² We also note that, in contrast to the broad precedential authority of the case law of a United States circuit court, we are not bound to follow the published decision of a United States district court in matters arising even within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before this office, the analysis does not have to be followed as a matter of law. *Id.* at 719.

IV. CONCLUSION

The petition must be denied and the appeal dismissed for the above stated reasons. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act; see e.g., *Matter of Otiende*, 26 I&N Dec. at 128. Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.

¹² It is noted that the district judge's decision in *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services* appears to have been based largely on the many factual errors made by the service center in its decision denying the petition. We further note that the service center director's decision was not appealed to this office. Based on the district court's findings and description of the record, if that matter had first been appealed through the available administrative process, we may very well have remanded the matter to the service center for a new decision for many of the same reasons articulated by the district court if these errors could not have been remedied by our *de novo* review of the matter.