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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: NOV 05 2013 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:

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The petitioner filed an appeal, which was treated as a motion by the director and dismissed. The petitioner subsequently filed a motion to reopen and reconsider that decision, which was also dismissed by the director. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on November 23, 2010. On the Form I-129 visa petition, the petitioner describes itself as a garment and accessories supplier established in 2002. In order to employ the beneficiary in what it designates as a "Sales and Marketing Manager" 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 on January 18, 2011, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

The AAO notes that the petitioner filed a timely appeal on February 22, 2011. However, the director erroneously considered the appeal late and instead treated it as a motion to reconsider which was dismissed on May 24, 2011. The petitioner filed a motion to reconsider that decision on June 21, 2011, contending that the director should have forwarded its appeal of the director's January 18, 2011 denial to the AAO. That motion was dismissed by the director on November 30, 2012. The director stated in her November 30, 2012 decision that the petitioner's February 22, 2011 appeal was late; therefore, the "untimely" appeal was treated as a motion pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B). The director further stated that the "untimely appeal" would not be sent to the AAO because the petitioner did not submit sufficient reason or any evidence to overturn the January 18, 2011 decision, and that the motion would be dismissed because it did not meet the applicable requirements. On December 28, 2012, the petitioner filed a combined motion to reopen and motion to reconsider which the service center forwarded to the AAO to be treated as an appeal.

Counsel asserts in a brief dated December 27, 2012, that the director's actions were erroneous, in that the initial appeal was timely filed and therefore was incorrectly treated as a motion by the director. The AAO concurs with counsel's contentions; therefore, the AAO will now consider the basis for the petitioner's original appeal filed on February 22, 2011. The AAO reminds the petitioner and counsel that the AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The AAO reviewed the record in its entirety before issuing its decision. For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has not established that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed. The petition will be denied.

In this matter, the petitioner indicated on the Form I-129 and in supporting documentation that it seeks the beneficiary's services in a position that it designates as a "Sales and Marketing Manager"

on a full-time basis at a salary of \$1,085 per week. In a letter of support dated November 21, 2010, the petitioner provided the following information regarding the duties of the proffered position:

[The beneficiary] has been offered a fulltime position with our company as a Sales & Marketing Manager. In this position, [the beneficiary] will be responsible for the following duties:

- Managing Sales/Marketing Department;
- Hire, fire and supervise sales account representatives;
- Solicit business, and expand our business in the U.S. and South America market;
- Coordinate with Purchasing Department, and negotiate pricing, discount terms and sales terms;
- Research market conditions, and develop and implement new marketing and sales strategies suitable to a product/clients;
- Determine demand for products and compare our products to competitors', and identify potential market for expansion and potential customers;
- Direct and coordinate activities of sales of goods;
- Analyze financial data, such as income growth, quality of management, and market share to determine profitability of our company; and
- Prepare budget reports to project sales.

The petitioner also claimed that performance of the duties of the proffered position required the candidate to possess at least a bachelor's degree in business management or marketing. Regarding the beneficiary's qualifications, the petitioner claimed that he possessed the U.S. equivalent of a Bachelor of Arts degree with a dual major in business management and physical education.

The director found the initial evidence insufficient to establish eligibility, and consequently issued an RFE on December 6, 2010. The director requested additional evidence to establish that the proffered position qualified as a specialty occupation. In response, previous counsel for the petitioner contended that the director applied the wrong standard in evaluating the proffered position for compliance with the regulatory requirements, noting that, when an occupation requires a minimum of a bachelor's degree for entry, additional factors such as the industry norm and prior employment practices of the petitioner are irrelevant. In support of this contention, previous counsel relied on federal caselaw which will be discussed in further detail herein. Previous counsel also submitted additional documentation including a letter from [REDACTED] a document entitled "About the Petitioner"; copies of the petitioner's previous job postings for the proffered position; and information regarding past hiring practices and employment of its purchasing manager.

To support the contention that the proffered position is a specialty occupation, counsel for the petitioner also submitted Occupational Information Network (O*NET) documentation for the 11-2021.00 –Marketing Managers and 11-2022.00 – Sales Managers occupational categories, noting that both occupations have a Job Zone 4 rating. The petitioner also submitted an LCA in support of

the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "Marketing Managers " – SOC (ONET/OES Code) 11-2021.00, at a Level I wage. Finally, the petitioner submitted a updated job description for the proffered position listing duties not previously identified, and also claimed that it required the incumbent to possess at least "a Bachelor's degree or equivalent in Business Administration, Marketing, Management and related areas, or its equivalent to for [sic] management level positions."

Regarding the proffered position, the petitioner claimed that the beneficiary's duties would focus on three distinct areas: marketing, sales, and personnel. A summary of the petitioner's updated description of duties and corresponding percentages of time the beneficiary would devote to each such duty is set forth below:

Marketing

Market Research (20%)

- Gather company profile and information on potential buyers in CA and other states
- Company public record search, if any
- Identify needs and demand for products
- Analyze market trends
- Forecast demand and sales projections
- Research and study garment materials and accessories components by material

Planning (20%)

- Prepare marketing plan outlining company's goal in terms of sales, dollars and what it's going to cost to achieve the goal
- Develop practical marketing tools to execute plans such as advertisement, cold calls, door-to-door, etc.

Financials (10%)

- Review Company's
 - Balance Sheets
 - Income Statement
 - Bank Statement
 - Income Tax Returns
- Project expense and income and project margin. Prepare budget.
 - Accounts Receivable Test
 - Inventory Test

Sales

Pricing (30%)

- Set pricing, negotiate pricing, discount terms[]
- Negotiate sales contracts
- Project sales and determine inventory[]
- Direct sales activities of Heidiful and Acetrims

Sales Field Work (10%)

- Onsite visits to local customers
- Sales presentations and provide samples to customers

Personnel (10%)

- Hire, train and supervise sales agents
- Prepare reports for upper management

The director denied the petition on January 18, 2011, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation. Counsel for the petitioner submitted an appeal of the denial of the H-1B petition.¹

The AAO will now discuss whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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

¹ As discussed above, the director's reasoning in the two adjudicated motions prior to the instant appeal was flawed; therefore, the director's original basis for the denial of the petition is the only issue remaining, and the AAO will not further address the procedural history of this matter.

- (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*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd 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), 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. 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, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

As previously noted by the AAO, however, the petitioner made contradictory claims regarding the minimum requirements necessary to perform the duties of the proffered position. Specifically, in the petitioner's support letter dated November 21, 2010, the petitioner claims on page two that its proffered position "requires . . . at least a Bachelor's degree or equivalent in Business Management, or Marketing." In response to the RFE, the petitioner submitted a document titled, "JOB DESCRIPTION," which states on page three that the proffered position requires a "minimum of a Bachelor's degree or equivalent in Business Administration, Marketing, Management and related areas, or its equivalent to [sic] for management level positions."

These discrepancies aside, the petitioner's claimed requirement of a general bachelor's degree in business administration is inadequate to establish that a position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). To prove that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. 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. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

Again, the petitioner in this matter claims that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree, i.e., a bachelor's degree in business administration. This assertion is tantamount to an admission that the proffered position is not in fact

a specialty occupation. The director's decision must therefore be affirmed and the petition denied on this basis alone.

Moreover, it also cannot be found that the proffered position is a specialty occupation due to the petitioner's failure to satisfy any of the supplemental, additional criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). To reach this conclusion, the AAO first turned to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position that is the subject of the petition.

The petitioner stated that the beneficiary would be employed in a sales and marketing manager position. However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. As previously mentioned, 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.

As previously discussed, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Marketing Managers." The AAO reviewed the information in the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* regarding the occupational category, "Marketing Managers." However, the *Handbook* does not indicate that marketing manager positions comprise an occupational group for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry.

The director determined that the duties of the proffered position reflect the duties as described in the *Handbook* under the title "Advertising, Marketing, Promotions, Public Relations, and Sales Managers."²

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. Despite the inclusion of the word "sales" in the position title, the AAO finds that the duties described by the petitioner appear to comport closest with the duties of a marketing manager as described in the *Handbook's* section entitled "Advertising, Promotions, and Marketing Managers." The *Handbook* describes the Advertising, Promotions, and Marketing Managers occupational classification as follows:

² The director's decision referred to the 2010-2011 edition of the *Handbook*. All of the AAO's references are to the 2012-2013 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/oco/>.

Advertising, promotions, and marketing managers plan programs to generate interest in a product or service. They work with art directors, sales agents, and financial staff members.

Duties

Advertising, promotions, and marketing managers typically do the following:

- Work with department heads or staff to discuss topics such as contracts, selection of advertising media, or products to be advertised
- Gather and organize information to plan advertising campaigns
- Plan the advertising, including which media to advertise in, such as radio, television, print, online, and billboards
- Negotiate advertising contracts
- Inspect layouts, which are sketches or plans for an advertisement
- Initiate market research studies and analyze their findings
- Develop pricing strategies for products to be marketed, balancing the goals of a firm with customer satisfaction
- Meet with clients to provide marketing or technical advice
- Direct the hiring of advertising, promotions, and marketing staff and oversee their daily activities

* * *

Marketing managers estimate the demand for products and services that an organization and its competitors offer. They identify potential markets for the organization's products.

Marketing managers also develop pricing strategies to help organizations maximize profits and market share while ensuring that the organizations' customers are satisfied. They work with sales, public relations, and product development staff.

For example, a marketing manager may monitor trends that indicate the need for new products and services. Then they oversee the development of that new product. For more information on sales or public relations, see the profiles on sales managers, public relations managers and specialists, and market research analysts.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Advertising, Promotions, and Marketing Managers," <http://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm#tab-2> (last visited Oct. 15, 2013).

As indicated in the excerpt below, a review of the *Handbook's* information about the education and training requirements for this occupational category, however, indicates that employers do not

normally require at least a bachelor's degree in a specific specialty or its equivalent for entry into the position. In pertinent part, the *Handbook* states:

A bachelor's degree is required for most advertising, promotions, and marketing management positions. These managers typically have work experience in advertising, marketing, promotions, or sales.³

Education

A bachelor's degree is required for most advertising, promotions, and marketing management positions. For advertising management positions, some employers prefer a bachelor's degree in advertising or journalism. A relevant course of study might include classes in marketing, consumer behavior, market research, sales, communication methods and technology, visual arts, art history, and photography.

Most marketing managers have a bachelor's degree. Courses in business law, management, economics, accounting, finance, mathematics, and statistics are advantageous. In addition, completing an internship while in school is highly recommended.

Id. at <http://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm#tab-4> (last visited Oct. 15, 2013).

Here, although the *Handbook* indicates that a bachelor's or higher degree is required for most positions within the occupational category, as noted above, a requirement for "most" does not equate to a standard entry requirement for the occupational category. Even if it did, a requirement for a general bachelor's degree 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.

With regard to specific degrees, the *Handbook* only indicates that "some employers prefer" those with bachelor's degrees in advertising or journalism. That some employers prefer a bachelor's

³ The first definition of "most" in *Webster's New College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of advertising, promotions, and marketing manager positions require at least a bachelor's degree in business administration or a closely related field, it could be said that "most" advertising, promotions, and marketing manager positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "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." § 214(i)(1) of the Act.

degree in advertising or journalism does not support a finding that such a degree is a standard, minimum entry requirement for this occupation.

Otherwise, the *Handbook* only indicates the type of coursework that may be advantageous for entering the occupation. First, there is no evidence presented that taking certain courses in seven or so subjects equate to a bachelor's degree in a specific specialty or thereby indicate that such a degree would be required for entry into the occupation, especially as the underlying coursework is only "advantageous," not required. Even if it did, the courses of study indicated as being advantageous by the *Handbook* cover distinctly different focus and academic concentrations from each other such that it is unclear what, if any, specialty would be derived from this combination of coursework.

Accordingly, the *Handbook* does not indicate that working as a marketing manager normally requires at least a bachelor's degree in a specific specialty or its equivalent for entry into the occupation and, therefore, it does not support the proffered position as being a specialty occupation.

The petitioner asserts that O*NET states that the Marketing Managers occupational category is designated a Job Zone 4 rating and, as such, the petitioner seems to imply that a bachelor's degree is the normal requirement for entry into the profession. The AAO notes that the O*NET Summary Reports, referenced by the petitioner, are insufficient to establish that the proffered position qualifies as a specialty occupation normally requiring at least a bachelor's degree or its equivalent in a specific specialty. On October 15, 2013, the AAO accessed the pertinent section of the O*NET OnLine Internet site relevant to 11-2021.00 – Marketing Managers. See <http://www.onetonline.org/link/summary/11-2021.00>. Contrary to the assertions of the petitioner, O*NET OnLine does not state a requirement for a bachelor's degree. Rather, it assigns this occupation a Job Zone 4 rating, which groups it among occupations of which "most," but not all, "require a four-year bachelor's degree." More importantly, however, O*NET OnLine does not indicate that four-year bachelor's degrees required by Job Zone 4 occupations must be in a specific specialty directly related to the occupation. Therefore, the O*NET OnLine information is not probative of the proffered position being a specialty occupation.

Moreover, the AAO notes that the petitioner's updated description of the duties of the proffered position simply paraphrase the duties of marketing managers as set forth in the *Handbook* and O*Net Online. The petitioner's submission fails to specifically and substantially expand upon the nature of the beneficiary's duties and the petitioner's business operations. Although the petitioner provided additional information regarding its organization in a document entitled "About the Petitioner," this document provides only a general and vague overview of the petitioner's intended expansion plans and the ultimate role of its purchasing, sales, and marketing departments therein. The AAO finds that, in the absence of evidence specifically identifying the day-to-day tasks of the beneficiary and the manner in which they support the petitioner's business operations, the petitioner failed to reveal the substantive nature of the actual work that would be involved, substantial information about any applications of a body of highly specialized knowledge in any specialty that would be required to perform such work, or a necessary correlation between such work and the necessity for the beneficiary to hold at least a bachelor's degree in a specific specialty, or its equivalent, directly related to the nature of the proffered position as it would actually be performed.

As a corollary to the record of proceeding's lack of substantive information about the proposed duties and the position they are said to constitute, the AAO also finds that the petitioner has not provided a factual foundation sufficient to establish that the proffered position or its duties are particularly complex, unique and/or specialized relative to other marketing manager positions.

Further, the AAO notes that the record of proceeding lacks probative evidence describing work with sales, public relations, and product development staff, as discussed in the relevant section in the *Handbook*. There is insufficient evidence within the record of proceeding regarding specific work assignments during the period of proposed employment, and there is insufficient evidence that would suggest that the petitioner has the organizational complexity that would require the services of a full-time marketing manager. Consequently, this precludes the AAO from further examining the nature of the beneficiary's duties and thus finding that the duties will be those of a specialty occupation.

It is noted that previous counsel relied on *Young China Daily v Chappell*, 742 F. Supp. 552 (N.D. Cal. 1989), asserting that the director erroneously focused on the size of the petitioner in the RFE. While the AAO concurs that USCIS should not limit its review to the size of a petitioner and must consider the actual responsibilities of the proffered position, it also notes that it is reasonable to assume that the size of an employer's business has or could have an impact on the claimed duties of a particular position. See *EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts the actual duties of a particular position. In this matter, the job description provided both initially and in response to the director's request for evidence identifies typical marketing duties, yet the record lacks sufficient evidence to demonstrate that the duties as described will actually be performed by the beneficiary or that the petitioner's organization actually has the need for an individual to perform such duties on a full-time basis.

Specifically, the AAO notes the organizational chart submitted with the petition, which identifies six areas: (1) a president; (2) sales/marketing; (3) purchasing, including buyers; (4) finance and accounting; (5) distribution and shipping; and (6) inventory. The petitioner's 2009 federal income tax return indicates that it paid only \$116,070 in salaries and wages for that year. The organizational chart provides no indication as to how many persons are employed in each department. The record does not document how many sales/marketing employees the petitioner employs, nor does it state the nature of any of its other employees' duties.

As discussed above, absent any independent documentary evidence to support a finding that the duties to be performed by the beneficiary in relation to the petitioner's claimed operations are sufficiently complex to require the services of a degreed marketing manager, or that a degree requirement is common to the industry, the petitioner's reliance on *Young China Daily* is not persuasive. Regardless, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising 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 the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Based on the above analysis of the evidence contained in the record, the AAO finds that the petitioner has failed to demonstrate that the proffered position normally requires the incumbent to possess a high level of specialized knowledge that may be obtained only through at least a baccalaureate degree in a specific specialty or its equivalent for entry into that particular position. Accordingly, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

Next, the AAO will consider whether the petitioner has 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 to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) 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)).

Here, and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement of at least a bachelor's degree in a specific specialty or its equivalent. The AAO notes the submission of the letter from Mr. [REDACTED] in which he claims that his business is akin to that of the petitioner which is a small, 7-employee garment and accessories wholesaler. Although Mr. [REDACTED] claims that "[his] company adheres to the policy of hiring individuals with a bachelor's degree in the particular field for managerial positions," this statement by itself is not persuasive evidence that an industry standard exists. The position in this matter is akin to that of a marketing manager. Mr. [REDACTED] makes no claim that his company routinely requires its marketing managers to hold a degree in a specific specialty as a prerequisite for employment. Moreover, aside from a screen shot from the State of California's Secretary of State website, which provides business entity detail, there is no additional evidence contained in the record to demonstrate that Mr. [REDACTED] business previously has employed or currently employs a specialty-degreed marketing manager. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The petitioner did not submit sufficient evidence demonstrating an industry-wide requirement of at least a bachelor's degree in a specific specialty or its equivalent such as submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry into those

positions. Thus, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will now analyze whether the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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."

The petitioner contends that it meets the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) because of the sophisticated and advanced nature of the position. This claim is not supported by sufficient documentation to demonstrate that this particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty. The evidence in the record does not support a finding that there is anything particularly unique or complex about its business operations or its business model, a seven-employee garment and accessories supplier with a net annual income of \$65,000, such that the duties of its marketing manager position would be so complex or unique that they could be performed only by an individual with a bachelor's or higher degree in a specific specialty or its equivalent. This lack of probative evidence related to this issue precludes a finding that the petitioner has satisfied this criterion.

The above-quoted job duties, both as initially presented and as expanded upon in response to the RFE, demonstrate that the substantive work of the beneficiary would involve marketing management at a generic level. There is insufficient evidence to establish that these duties would involve marketing management demonstrably requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty directly related to the proffered position, as is necessary to establish an H-1B specialty occupation under the controlling statutory and regulatory framework.

Specifically, even though the petitioner claims that the proffered position's duties are so complex and unique that a bachelor's degree is required, the petitioner failed to demonstrate how the marketing manager duties described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it claims are so complex and unique. As indicated by the *Handbook, supra*, while certain college-level courses may be advantageous in performing some duties of a marketing manager 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 particular position here proffered.

Therefore, the evidence of record does not establish that this position is significantly different from other marketing manager positions such that it refutes the *Handbook's* information to the effect that there is a spectrum of preferred degrees acceptable for marketing manager 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 marketing management or other closely related positions that can be performed by persons without at least a bachelor's

degree in a specific specialty or its equivalent. Consequently, as the petitioner fails to demonstrate how the proffered position of sales and marketing manager is so complex or unique relative to other marketing manager 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).

Of particular significance to this finding, the AAO notes that the petitioner has submitted in support of the petition an LCA that was certified as a Level I wage-rate position, a designation for an entry-level position for an employee who has only a basic understanding of the 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. This Level I LCA wage level is not indicative of the relative level of complexity or uniqueness required to satisfy this criterion.

That *Prevailing Wage Determination Policy Guidance* instructs that LCA wage levels should be determined only after selecting the most relevant O*NET occupational 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. Prevailing wage determinations start with an entry level wage (i.e. Level I) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent worker) 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 as indicated by the job description.

The *Prevailing Wage Determination Policy Guidance* issued by DOL provides a description of the wage levels. A Level I wage rate is described by DOL 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 id.

As the evidence in this record of proceeding does not show that the position possesses the requisite level of relative complexity or uniqueness, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Next, the AAO evaluates the record of proceeding to see whether the petitioner has established that it normally requires a degree or its equivalent for the proffered position, pursuant to the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO's review of the record of proceeding under this criterion necessarily includes whatever evidence the petitioner has submitted with regard to its past recruiting, hiring, and employment practices and employees who previously held the position in question.

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the specific degree, or its equivalent, in its prior employment for the position. 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 the performance requirements of the proffered position.⁴ In the instant case, the record does not establish a prior history of recruiting and hiring for the proposed position only persons with at least a bachelor's degree in a specific specialty or the equivalent.

Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

The petitioner submitted two photocopies of classified advertisements in response to this criterion. One is for the position of business development director and the other is for a purchasing manager. Neither of these postings pertains to the proffered position in question, which is a sales and marketing manager position. Moreover, neither posting states that a bachelor's degree in a specific specialty is required.

The record also contains two copies of electronic job vacancy postings on the [REDACTED] website, for the positions of purchasing manager and sales/marketing manager. While these postings contain

⁴ Any such assertion would be undermined in this particular case by the fact that the petitioner indicated in the LCA that its proffered position is a comparatively low, entry-level position relative to others within this occupational category.

additional details regarding the proffered positions in those postings, including the requirement of a "bachelor's degree," neither states that a bachelor's degree in a *specific specialty* is required.

The petitioner also submits a copy of a foreign diploma demonstrating a bachelor's degree in business administration for [REDACTED] whom it claims is currently employed as its purchasing manager. This evidence is not relevant to this criterion, because the petitioner must establish that it routinely hires specialty-degreed individuals for the proffered position, which is a sales and marketing manager. Nevertheless, even if this submission was relevant to this criterion, the fact that Mr. [REDACTED] possesses a generalized degree in business administration would not establish eligibility here. As stated above, USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

As the record contains insufficient material evidence on point, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

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's duties. In other words, the proposed duties have not been described with sufficient specificity to show that their nature is more specialized and complex than marketing manager positions whose duties are not of a nature so specialized and complex that their performance requires knowledge usually associated with a bachelor's or higher degree in a specific specialty or its equivalent.

In regard to this and all of the criteria, it is worth noting that going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Also, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Further, the AAO incorporates its earlier discussion regarding the Level I wage-level designation on the LCA, which is appropriate for duties whose nature is less complex and specialized than required to satisfy this criterion.

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. The appeal will be dismissed and the petition denied for this reason.

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to establish that it is a specialty occupation. Therefore, the AAO need not and will not address the beneficiary's qualifications further, except to note that, in any event, the petitioner did not submit an evaluation of the beneficiary's foreign academic credentials and prior work experience that sufficiently establishes that the beneficiary's qualifications are equivalent to a U.S. bachelor's or higher degree in a specific specialty.

As mentioned previously, the petitioner submitted an education evaluation finding that the beneficiary's foreign education, training, and prior work experience is equivalent to a bachelor of arts degree with a dual major in business management and physical education. However, the combined evaluation of the beneficiary's education and work experience submitted by the petitioner is insufficient to establish that the beneficiary possesses the equivalent of a U.S. bachelor's degree in any specific specialty. Specifically, as the claimed equivalency was based in part on experience, there is no evidence that the evaluator has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience and that the beneficiary also has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty. See 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) and (D)(1). As such, since evidence was not presented that the beneficiary has at least a U.S. bachelor's degree in any specific specialty, or its equivalent, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

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. The petition is denied.