



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **AUG 26 2014**

OFFICE: VERMONT 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,

for 
Ron Rosenberg
Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as a 48-employee "consulting and software development" company established in 2007.¹ In order to employ the beneficiary in a full-time position to which it assigned the job title "Marketing Manager" at a salary of \$95,826 per year, 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 acting center director denied the petition, concluding that the evidence of record does not demonstrate that the position as described constitutes a specialty occupation.

The record of proceeding before this office contains the following: (1) the Form I-129 and supporting documentation; (2) the acting center director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the acting center director's letter denying the petition; and (5) the Form I-290B, a brief, and supporting documentation.

Upon review of the entire record of proceeding, we find that the evidence of record does not overcome the acting center director's ground for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

I. FACTUAL AND PROCEDURAL HISTORY

As noted above, the petitioner stated on the Form I-129 that it has been doing business as a consulting and software development company since 2007, that it currently employs 48 individuals, and that it has a gross annual income of \$3.4 million.

The Labor Condition Application (LCA) that the petitioner submitted in support of the petition was certified for use with a job prospect within the "Advertising, Promotions, and Marketing Managers" occupational classification, SOC (O*NET/OES) Code 11-2021, and at a Level I prevailing wage rate. The LCA also reflects that, as mentioned above, the petitioner assigned "Marketing Manager" as the position's job title.

The petitioner's March 21, 2013 letter of support, which was filed with the Form I-129, described the duties of the proffered position as follows:

¹ The petitioner provided a North American Industry Classification System (NAICS) Code of 541511, "Custom Computer Programming Services." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "541511 Custom Computer Programming Services," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited Aug. 12, 2014).

[W]e have offered [the beneficiary] a position as a Marketing Manager and his duties will be as follows:

- Responsible for formulating and implementing online strategy and establish online platform[.]
- Collect and analyze sales data using web traffic metrics such as page visits, transaction size, link popularity, email promotions or viral marketing campaigns on social media web sites.
- Optimize web site exposure by analyzing search engine patterns to direct online placement of keywords or contents[.]
- Responsible for search engine optimization, website analytical and prepare daily, weekly and monthly reports on website traffic performance[.]
- Conduct financial modeling for online marketing programs[.]
- Conduct market research analysis to identify electronic commerce trends, market opportunities and competitor performance[.]
- Participate in the development of online marketing strategy. Conceptualize and execute strategies, assess market potential, understand client preferences to achieve key targets[.]
- Assist in the evaluation or negotiation of contracts with vendors and online partners[.]
- Assist in marketing [the petitioning company's] IT consulting business and negotiating with global companies using new commercial opportunities and strategic marketing relationships.
- Identify methods for interacting web application technologies with enterprise resource planning or other system software[.]
- Evaluate and procure hardware and software for implementing online marketing campaigns[.]

The petitioner further states that "[t]he position requires an individual with at least a Bachelor's degree in Business Administration, Marketing or a related field to perform."

The acting center director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on June 21, 2013. The petitioner was asked to submit probative

evidence to establish that that the position required a bachelor's degree in a specific field of study in order to perform the duties of the position. Further, the petitioner was asked to submit additional information about the business. The acting center director outlined some of the types of specific evidence that could be submitted.

In response to the RFE, the petitioner presented the following description of the position and its constituent duties:

[W]e need a person with specialty knowledge and experience in marketing concepts, trends, and methodologies to develop a campaign that is cost effective to reach our target customers through the internet. It is crucial to understand the needs of our existing and new clients to create a campaign that brings in increased business. In addition, the marketing manager works with our technical recruiters to develop a strategy and plan to search and reach the talent professionals that we need. The effective way to reach out to large pools of talents is also through internet such as social media, email, online advertisement, and other online platforms. The incumbent must have the specialized knowledge of different web marketing tools; web utilization/optimization; ability to analyze various business data such as sales data and web traffic metrics; and experience to formulate the optimum marketing strategy. The Marketing Manager must also be able to implement the campaign and monitor the details of the campaign for any modifications and changes as needs arise. The responsibilities of the Marketing Manager is not an easy task, as the detailed description illustrates how specialized and complex each duty is for the incumbent.

- Responsible for formulating and implementing online strategy and establish online platform.

The Marketing Manager applies concept of SWOT (Strength, Weakness, Opportunity, Trends) which the incumbent learned during studies in business management in the strategic management course. This concept enables the marketing manager to determine the strengths and weaknesses and derive marketing goals to be achieved. Once the goals or targets are determined, strategy with mission statement and objectives are formulated and established.

To conduct a complex SWOT analysis, the Marketing Manager utilizes complex research methodologies. Research methodologies include inductive and deductive modes such as opinion, empirical, archival and analytics. Analytics are further applied by mathematical modeling and philosophical arguments which comprise hypothesis and regression which will enable to conclude possible goal/target to be adopted.

- Collect and analyze sales data using web traffic metrics such as page visits, transaction size, link popularity, email promotions or viral marketing campaigns on social media website.

The Marketing Manager finds optimal web site exposure by search engine patterns to direct online placement of keyword or content. Responsible for search engine optimization website analytical and prepare daily weekly and monthly reports on website traffic performance.

Once target is established, web objective in place then the web operations are managed by web traffic metrics which comprise of real-time tracking of visitors by location, source and content. The Marketing Manager analyzes audience by demographics, behavior, technologies, which further consist of language analysis/occasion analysis/frequency of visits/time and engagement on website. It will be further analyzed by browser, OS and network. Search engine optimization which includes queries analysis, landing page analysis and geographic analysis.

Social Analysis which includes network reference, data hub activity, landing pages, trackback, conversions, plugging and visitor flow. Content analyses which contain: behavior flow analysis, site content, speed, search analysis are performed. The above analysis is further funneled down to ABC analysis (which is cost and benefits analysis).

- Conduct financial modeling for online marketing program.

Financial modeling is very key component of web marketing which is usually learned in a Business Management program course of managerial accounting/data analysis for managers/internet marketing and brand management. Basic concepts like BEP/gestation/marketing budgeting to more specific advanced online campaign analysis methods which comprise CPM/CPC/CPV/CPS/CTR/eCPM are advanced and reliable way to measure cost benefit performance. Generally it is done by using tools like web trend, omniture, site catalyst, and click trap. To better model, analyze and forecast, analysis is further fed in to business intelligence tool like SAS to achieve insight for better decision making.

- Participate in the development of online marketing strategy. Conceptualization and execute strategies, assess market potential, understand client preferences to achieve key target Assist in the evaluation or negation of contracts with vendor and online partner.

Developing marketing strategy and executing strategy are typically associated with college courses such as marketing management/strategic

marketing/internet marketing and brand management, international marketing, managed Information systems and strategic management.

- Evaluate and procure hardware and software for implementation online marketing campaigns

An online marketing campaign is core responsibility of web marketing manager. This is generally associated with degree coursework on fundamentals (sic) of execution of online marketing, Internet marketing, and brand management. The beneficiary also has developed expertise in his previous employment opportunities. The beneficiary is capable and has expertise in search/display and contextual campaigns, online branding advertisement concept development usage of rich media for brand communication. He is also well versed with tools such as Photoshop, Adobe Illustrator and Corel Draw which are used for developing banners to deliver advertisements to desired target groups. Furthermore, he has experience in handling high-end tool such as Google analytics for train, managing, and measuring online campaigns.

The acting center director reviewed the petitioner's RFE response, but found it insufficient to establish eligibility for the benefit sought. The acting center director denied the petition on December 20, 2013.

The petitioner thereafter filed a timely appeal, which is the matter now before us for a decision.

II. SPECIALTY OCCUPATION ISSUE

We will now address the acting center director's determination that the proffered position is not a specialty occupation. Based upon a complete review of the record of proceeding, we find that the evidence of record fails to establish that the position as there described constitutes a specialty occupation.

A. Law

To meet the petitioner's burden of proof with regard to the proffered position's classification as an H-1B specialty occupation, 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*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

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

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

B. Preliminary Findings Regarding the Position and its Duties, as Described in the Record

When determining whether a position is a specialty occupation, USCIS looks at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. To ascertain the intent of a petitioner, USCIS looks 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 acting center 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."

Thus, a crucial aspect of this matter is whether the petitioner has adequately described the duties of the proffered position, such that USCIS may discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through at least a baccalaureate degree in a specific discipline. We find that the petitioner has not done so here.

While the petitioner and counsel may claim otherwise, the record's descriptions of the proffered position and its duties do not elevate them above positions within the Advertising, Promotions and Marketing Managers occupational group that are not so specialized, complex, and/or unique as to require either a person with at least bachelor's degree in a specific specialty, or the equivalent, or application of knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty. 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)).

As we will later discuss in more detail, the record's descriptions of the proffered position and its duties comport with general duties of the Marketing Managers occupational group – which the petitioner identified in the LCA as the group to which the proffered position belongs. As evident in the descriptions of the proposed duties quoted above, the record of proceeding presents the proposed duties in terms of many functions that are described in various degrees of detail. However, as also evident in those descriptions, they do not themselves convey whatever particular types and levels of training, work experience, and/or academic education would be required to perform them. We note, for instance, the RFE-response's narrative paragraphs dealing with the proffered position's responsibility to "[c]ollect and analyze sales data using web traffic metrics." Those paragraphs deconstruct this general responsibility into many constituent work activities (such as analysis of the Internet web audience, and "[s]ocial analysis") and even subsets of such work activities. However, the petitioner has not supplemented that information with substantive explanations about the nature, level, and sources of specialized knowledge that would be required to perform those job activities.

The petitioner and counsel may suggest that the proffered position and its duties are so specialized, complex, and/or unique that either (1) the position requires a person with at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty, or (2) performance of the proposed duties requires knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty. However, the record of proceeding does not establish any correlation between the performance requirements of the proffered position, on the one hand, and attainment of at least a bachelor's degree, or the equivalent, in a specific specialty. In this regard, we note that, while the petitioner ascribes a wide range of functions and work activities to the proffered position, the record does not establish any objective, reliable standard by which to gauge the minimal education, or education-equivalent, credentials needed to perform them.

Thus, we conclude that the extent to which the proffered position and its duties are presented and explained do not establish the nature of the position or its duties as more complex, specialized, and/or unique than those of marketing manager positions that do not require the services of a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

Next, there are the adverse implications of the acceptability of a degree in Business Administration with no further specification.

The petitioner stated that the proffered position requires "an individual with at least a Bachelor's degree in Business Administration, Marketing or a related field to perform." The petitioner's claim that a bachelor's degree in "business administration" is a sufficient minimum requirement for entry into the proffered position is inadequate to establish that the 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).

As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).²

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.

C. Application of the Criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)

Having made the above preliminary findings, we turn now to the application of each supplemental, alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

We will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which is satisfied by establishing that a baccalaureate or higher degree, or its equivalent, in a specific specialty is

² 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.

normally the minimum requirement for entry into the particular position that is the subject of the petition.

We recognize the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.³ As noted above, the petitioner submitted an LCA in support of this position certified for a job offer falling within the "Marketing Managers" occupational category.

The *Handbook's* discusses Marketing Managers in its chapter "Advertising, Promotions, and Marketing Managers," which obviously also addresses two other management types. The *Handbook's* discussion includes the following information:

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.

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

- Work with department heads or staff to discuss topics such as budgets and contracts, marketing plans, and the selection of advertising media
- Plan advertising and promotional campaigns
- Plan advertising, including which media to advertise in, such as radio, television, print, online media, and billboards
- Negotiate advertising contracts
- Evaluate the look and feel of websites used in campaigns or layouts, which are sketches or plans for an advertisement
- Initiate market research studies and analyze their findings to understand customer and market opportunities for businesses
- Develop pricing strategies for products or services marketed to the target customers of a firm
- Meet with clients to provide marketing or technical advice
- Direct the hiring of advertising, promotions, and marketing staff and oversee their daily activities

³ The *Handbook*, which is available in printed form, may also be accessed online at <http://www.bls.gov/ooh>. The references to the *Handbook* are from the 2014-15 edition available online.

Advertising managers create interest among potential buyers of a product or service for a department, for an entire organization, or on a project basis (account). They work in advertising agencies that put together advertising campaigns for clients, in media firms that sell advertising space or time, and in organizations that advertise heavily.

Advertising managers work with sales staff and others to generate ideas for an advertising campaign. They oversee the staff that develops the advertising. They work with the finance department to prepare a budget and cost estimates for the advertising campaign.

Often, advertising managers serve as liaisons between the client requiring the advertising and an advertising or promotion agency that develops and places the ads. In larger organizations with an extensive advertising department, different advertising managers may oversee in-house accounts and creative and media services departments.

In addition, some advertising managers specialize in a particular field or type of advertising. For example, *media directors* determine the way in which an advertising campaign reaches customers. They can use any or all of various media, including radio, television, newspapers, magazines, the Internet, and outdoor signs.

Advertising managers known as *account executives* manage clients' accounts, but they are not responsible for developing or supervising the creation or presentation of the advertising. That task becomes the work of the creative services department.

Promotions managers direct programs that combine advertising with purchasing incentives to increase sales. Often, the programs use direct mail, inserts in newspapers, Internet advertisements, in-store displays, product endorsements, or special events to target customers. Purchasing incentives may include discounts, samples, gifts, rebates, coupons, sweepstakes, or contests.

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 their 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 a new product or service. Then they oversee the development of that product or service. For more information on sales or public relations, see the profiles on sales

managers, public relations and fundraising managers, public relations specialists, and market research analysts.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Advertising, Promotions and Marketing Managers," <http://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm#tab-2> (accessed Aug. 12, 2014).

The *Handbook* states the following with regard to the educational requirements necessary for entrance into the Marketing Managers occupational group:

A bachelor's degree is required for most advertising, promotions, and marketing management positions. . . .

Most marketing managers have a bachelor's degree. Courses in business law, management, economics, finance, computer science, mathematics, and statistics are advantageous. For example, courses in computer science are helpful in developing an approach to maximize traffic through online search results, which is critical for digital advertisements and promotions. 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> (accessed Aug. 12, 2014).

The statements from the *Handbook* do not indicate that a bachelor's degree or the equivalent, in a specific specialty, is normally required for entry into this occupation. To the contrary, although the *Handbook* states that courses in business law, management, economics, accounting, finance, mathematics, and statistics are "advantageous," it does not report that a bachelor's degree in a specific specialty is normally required. The statement that certain courses are advantageous is not sufficient to establish that a bachelor's degree in a specific field of study is a normal minimum entry requirement.⁴

Moreover, with regard to the *Handbook's* statement that "most" marketing managers possess a bachelor's degree, it is noted that 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 marketing manager positions requires at least a bachelor's degree or a closely related field, it could be said that "most" 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-

⁴ If merely stating that a degree confers advantage upon its holder were sufficient to satisfy this criterion, then virtually any position would qualify for classification as a specialty occupation, and the adjudicatory process would be rendered meaningless, as virtually every degree could be found to confer some type of advantage upon its holder.

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.

Furthermore, the materials from DOL's Occupational Information Network (O*NET OnLine) submitted by counsel do not establish that the proffered position satisfies the first criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A), either. O*NET OnLine is not particularly useful in determining whether a baccalaureate degree in a specific specialty, or its equivalent, is a requirement for a given position, as O*NET OnLine's Job Zone designations make no mention of the specific field of study from which a degree must come. As was noted previously, we interpret 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. The Specialized Vocational Preparation (SVP) rating is meant to indicate only the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. Therefore, O*NET OnLine information is not probative of the proffered position being a specialty occupation.

Nor does the record of proceeding contain any persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion within the Marketing Managers occupational group is sufficient in and of itself to establish the proffered position as, in the words of this criterion, a "particular position" for which "[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry."

Finally, as noted previously, the petitioner submitted an LCA certified for a job prospect with a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation (that is, Level I), which signifies that the beneficiary is only expected to possess a basic understanding of the occupation.⁵

⁵ The *Prevailing Wage Determination Policy Guidance* (available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf) (last visited Aug. 12, 2014) issued by DOL states the following with regard to Level I wage rates:

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 [emphasis in original].

As the evidence in the record of proceeding does not establish that at least a baccalaureate 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 described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, 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 for positions sharing all three characteristics of being (1) within the petitioner's industry, (2) parallel to the proffered position, and also (3) located in organizations that are similar to the petitioner.

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

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 for at least a bachelor's degree in a specific specialty or its equivalent. Nor are there any submissions from a professional association in the petitioner's industry stating 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. Nor has the petitioner submitted any letters or affidavits from firms or individuals in the industry attesting that such firms "routinely employ and recruit only degreed individuals.

Next, we find that the job-vacancy announcements submitted by counsel do not satisfy this alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), either. That is, neither the job-vacancy announcements themselves, nor any other evidence within the record of proceeding, establish that those advertisements pertain to positions that meet all of the criterion's elements of being in the petitioner's industry, in organizations similar to the petitioner, and also parallel to the proffered position, as required for evidence to merit consideration under this first alternative prong. In this regard, we make several specific findings.

The proposed duties' level of complexity, uniqueness, and specialization, as well as the level of independent judgment and occupational understanding required to perform them, are questionable, as the petitioner submitted an LCA certified for a Level I, entry-level position. The LCA's wage-level is appropriate for a proffered position that is actually a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, by submitting an LCA with a Level I wage rate, the petitioner effectively attests that the beneficiary is only required to possess a basic understanding of the occupation; that he will be expected to perform routine tasks requiring 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.

First, we note that under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), the petitioner must establish that "the degree requirement is common to *the industry in parallel positions* among *similar organizations* (emphasis added)." For the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, documentation regarding other organizations 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 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 the organizations are similar and in the same industry without providing a legitimate basis for such an assertion. 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)).

Also, we find no probative value in the submitted advertisements because the evidence of record has not established that they relate to the petitioner's industry, as would be required if those submissions were to be within this prong's zone of consideration. Again, the language of this prong limits the range of relevant evidence to the petition-pertinent industry's practices (stating "[t]he degree requirement" as one that would be "common to the industry" as well as "in parallel positions among similar organizations.")

In addition, the petitioner did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting and actual hiring history for the type of jobs advertised, let alone how representative they are of the industry practice in those areas.

Furthermore while some of the advertisements bear the title "Marketing Manager," the occupational group identified in the petitioner's certified LCA, it is the nature of the duties comprising the advertised positions that would determine whether those positions are in fact parallel to the proffered position. However, we see that the duty descriptions of the advertised positions and their constituent duties are not substantially similar to the proffered position's duties as stated in the petitioner's letters. Also, although the petitioner has designated the proffered position as a Level I position, indicating that it is an entry-level position, it has provided several job announcements for positions requiring extensive experience.⁶ So, the job-vacancy advertisements do not establish that the advertised positions are "parallel" to the proffered position.

⁶By way of example, the [REDACTED] advertisement for a "Portfolio Marketing Manager job" states "5+ years in services sales, services marketing and/or consulting delivery." The [REDACTED] advertisement for a "Marketing Manager III" states "Experience: 2+ to 5 years." The [REDACTED] advertisement for a "Marketing Manager" states "5-7 years of experience in marketing for a [REDACTED] technology company, Cyber Security Domain Experience (sic)." The [REDACTED] advertisement for a "Technical Marketing Manager" states "At least 3 years in technical marketing role or combination of 5 years total in lab/test

In addition, the submitted advertisements do not all specify a requirement for a bachelor's or higher degree in a specific specialty or its equivalent. By way of example, the [REDACTED] advertisement for a "Marketing Manager" specifies a "B.S. or B.A. degree" with no indication that the bachelor's degree must be in any particular area or be equivalent to a bachelor's or higher degree in a specific specialty. In addition, the [REDACTED] advertisement for a "Marketing Manager III" only states a "Bachelor's Degree" as the educational requirement.

(As the submitted vacancy-announcements are not probative evidence towards satisfying this criterion, further analysis of their content is not necessary.)

Thus, the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not 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 (2) for positions that are both: (a) parallel to the proffered position, and (b) located in organizations that are similar to the petitioner.

Next, the evidence of record does not satisfy 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."

We have, of course, considered all of the statements of counsel and the petitioner bearing on this issue. However, we find that the evidence in the record of proceeding does not develop relative complexity or uniqueness as aspects of the proffered position, let alone as aspects that would distinguish the proffered position from positions in the Marketing Managers occupational group that can be performed by persons without at least a bachelor's degree, or the equivalent, in a specific specialty. In this regard, we refer the petitioner to our earlier discussion and findings about the record's descriptions of the proffered position and its proposed duties – which we incorporate by reference into our analysis here.

Now aside from such evidentiary deficiencies, reliance upon assertions of job complexity or uniqueness is further undermined by the fact that the petitioner submitted an LCA certified for a job prospect with a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation. We incorporate here by reference and reiterate our earlier discussion regarding the LCA and its indication that the petitioner would be paying a wage-rate that is only appropriate for a low-level, entry position relative to others within the occupation: this factor is inconsistent with the level of relative complexity or uniqueness required to satisfy this criterion. Based upon the wage rate selected by the petitioner, the beneficiary is only required to have a basic understanding of the occupation. Moreover, that wage rate indicates that the beneficiary will perform routine tasks requiring limited, if any, exercise of independent judgment; that the

environment + product mgmt./marketing." The extensive experience that these job advertisements specify as hiring requirements suggests that they involve the application of greater occupational knowledge than the proffered position, a Level I position.

beneficiary's work will be closely supervised and monitored; that he will receive specific instructions on required tasks and expected results; and that his work will be reviewed for accuracy.

As the evidence of record therefore fails to establish how the beneficiary's responsibilities and day-to-day duties comprise a position so complex or unique that the position can be performed only by an individual with at least a bachelor's degree in a specific specialty or its equivalent, the petitioner has not satisfied the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

We turn next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty or its equivalent for the position.

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. Additionally, 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.⁷

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").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. 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 at 387. 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 a specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proposed position - and without consideration of how a

⁷ Any such assertion would be undermined in this particular case by the fact that the petitioner's submission of an LCA certified for a Level I prevailing-wage signifies assessment of the proffered position as a comparatively low, entry-level position relative to others within the same occupation.

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.* at 388.

The record of proceeding indicates that the petitioner has not "hired any Marketing Manager during the past years." While a first-time hiring for a position is certainly not a basis for precluding a position from recognition as a specialty occupation, it is not possible that an employer that has never recruited and hired for the position would be able to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a demonstration that the petitioner normally requires at least a bachelor's degree in a specific specialty or its equivalent for the position. Even if the record contained such evidence, we would still find that the petitioner failed to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) because the record does not, as indicated above, establish that its degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the proffered position, a determination which is strengthened by the petitioner's submission as the supporting LCA one that was certified for the lowest wage-level, which is appropriate for a comparatively low, entry-level position relative to others within its occupation.

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

Next, the evidence of record does not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires the petitioner to establish that the nature of the proffered position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in the specific specialty or its equivalent.

For context, we again refer the petitioner to the *Handbook* and the pertinent sections that we have quoted from it. The *Handbook's* information does not indicate that the performance requirements of the duties of Marketing Managers occupational group are usually associated with attainment of at least a bachelor's degree in a specific specialty.

As reflected in this decision's earlier comments and findings with regard to the proposed duties as presented in the record - which we here incorporate into the present analysis - the evidence of record does not establish the nature of the proposed duties as so specialized and complex that their performance would require knowledge usually associated with a particular level of education in a specific specialty. While the petition relates many and varied duties and functions that the beneficiary would have to perform, it does not show that even the aggregate of such duties is usually associated with a particular level of educational attainment in any specific specialty. Thus, the evidence in the record of proceeding fails to establish that the proposed duties meet the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Additionally, we find that both on its own terms and also in comparison with the three higher wage-levels that can be designated in an LCA, by the submission of an LCA certified for a wage-level I, the petitioner effectively attests that the proposed duties are of relatively low complexity as

compared to others within the same occupational category. This fact is materially inconsistent with the level of complexity required by this criterion.

As earlier noted, the *Prevailing Wage Determination Policy Guidance* issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

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 [emphasis in original].

The pertinent guidance from the Department of Labor, at page 7 of its *Prevailing Wage Determination Policy Guidance* describes the next higher wage-level as follows:

Level II (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones.

The above descriptive summary indicates that even this higher-than-designated wage level is appropriate for only "moderately complex tasks that require limited judgment." The fact that this higher-than-here-assigned, Level II wage-rate itself indicates performance of only "moderately complex tasks that require limited judgment," is very telling with regard to the relatively low level of complexity imputed to the proffered position by virtue of its Level I wage-rate designation.

Further, we note the relatively low level of complexity that even this Level II wage-level reflects when compared with the two still-higher LCA wage levels, neither of which was designated on the LCA submitted to support this petition.

The aforementioned *Prevailing Wage Determination Policy Guidance* describes the Level III wage designation as follows:

Level III (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years

of experience or educational degrees that are at the higher ranges indicated in the O*NET Job Zones would be indicators that a Level III wage should be considered.

Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. . . .

The *Prevailing Wage Determination Policy Guidance* describes the Level IV wage designation as follows:

Level IV (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

Here we again incorporate our earlier discussion and analysis regarding the implications of the petitioner's submission of an LCA certified for the lowest assignable wage-level. By virtue of this submission the petitioner effectively attested that the proffered position is a low-level, entry position relative to others within the occupation, and that, as clear by comparison with DOL's instructive comments about the next higher level (Level II), the proffered position did not even involve "moderately complex tasks that require limited judgment" (the level of complexity noted for the next higher wage-level, Level II).

For all of these reasons, the evidence in the record of proceeding fails to establish that the proposed duties meet the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As the petitioner has not satisfied at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation.

III. Conclusion and Order

For the reasons discussed above, we conclude that the evidence of record does not establish that the proffered position qualifies for classification as a specialty occupation.

An application or petition that fails to comply with the technical requirements of the law may be denied by this office even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of our enumerated grounds. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.