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



U.S. Citizenship  
and Immigration  
Services

DATE: JAN 24 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:  
[REDACTED]

INSTRUCTIONS:

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

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

Thank you,

*NR*  
for

Ron Rosenberg  
Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the Vermont Service Center on November 26, 2012.<sup>1</sup> In the Form I-129 visa petition, the petitioner describes itself as a "Natural Foods Distributor" established in 2003, with nine employees. In order to employ the beneficiary in what it designates as a part-time "Marketing/Advertising 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 May 23, 2013, finding that the petitioner failed to establish (1) that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions and (2) that the beneficiary is not qualified to perform services in a specialty occupation. The petitioner, through counsel, submitted an appeal of the decision. On appeal, counsel asserts that the director's decision was erroneous. Counsel submits a brief and additional evidence in support of the appeal.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the petitioner's Form I-290B and supporting documentation. 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. Accordingly, the appeal will be dismissed, and the petition will be denied.

However, the AAO hereby withdraws the beneficiary-qualification issue that the director's decision specified as an additional basis for the dismissal. This is because a beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.<sup>2</sup> In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services as a "Marketing/Advertising Manager" to work on a part-time basis of 20 hours per week at a salary of \$705.00 per week (\$35.25 per hour/ \$36,660.00 per year).

The petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The LCA designation for the proffered position corresponds to the occupational

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<sup>1</sup> The petition was incorrectly submitted to the California Service Center (CSC). The CSC forwarded the submission (as received) to the Vermont Service Center for processing.

<sup>2</sup> U.S. Citizenship and Immigration Services (USCIS) is required to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether an alien beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].")

classification of "Advertising and Promotions Managers" - SOC (ONET/OES) code 11-2011, at a Level II (qualified) wage.

In a support letter dated October 9, 2012, that accompanied the Form I-129, the petitioner described the duties of the proffered position as follows:

- 1) Analyze product marketing or sales trends to forecast future conditions; 2) conduct research on consumer opinion and buying habits; 3) develop comprehensive marketing and advertising strategies for the whole foods market; 4) revise existing marketing plans; and 5) help develop effective web site, brochures and other communication media.

The petitioner stated that the beneficiary was qualified to perform the duties of the proffered position because "he possesses the foreign equivalent of a Bachelor[']s degree in Veterinary Medicine and [a Master's degree in] Agricultural Systems and Management. . . ." The petitioner provided a copy of the beneficiary's diploma from [REDACTED] Colombia, and a certified English translation of the diploma in Veterinary Medicine indicating that the beneficiary was granted the title of Veterinary Doctor. The petitioner also submitted a copy of the beneficiary's Master of Applied Science degree in Agricultural Systems and Management from [REDACTED] in New Zealand. In addition, the petitioner provided a document dated April 17, 2008, entitled "Evaluation Report" prepared by [REDACTED] for the purpose of teacher certification, stating that the beneficiary's foreign degrees are "equivalent to a first professional degree in Veterinary Medicine (DVM) and a Master of Applied Science [degree] in Agricultural Systems and Management awarded by a regionally accredited university in the U.S."

Finally, the AAO must note that the petitioner failed to specify any minimal educational requirement for the proffered position in its support letter dated October 9, 2012.

Upon review of the documentation, the director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on January 17, 2013. The director requested, among other things, that the petitioner submit probative evidence to establish that the proffered position is a specialty occupation and outlined the evidence to be submitted.

On April 10, 2013, counsel responded to the director's RFE and submitted a letter dated April 4, 2013 in which he asserted that "although the beneficiary does not have a degree directly related to the position, the employer strongly believe[s] that [the] beneficiary is able to fulfill the job duties based on the fact that he possesses a bachelor's degree."

In response to the RFE, counsel also submitted a letter from the petitioner dated March 29, 2013, in which the petitioner provided the following revised description of the duties of the proffered position:

This position requires that the individual be able to conduct marketing research for present and future sales trends and conduct extension research for consumer buying habits. I also mentioned that the position requires the development of comprehensive



marketing and advertising strategies for the whole food market, revising existing limited market plans, and develop website, brochures and other media. In addition [to] these duties, the position also requires coordinating promotional activities to market our products, consulting with buying personnel to gain advice for the demand in the market, evaluating financial aspects or [sic] product development, such as budgets, expenditures, etc., preparing and negotiating advertising and sales contracts, and preparing advertising budgets.

The petitioner noted that the proffered position required a degree because “[t]he duties [of] the position are highly complex.” The petitioner also stated that “[t]he complexity of the job duties can be accomplish[ed] if the applicant has a degree in any field.”

Counsel also provided the following documentation in response to the RFE: (1) copies of various job postings; and (2) a copy of the O\*NET OnLine “Summary Report for: 11-2021.00 – Marketing Managers.”

The director reviewed all of the information provided by the petitioner. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level 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 and that the beneficiary is not qualified to perform services in a specialty occupation. The director denied the petition on May 23, 2013. The petitioner, through counsel, submitted an appeal of the denial of the H-1B petition.

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
- (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), 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.

The issue before the AAO is 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. The AAO, however, will first make some preliminary findings that are material to the determination of the merits of this issue on appeal.

When determining whether a position is a specialty occupation, the AAO must look 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 must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

Thus, a crucial aspect of this matter is whether the petitioner has sufficiently 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 obtained through attainment of at least a baccalaureate degree in a specific discipline. The AAO finds that the petitioner has not done so.

The record contains two generic and distinct job descriptions for the proffered position that do not adequately establish the substantive nature of the work that the beneficiary is expected to perform in order to establish eligibility for H-1B classification.



The AAO notes that the revised description of the duties of the proffered position that was provided in the letter in response to the RFE dated March 29, 2013, is different than the original job duties that were provided in the support letter dated October 9, 2012. In its response to the RFE, the petitioner expanded the beneficiary's duties, adding items such as: (1) "coordinating promotional activities to market our products"; (2) "consulting with buying personnel to gain advice for the demand in the market"; (3) "evaluating financial aspects or [sic] product development, such as budgets, expenditures, etc."; (4) "preparing and negotiating advertising and sales contracts"; and (5) "preparing advertising budgets." In addition, in the support letter, the petitioner failed to specify the minimal educational requirements for the proffered position. In contrast, in the letter in response to the RFE dated March 29, 2013, the petitioner's revised description of the duties of the proffered position included a minimal educational requirement of a bachelor's degree. The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to an RFE, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's RFE did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description.

Moreover, the generalized level of information provided about the proffered position and its constituent duties is exemplified by the petitioner's assertion that the beneficiary's duties would include "1) [a]nalyze product marketing or sales trends to forecast future conditions.; 2) conduct research on consumer opinion and buying habits; 3) develop comprehensive marketing and advertising strategies for the whole foods market; 4) revise existing marketing plans; and 5) help develop web site, brochures and other communication media," as well as those duties listed in the previous paragraph. The petitioner provided no explanation as to what tasks these duties would actually entail. The duties could cover a range of activities, and without further information, do not provide any insight into the beneficiary's day-to-day work. The petitioner's description of the proffered position fails to illuminate the substantive application of knowledge involved in the proposed duties or any particular educational attainment associated with such application.

While the petitioner has identified its proffered position as that of a "Marketing/Advertising Manager," the description of the beneficiary's duties, as provided by the petitioner, lacks the specificity and detail necessary to support the petitioner's contention that the position is a specialty occupation. In establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in the context of the petitioner's business operations, demonstrate a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. In the instant case, it is not evident that the proposed duties as described in this record of proceeding, and the position that they comprise, merit recognition of the proffered position as a specialty occupation. To the extent that they are described, the AAO finds that the proposed duties



do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire period requested, so as to persuasively support the claim that the position's actual work would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific specialty directly related to the duties and responsibilities of the proffered position. The job description fails to communicate (1) the actual work that the beneficiary would perform on a day-to-day basis; (2) the complexity, uniqueness and/or specialization of the tasks; and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. The AAO will provide a few illustrative examples.

The petitioner claimed that a substantial part of the duties of the proffered position are devoted to the development of "comprehensive marketing and advertising strategies for the whole foods market" and the revision of "existing marketing plans," but the petitioner provided neither substantive information about, nor documentary evidence illustrating, the nature of the "marketing and advertising strategies for the whole foods market" that the beneficiary would develop or the types of "existing marketing plans" that the beneficiary would have to revise. Likewise, the evidence of record sheds no light on the substantial nature of the "financial aspects" of product development, "such as budgets, expenditures, etc.," that the petitioner says that the beneficiary would evaluate, or on the "product marketing or sales trends" that the beneficiary is to analyze "to forecast future conditions, or on the "promotional activities" that the beneficiary would coordinate "to market our products."

Upon review of the record of proceeding, the AAO finds that the overall responsibilities for the proffered position contain insufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their daily performance. Furthermore, the petitioner did not provide sufficient documentation to establish and substantiate the actual job duties and responsibilities of the proffered position. Moreover, the petitioner did not submit sufficient evidence to establish the beneficiary's specific role within its business operations and how the beneficiary would be relieved from performing non-qualifying duties.

In addition, the AAO observes that the petitioner claimed the minimum educational requirement for the proffered position is at least a bachelor's degree in the letter in response to the RFE dated March 29, 2013. The petitioner's claim that a bachelor's degree is a sufficient minimum requirement for entry into the proffered position is inadequate to establish that the proposed 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. There must be a close correlation between the required specialized studies and the position; thus, the mere requirement of a degree, 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) ("The mere requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility."). Thus, while a general-purpose bachelor's degree may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147 (1st

Cir. 2007). Accordingly, the petitioner's assertion that its minimum requirement for the proffered position is only a bachelor's degree, without further requiring that that degree be in any specific specialty, 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.

Nevertheless, for the purpose of performing a comprehensive analysis, the AAO will now discuss in detail the applicable statutory and regulatory provisions for determining whether the proffered position qualifies as a specialty occupation. Based upon a complete review of the totality of the evidence in the record of proceeding, the AAO again notes that it agrees with the director that the evidence in the record fails to establish that the position as described constitutes a specialty occupation.

To make its determination as to whether the proffered position qualifies as a specialty occupation, the AAO turns to the supplemental, additional criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO will first review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is 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 "Marketing/Advertising Manager" position on the Form I-129. 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 evidence in the record of proceeding establishes that performance of the particular proffered 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.

The AAO recognizes 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 that it addresses.<sup>3</sup> As noted above, the petitioner asserts in the LCA that the proffered position falls within the occupational category "Advertising and Promotions Managers." In the "Advertising, Promotions, and Marketing Managers" chapter, the *Handbook* provides the following description of the duties of those positions:

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<sup>3</sup> The *Handbook*, which is available in printed form, may also be accessed on the Internet at <http://www.bls.gov/ooh/>. The AAO's references to the *Handbook* are to the 2014-2015 edition available online.



## **What Advertising, Promotions, and Marketing Managers Do**

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 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

**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 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, and 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> (last visited Jan. 23, 2014).

The narrative contained in the *Handbook* does not indicate that advertising, promotions, and marketing managers constitute an occupational group for which normally the minimum requirement for entry is a specialty occupation level of education, that is, at least a U.S. bachelor's degree *in a specific specialty*, or its equivalent. The subchapter of the *Handbook* entitled "How to Become an Advertising, Promotions, and Marketing Manager" states the following regarding the educational requirements for this occupational category:

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.

**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, 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.

**Work Experience in a Related Occupation**

Advertising, promotional and marketing managers typically have work experience in advertising, marketing, promotions, or sales. For example, many managers are former sales representatives; purchasing agents; buyers; or product, advertising, promotions, or public relations specialists.

**Important Qualities**

**Analytical skills.** Because the advertising industry changes with the rise of digital media, advertising, promotions, and marketing managers must be able to analyze industry trends to determine the most promising strategies for their organization.

**Communication skills.** Managers must be able to communicate effectively with a broad-based team made up of other managers or staff members during the advertising, promotions, and marketing process. They must also be able to communicate persuasively with the public.

**Creativity.** Advertising, promotions, and marketing managers must be able to generate new and imaginative ideas.

**Decision-making skills.** Managers often must choose between competing advertising and marketing strategies put forward by staff.

**Interpersonal skills.** These managers must deal with a range of people in different roles, both inside and outside the organization.

**Organizational Skills.** Advertising, promotions, and marketing managers must manage their time and budget efficiently while directing and motivating staff members.



*Id.* at <http://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm#tab-4> (last visited Jan. 23, 2014).

While the *Handbook* reports that a baccalaureate degree is the minimum educational requirement for *most* advertising, promotions, and marketing management jobs, it does not indicate that such a degree is a minimum entry requirement or, more importantly, that the degrees or equivalencies held by such workers must be in a specific specialty that is directly related to advertising, promotions, and marketing management, as would be required for the occupational category to qualify as a specialty occupation, as that term is defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).<sup>4</sup> *See id.* With no indication that such knowledge must be equivalent to a U.S. bachelor's or higher degree in a specific specialty or its equivalent, the *Handbook* is not sufficient evidence in and of itself that the particular position proffered here qualifies as a specialty occupation.

When, as here, the *Handbook* does not support the proposition that the proffered position satisfies this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise satisfies the criterion, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that supports a favorable finding with regard to this criterion. 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." 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In response to the RFE, counsel asserted that the DOL's O\*NET "clearly states that a bachelor's degree is normally required for a marketing manager [position]" and provided a copy of the O\*NET OnLine Summary Report for the occupation "Marketing Managers." The AAO reviewed the O\*NET OnLine Summary Report but finds that the petitioner's and counsel's reliance on the report is misplaced. That is, O\*NET assigns this occupation a Job Zone Four rating, which groups it among occupations that are described as follows: "[m]ost of these occupations require a four-year bachelor's degree, but **some do not**" (emphasis added). As counsel acknowledges on appeal, the O\*NET does not report that for those occupations with an academic degree requirement, that such a degree must be in a specific specialty directly related to the occupation. As previously discussed, USCIS consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to

<sup>4</sup> For instance, 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 require at least a bachelor's degree, it could be said that "most" accountant 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 offered 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.



mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the duties and responsibilities of the position. Further, as previously explained, "most" is not indicative that a position normally requires at least a bachelor's degree in a specific specialty, or its equivalent, (the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1)), or that a position is so specialized and complex as to require knowledge usually associated with attainment of a baccalaureate or higher degree in a specific specialty (the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4)). Notably, O\*NET indicates that some of these occupations do not require a four-year bachelor's degree.

Upon review of the totality of the evidence in the entire record of proceeding, the AAO concludes that the petitioner has not established that the proffered position falls within an occupational category for which the *Handbook*, or other authoritative source, indicates that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is normally required for entry into the occupation. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the particular position that is the subject of this petition is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Therefore, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a requirement of a bachelor's degree 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*, or other authoritative source, reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Thus, the AAO incorporates by reference the previous discussion on the matter. Also, there are no 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. Finally, for the reasons discussed in greater detail below, the petitioner's reliance upon the job vacancy advertisements is misplaced. In support of their assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner and counsel submitted copies of several job vacancy announcements.

However, as the petitioner and counsel acknowledge, none of the advertisements that were provided indicate that a bachelor's degree in a *specific specialty*, or its equivalent, is required by the

advertising employers. The AAO here reiterates that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a specific specialty, or its equivalent, that is directly related to the specialty occupation claimed in the petition. In addition, even if all of the job postings indicated that a bachelor's or higher degree in a specific specialty or its equivalent were required, the petitioner fails to establish that the submitted advertisements are relevant as the record does not indicate that the posted job announcements are for parallel positions in similar organizations in the same industry. 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). Thus, for the reasons discussed above, the petitioner's reliance on the job vacancy advertisements is misplaced. As a result, the petitioner has not established that similar companies in the same industry routinely require at least a bachelor's degree in a specific specialty or its equivalent for parallel positions.<sup>5</sup>

Thus, based upon a complete review of the record, the AAO finds that the petitioner has not established that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is common in the petitioner's industry for positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. Thus, for the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

In the instant case, the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position. Specifically, the petitioner failed to demonstrate how the proffered position's duties as described require the theoretical and practical application of a body of

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<sup>5</sup> Although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from such a limited number of advertisements with regard to determining the common educational requirements for entry into parallel positions in similar state universities. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that the position of "Marketing/Advertising Manager" at a natural foods distributor required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the statistics-based findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.



highly specialized knowledge such that a person who has attained a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. The petitioner designated the proffered position as a Level II (qualified level) position on the LCA.<sup>5</sup> The wage levels are defined in the U.S. Department of Labor (DOL) "Prevailing Wage Determination Policy Guidance."<sup>6</sup> A Level II wage rate is described by DOL 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.

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

Thus, in designating the proffered position at a Level II wage, the petitioner has indicated that the proffered position is a comparatively low position relative to others within the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, the selected wage rate indicates that the beneficiary is only required to perform "moderately complex tasks that require limited judgment." Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."<sup>7</sup>

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<sup>5</sup> Wage levels should be determined only after selecting the most relevant O\*NET code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.

<sup>6</sup> Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

<sup>7</sup> For additional information regarding wage levels as defined by DOL, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).



Thus, the wage level designated by the petitioner in the LCA for the proffered position is not consistent with claims that the position would entail any particularly complex or unique duties or that the position itself would be so complex or unique as to require the services of a person with at least a bachelor's degree in a specific specialty.

The evidence of record does not establish that this position is significantly different from other "Marketing/Advertising Manager" positions such that it refutes the *Handbook's* information that a degree in a specific specialty is not required for these positions, for entry into the occupation. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique than other positions in the pertinent occupation 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 its particular position is so complex or unique relative to other positions in the pertinent occupation that can be performed by an individual without at least a bachelor's degree in a specific specialty, or its equivalent for entry into the occupation in the United States, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

The AAO's review of the record of proceeding under this criterion necessarily includes whatever evidence the petitioner may have submitted with regard to its history of recruiting and hiring for the proffered position and with regard to the educational credentials of the persons who have held the proffered position in the past. Here, the petitioner did not submit evidence to satisfy this criterion and specifically acknowledged, in the letter in response to the RFE dated March 29, 2013, that it "never had an individual as a marketing/advertising manager in the past."

As the petitioner has not provided any evidence to demonstrate a prior history of recruiting and hiring for the proffered position only individuals with at least a bachelor's degree in a specific specialty, or its equivalent, it has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

Upon review of the record of the proceeding, the AAO finds that the petitioner has not provided sufficient evidence to satisfy this criterion of the regulations. There is insufficient evidence in the record to establish that the duties of the proffered position require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty.

The AAO finds that the petitioner has not provided probative evidence to satisfy this criterion of the

regulations. In the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish their nature as more specialized and complex than the nature of the duties of other positions in the pertinent occupational category whose performance does not require the application of knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty, or its equivalent.

In this regard, the AAO here incorporates into this analysis its earlier comments and findings with regard to the implication of the Level II wage-rate designation in the LCA. That is, that the proffered position's Level II wage designation is indicative of a low-level position relative to others within the occupational category and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, the DOL indicates that a Level II designation is appropriate for "moderately complex tasks that require limited judgment."

The petitioner has submitted insufficient evidence to satisfy this criterion of the regulations. That is, the petitioner has not established that the nature of the duties of the position is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. The AAO, therefore, concludes that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, 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.

As noted earlier, the director also found that the beneficiary would not be qualified to perform the duties of the proffered position if the job had been determined to be a specialty occupation. However, a 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 has failed to establish that the proffered position requires a baccalaureate or higher degree in a specific specialty or its equivalent. Therefore, the AAO need not and will not address the beneficiary's qualifications.

As the grounds discussed above are dispositive of the petitioner's eligibility for the benefit sought in this matter, the AAO will not address and will instead reserve its determination on the additional issues and deficiencies that it observes in the record of proceeding with regard to the approval of the H-1B petition.

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.