



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **OCT 08 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,

Ron Rosenberg
Chief, Administrative Appeals Office

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

On the Form I-129, Petition for a Nonimmigrant Worker, and supporting documentation, the petitioner describes itself as a Pilates studio established in 2004. In order to employ the beneficiary in what it designates as an advertising and promotions manager position, the petitioner seeks to classify her 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, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before us contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner and its counsel's response to the RFE; (4) the notice of decision; and (5) the Form I-290B, Notice of Appeal or Motion, and supporting materials. We reviewed the record in its entirety before issuing our decision.¹

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

I. FACTUAL AND PROCEDURAL BACKGROUND

In the Form I-129 visa petition, the petitioner indicated that it is seeking the beneficiary's services as an advertising and promotions manager on a part-time basis. In the letter of support, the petitioner stated that the beneficiary will be responsible for the following duties:

As our Advertising and Promotions Manager, [the beneficiary] will be responsible for planning, directing, and coordinating advertising campaigns. She will also direct and plan the production of advertising materials such as posters, brochures, invitational cards, among other materials to create extra interest in our studio and the services we offer to the public. She will direct market research, analyze the findings, and utilize the information obtained to plan advertising campaigns. Moreover, she will coordinate and work with the marketing staff to discuss topics such as contracts negotiation and selection of advertising media. She will direct and monitor the progress of the marketing staff in advancing advertising campaign goals.

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

In addition, [the beneficiary] will be responsible for the following job duties:²

- Plan and prepare advertising and promotional material to increase sales of products and services, working with clients, company officials, and advertising agencies.
- Gather and organize information to plan advertising campaigns.
- Inspect layouts, which are sketches or plans for an advertisement, and edit scripts, audio, video, and other promotional material for adherence to specifications.
- Plan the advertising campaign, including which media to advertise in, such as radio, television, print, online, and billboards[.]
- Direct, motivate, and monitor the mobilization of marketing staff to advance campaigns goals.
- Initiate market research studies and analyze their findings[.]
- Confer with marketing staff to discuss topics such as contracts, selection of advertising media, or services to be advertised.
- Prepare budgets and submit estimates for program costs as part of campaign plan development.
- Prepare and negotiate advertising and sales contracts.
- Plan and execute advertising and strategies for the company[.]
- Direct the hiring of advertising, promotions, and marketing staff and oversee their daily activities[.]
- Confer with clients to provide marketing or technical advice.

The petitioner also stated: "our Advertising and Promotions Manager must possess at least a Bachelor's degree in Communications, or a related field."

With the Form I-129 petition, the petitioner submitted a copy of the beneficiary's foreign diploma and transcript, as well as a credential evaluation from The [REDACTED]. The credential evaluation indicates that the beneficiary's foreign education is "the equivalent of a four-year Bachelor of Arts Degree, with a major in Communications and a minor in Sport Science, from an accredited college or university in the United States."

The petitioner also 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 classification of "Advertising and Promotions Manager" - SOC (ONET/OES Code) 11-2011, at a Level I (entry level) wage.

The director found the evidence insufficient to establish eligibility for the benefit sought, and issued

² We observe that the wording of the duties provided by the petitioner for the proffered position are taken almost verbatim from the Occupational Information Network (O*NET) OnLine and the *Occupational Outlook Handbook's* (hereinafter the *Handbook*) list of tasks associated with an advertising and promotions manager position.

an RFE. The director outlined the specific evidence to be submitted. The petitioner and counsel responded to the RFE by submitting additional evidence. In a letter dated December 2, 2013, the petitioner provided the approximate percentage of time the beneficiary will spend performing each duty mentioned in the letter of support.

The director reviewed the information provided by the petitioner and counsel. 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. The director denied the petition. The petitioner submits an appeal of the denial of the H-1B petition. With the appeal, counsel submits a brief and additional evidence.³

II. MATERIAL FINDINGS

The primary issue is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, we will make some preliminary findings that are material to the determination of the merits of this appeal.

To ascertain the intent of a petitioner, U.S. Citizenship and Immigration Services (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 adequately described the duties of the proffered position, such that USCIS may discern the nature of the position and whether the

³ With regard to the new documentation submitted on appeal that was encompassed by the director's RFE, we note that this evidence is outside the scope of the appeal. The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. See 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. § 103.2(b)(1), (8), and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Under the circumstances, we need not consider the sufficiency of such evidence requested by the director in the RFE but submitted for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533. Nevertheless, we have analyzed this documentation in our *de novo* review of this matter.

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. The petitioner has not done so here.

We observe that the duties of the proffered position, as described by the petitioner, have been stated in generic terms that fail to convey the actual tasks the beneficiary will perform on a day-to-day basis. That is, we note that the wording of the above duties provided by the petitioner for the proffered position are taken almost verbatim from the O*NET OnLine and the *Handbook's* list of duties associated with an advertising and promotions manager position. This type of description may be appropriate when defining the range of duties that may be performed within an occupational category, but it fails to adequately convey the substantive work that the beneficiary will perform within the petitioner's business operations and, thus, generally cannot be relied upon by a petitioner when discussing the duties attached to specific employment. 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, as well as 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.

The job description for the proffered position fails to convey either the substantive nature of the work that the beneficiary would actually perform, or any particular body of highly specialized knowledge that would have to be theoretically and practically applied to perform the proffered position. The petitioner's assertion with regard to the educational requirement is conclusory and unpersuasive, as it is not supported by the job description or other substantive evidence.

III. REVIEW OF THE DIRECTOR'S DECISION

The primary issue on appeal for consideration is whether the petitioner's proffered position qualifies as a specialty occupation. 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.

A. The Law

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), 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. Specialty Occupation Analysis

We now turn to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). As explained earlier in this decision, the petitioner has not established the nature of the proffered position and in what capacity the beneficiary will actually be employed within the petitioner's business operations. The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Nevertheless, assuming, for the sake of argument, that the petitioner had adequately and accurately described the duties of the proffered position, we will now discuss the proffered position 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.

We recognize the *Handbook* as an authoritative source on the duties and educational requirements

of the wide variety of occupations that it addresses.⁴ As previously mentioned, the petitioner attested in the LCA that the proffered position falls under the occupational category "Advertising and Promotions Managers" and designated the wage level of the proffered position as a Level I position (the lowest out of four assignable wage-levels).⁵

We reviewed the chapter of the *Handbook* entitled "Advertising, Promotions, and Marketing Managers," including the sections regarding the typical duties and requirements for this occupational category. However, the *Handbook* does not indicate that "Advertising, Promotions, and Marketing Managers" comprise an occupational group for which normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent.

⁴ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. Our references to the *Handbook* are to the 2014 – 2015 edition available online. We hereby incorporate into the record of proceeding the chapter of the *Handbook* regarding "Advertising and Promotions, and Marketing Managers."

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

Prevailing wage determinations start with 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) position 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. The U.S. Department of Labor (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.

The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is described as follows:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

The subchapter of the *Handbook* entitled "How to Become an Advertising, Promotions, or Marketing Manager" states, in part, the following about this occupation:

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

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Advertising, Promotions, and Marketing Managers, available on the Internet at <http://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm#tab-4> (last visited September 24, 2014).

The *Handbook* does not support the assertion that a baccalaureate or higher degree *in a specific specialty*, or its equivalent, is normally the minimum requirement for entry into the occupation. The *Handbook* states that for advertising management positions, some employers prefer a bachelor's degree in advertising or journalism. Clearly, a preference by *some employers* is not an occupational, entry requirement. The *Handbook* further states that a relevant course of study for these positions might include classes in marketing, consumer behavior, market research, sales, communication methods and technology, visual arts, art history, and photography. Thus, a range of courses of study are considered relevant for advertising management positions. This passage of the *Handbook* also states that most marketing managers have a bachelor's degree, but it does not indicate that any specific specialty is normally required for these positions.⁶ The *Handbook*

⁶ Moreover, the first definition of "most" in *Webster's New Collegiate College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of these positions have a bachelor's degree, it could be said that "most" advertising, promotions, and marketing managers possess such a degree. It cannot be found, therefore, that the statement in the *Handbook* that a "[m]ost marketing managers have a bachelor's degree [in no specific specialty]" would equate to establishing that a baccalaureate or higher degree in a *specific specialty*, or its equivalent, is the normal minimum entry requirement for this occupation, much less for the particular position proffered by the petitioner (which as has been designated by the petitioner in the LCA as a Level I position). Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that

indicates that courses in business law, management, economics, accounting, finance, mathematics, and statistics are advantageous for marketing managers. We note that the courses that the *Handbook* indicates are advantages for marketing managers are in a wide-variety of disparate fields.⁷ The *Handbook* does not conclude that normally the minimum requirement for entry into these positions is at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the *Handbook* does not support the assertion that the proffered position falls under an occupational group for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry.

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook* (or other objective, authoritative source) indicates that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not demonstrate that the position is

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." Section 214(i)(1) of the Act.

⁷ In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields would not meet the statutory requirement that the degree be "in the specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," we do not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. See section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties provided the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

Here, although the *Handbook* states that a bachelor's degree is required for most advertising, promotions, and marketing management positions, it also indicates that "[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 marketing, consumer behavior, market research, sales, communication methods and technology, visual arts, art history, and photography" for advertising management positions. The *Handbook* further indicates that "[c]ourses in business law, management, economics, accounting, finance, mathematics, and statistics are advantageous" for marketing managers. Thus, courses of study in a wide-range of disparate fields are considered relevant and/or advantageous for entry into the occupation. Notably, these dissimilar courses of study fail to delineate a specific specialty. Thus, the *Handbook's* narrative does not support the assertion that positions in this occupation normally require at least a bachelor's degree in a specific specialty, or its equivalent, for entry into the occupation.

one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, we will review the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common 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.

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

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* (or other objective, authoritative source), reports a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference our previous discussion on the matter.

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 submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the 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). Notably, it is not sufficient for the petitioner to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

In the Form I-129 petition and supporting documentation, the petitioner stated that it is a Pilates studio established in 2004. The petitioner further stated that it has six employees and a gross annual income of \$500,000. The petitioner did not indicate its net annual income. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 713940.⁸ This NAICS code is designated for "Fitness and Recreational Sports Centers." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

⁸ According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity and each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last visited September 24, 2014).

This industry comprises establishments primarily engaged in operating fitness and recreational sports facilities featuring exercise and other active physical fitness conditioning or recreational sports activities, such as swimming, skating, or racquet sports.

U.S. Dep't of Commerce, U.S. Census Bureau, 2012 NAICS Definition, 713940 – Fitness and Recreational Sports Centers, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited September 24, 2014).

In support of the assertion that the proffered position is a specialty occupation under this criterion of the regulations, the petitioner and counsel submitted letters from [REDACTED] and [REDACTED] ("the writers").⁹ We reviewed the letters in their entirety. However, contrary to the purpose for which the letters were submitted, they are not persuasive in establishing the proffered position as a specialty occupation position under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The letters do not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the positions. For instance, the letters indicate that a degree in a wide variety of disciplines is acceptable.¹⁰ Specifically, in Ms. [REDACTED] letter, she states that a "Bachelor's Degree in a specialized field such as Communications, Journalism, Marketing, Advertising or other related fields" is required for the proffered position. Further, in Ms. [REDACTED] and Mr. [REDACTED] letters, they indicate that a bachelor's degree in advertising, journalism, communications or a related field is required for the position.

Furthermore, the writers failed to provide any specific job duties and day-to-day responsibilities for the position claimed to require a bachelor's degree. There is no information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, there is insufficient information regarding the duties and responsibilities of the writers' organizations' positions to determine whether the positions are the same or parallel to the proffered position. Moreover, we observe that the writers did not provide any documentary evidence to corroborate that they currently or in the past employed individuals in parallel positions to the proffered position, nor did they provide any documentation to substantiate the claimed academic requirements. The writers have failed to submit any probative evidence of

⁹ We reviewed all of the letters and observe that the wording of portions of two letters (specifically, the letters from Ms. [REDACTED] and Mr. [REDACTED] match virtually verbatim, including grammatical and punctuation errors. When affidavits are worded the same (and include identical errors), it indicates that the words are not necessarily those of the affiant and may cast some doubt on the affidavits' validity.

¹⁰ As previously noted, since there must be a close correlation between the required "body of highly specialized knowledge" and the position, a minimum entry requirement of a degree in disparate fields would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

their recruitment and hiring practices. Thus, the letters do not establish that the proffered position qualifies as a specialty occupation.

Thus, based upon a complete review of the record, the petitioner has not established that a requirement for at least a bachelor's or higher degree in a specific specialty, or its equivalent, is (1) common to the petitioner's industry (2) in parallel positions (3) among organizations similar to the petitioner. Thus, for the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

In support of its assertion that the proffered position 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, the petitioner and counsel submitted an opinion letter prepared by [REDACTED] of [REDACTED] Ms. [REDACTED] lists the duties of the proffered position as described by the petitioner in the letter of support, and concludes that the proffered position's "complex job duties . . . would clearly require a Bachelor's degree in Communications, or a closely related field."

Upon review of the opinion letter, there is no indication that Ms. [REDACTED] possesses any knowledge of the petitioner's proffered position and its business operations beyond that which was provided in the petitioner's letter of support. There is no evidence that Ms. [REDACTED] has visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. She does not demonstrate or assert in-depth knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise.

Furthermore, it does not appear that Ms. [REDACTED] is aware that the petitioner designated the proffered position as a Level I (entry) position (the lowest out of four assignable wage-levels) in the LCA. As previously discussed, this designation is indicative of a comparatively low, entry-level position relative to others within the occupation and signifies that the beneficiary is only expected to possess a basic understanding of the occupation. It appears that Ms. [REDACTED] would have found this information relevant for the opinion letter. Without this information, the petitioner has not demonstrated that Ms. [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position.

We may, in our discretion, use an advisory opinion or statement submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). As a reasonable exercise of our discretion, we find that the advisory opinion letter is not probative evidence of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). For efficiency's sake, we hereby incorporate the above discussion regarding the opinion letter into our analyses of each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent. That is, the petitioner has not developed or established complexity or uniqueness as attributes of the proffered position that would require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent.

For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While related courses may be beneficial, or even essential, in performing certain duties of an advertising and promotions manager position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the petitioner's proffered position.

Therefore, the evidence of record does not establish that this position is significantly different from other positions such that it refutes the *Handbook's* information to the effect that there is a spectrum of preferred courses acceptable for such positions, including coursework that may lead to degrees not in a specific specialty or not in a specific specialty directly related to the duties and responsibilities of the proffered position. The record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than similar positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

The petitioner claims that the beneficiary's academic background will assist her in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area (or its equivalent). The petitioner does not sufficiently explain or clarify which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. Upon review of the record of proceeding, we find that the petitioner has failed to establish the proffered position as satisfying the second prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. We usually review the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

To satisfy this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

While a petitioner may assert that a proffered position requires a specific degree that opinion alone

without corroborating evidence cannot establish the position qualifies as a specialty occupation. 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 petitioner 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 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

With the initial petition, the petitioner submitted a posting notice regarding an LCA for the position of advertising and promotions manager ["Notice of Filing of the LCA"]. The "Notice of Filing of the LCA" is a statement to the petitioner's workers that it has a job opportunity available, that a foreign worker may be placed in the position and that interested parties may read the notice and provide comments to DOL. Its primary purpose is not intended to be a form of recruitment. The document, which was posted in connection with the LCA on behalf of the beneficiary, is not sufficient to establish a history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

On appeal, counsel claims that the petitioner has a marketing staff, which consists of two instructors. Counsel further asserts that these instructors "execute administrative duties relating to the advertising and promotions aspect of the studio." In support of these assertions, counsel submitted the job duties of these individuals. Notably, counsel did not submit the academic credentials of the individuals, e.g. copies of diplomas and transcripts.

The petitioner stated in the Form I-129 petition that it has six employees and was established in 2004 (approximately nine years prior to the submission of the H-1B petition). The petitioner did not provide any further information or evidence regarding its recruiting history for the position. Without further information, the submission is not persuasive in establishing that the petitioner normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the position.

Upon review of the record, the petitioner has not provided sufficient probative evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Thus, the petitioner 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 them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

Counsel asserts that the nature of the specific duties of the position in the context of the petitioner's business operations 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 a specific specialty, or its equivalent. We reviewed all of the evidence in the record, including the petitioner's statements and the documents regarding the petitioner's business operations. However, we find that the petitioner's statements and the submitted documentation fail to support the assertion that the proffered position qualifies as a specialty occupation under this criterion of the regulations. More specifically, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position.

Furthermore, we also reiterate our earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four assignable levels). That is, the Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category, and hence one not likely distinguishable by relatively specialized and complex duties.

The petitioner has not established that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. We, therefore, conclude 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.

IV. CONCLUSION AND ORDER

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.