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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

PUBLIC COPY

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Date: DEC 01 2011

Office: CALIFORNIA SERVICE CENTER

File: [REDACTED]

IN RE:

Petitioner:

Beneficiary:

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 in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael T. Kelly
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. 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 California Service Center on July 31, 2009. The petitioner indicated that it is a for-profit, provider of healthcare services with 100 employees and a gross annual income of approximately \$6.5 million and a net annual income of approximately \$370,000.

Seeking to employ the beneficiary in what it designates as a marketing manager position, the petitioner filed this H-1B petition in an endeavor 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 on October 20, 2009, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A). On appeal, the petitioner and counsel assert that the director's basis for denial was erroneous and contend that the petitioner satisfied all evidentiary requirements.

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 response to the RFE; (4) the director's denial letter; (5) the Form I-290B and documentation in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO concurs with the director that the petitioner has not established that the proffered position qualifies as a specialty occupation within the meaning of the controlling statutory and regulatory provisions. Accordingly, the director's decision will be affirmed, and the petition will be denied.

The primary issue before the AAO is whether the 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 following statutory and regulatory requirements.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one requiring the following:

- (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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as the following:

An occupation which requires [(1)] 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 requires [(2)] 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, the 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 stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

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. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

The petitioner indicates on the Form I-129 and supporting documentation that it seeks the beneficiary's services as a marketing manager. In a letter of support dated July 10, 2009, the petitioner states that the beneficiary will be employed to perform the following duties:

- Coordinate and implement marketing communication projects with responsibilities that include public relations, special event management, advertising and creating brand awareness;
- Organize the preparation of proposals and presentations using marketing resource materials such as brochures, data, slides and reports;
- Prepare status reports on marketing efforts;
- Generate appropriate patient referrals/admissions from customers and continue to grow the number of referrals/admissions overtime (sic);
- Establish and maintain professional relationships and all referral sources including physicians, hospital personnel, nursing homes, assisted living facilities, including but not limited to case managers, discharge planners and other appropriate referral sources.

The AAO notes that most of the duties as provided by the petitioner for the proffered position are taken verbatim from the description of duties for marketing coordinators provided at the Internet website *www.salary.com*.¹

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on August 19, 2009. Specifically, the director requested additional information from the petitioner to demonstrate that the proffered position of marketing manager is a specialty occupation. The petitioner was asked to provide additional evidence, including a more detailed description of the work to be performed by the beneficiary for the entire period requested, including specific job duties, the percentage of time to be spent on each job duty, level of responsibility and hours per week of work. The director also asked the petitioner to explain why the work to be performed requires the services of a person who has a college degree in a specific specialty or the equivalent in the occupational field. Furthermore, the RFE indicated

¹ The description for the occupational classification Marketing Coordinator from the website is accessible on the Internet at *http://www1.salary.com/Marketing-Coordinator-salary.html* (visited November 22, 2011).

that the petitioner should submit documentation to show the ongoing need for the beneficiary's services as a marketing manager.

In response to the RFE, the petitioner provided additional evidence, including the following documents:

- A brochure for the petitioner.²
- A Power Point presentation entitled "Marketing Plan." The AAO notes that the plan lacks sufficient detail to establish the duties of the proffered position and the level of specialization and complexity the job might entail. Furthermore, the plan does not establish that the petitioner would be able to sustain an employee for the entire period requested to perform duties at the H-1B level.
- A document that counsel calls the petitioner's product poster, which lists the petitioner's services.
- A document entitled "Illinois Occupational Outlook in Brief" regarding occupations with the most openings each year.
- Job advertisements for various positions.

Counsel for the petitioner also provided the following list of job duties for the proffered position, which include the previously provided job duties as well as some new duties:

- Coordinating and implementing marketing communication projects as well as all marketing activities;
- Public Relations [including developing sound relationships with clients and prospective ones] and Special Events Management;
- Advertising and Creating Brand Awareness;
- Organizing the preparation of proposals and presentations using marketing resource materials such as brochures, data, slides, and reports;
- Preparing Status Reports on marketing efforts;
- Generating appropriate patient referrals/admissions and undertake growth/projection levels;
- Communicating and coordinating with other healthcare providers regarding service and financial agreements to ensure appropriate services;

² The brochure is in a foreign language and is not accompanied by an English translation. The RFE specifically notified the petitioner that any document submitted containing a foreign language must be accompanied by a full English language translation that has been certified by the translator as complete and accurate, and that the translator is competent to translate from the foreign language into English. Because the petitioner failed to submit a certified translation of the document, the AAO cannot determine whether the evidence supports the petitioner's claims. See 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

- Developing pricing strategies – balancing firm objectives and customer satisfaction;
- Identifying, developing and evaluating marketing strategy based on knowledge of established objectives, market characteristics, and cost and mark-up factors;
- Formulating, directing and coordinating marketing activities and policies to promote Petitioner's products and services;
- Direct the hiring, training and performance evaluations of marketing staff and oversee their daily activities;
- Meeting and exceeding the short and long-term sales goals as outlined in the Marketing Plan;
- Establishing and maintaining professional relationships with all referral sources including physicians, hospital personnel, nursing homes, assisted living facilities, including but not limited to case managers, discharge planners, and other appropriate referral sources.

The director requested the petitioner provide the percentage of time the beneficiary would spend on each job duty as well as the level of responsibility and hours per week of work. However, the petitioner failed to submit this information. The AAO notes that the wording for most of the new duties of the proffered position are the same (verbatim) as the description of duties for marketing managers provided at the Internet version of the *O*NET* (which is commonly, and hereinafter, referred to as *O*NET OnLine*).³

Counsel also provided a description of the duties the beneficiary would perform in connection with market research and analysis (specifically conducting customer, company and competitor analysis); developing a marketing strategy; and implementing the marketing plan. The AAO notes that the wording of these duties as provided by counsel for the proffered position is almost verbatim from an article on marketing management that appears on the Internet site Wikipedia.⁴

It must be noted that counsel's description of the proffered position mistakenly and repeatedly references a company that is not the petitioner.⁵ Thus, the AAO must question the accuracy of the description of duties. The record provides no explanation for these inconsistencies. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability

³ *O*NET OnLine* is accessible at <http://www.onetonline.org/>. As stated on the Home Page of this Internet site, *O*NET OnLine* is created for the U.S. Department of Labor's Employment & Training Administration by the National Center for *O*NET* Development. The *O*NET OnLine* Summary Report for the occupational classification Marketing Manager is accessible on the Internet at <http://www.onetonline.org/link/summary/11-2021.00>.

⁴ The Wikipedia article on marketing management is accessible on the Internet at http://en.wikipedia.org/wiki/Marketing_strategy (visited November 22, 2011).

⁵ Furthermore, within the brief the proffered position is referenced as Quality Assurance Manager rather than as Marketing Manager.

and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Furthermore, the AAO notes that the job duties of the proffered position are described in terms of general functions, which, the AAO finds, do not convey either the substantive nature of either the specific matters upon which the beneficiary would focus or the practical and theoretical level of marketing knowledge that the beneficiary would have to apply to those matters. The duties relate generic functions for which the particular level of marketing knowledge to be applied in this case is not self-evident.

In the response to the RFE, counsel indicated that the beneficiary would be the only employee performing any marketing duties. Counsel further stated the following:

Consequently, there are no other staff at this time which she will be coordinating with or directing. Nonetheless, her position is managerial in level. It is expected that as the marketing efforts and needs of the petitioner grows, petitioner will hire additional marketing staff. To this end, and at that point in time, beneficiary shall primarily be responsible for the hiring of additional marketing personnel as well as directing their activities and evaluating their performance.

Counsel claims that the beneficiary will serve in a managerial role; however, the petitioner does not have anyone else on its staff to actually perform the marketing function. Although counsel claims the proffered position is a managerial position, he failed to establish how the beneficiary's immediate duties will primarily involve managerial duties. Based upon the information provided by counsel, there will not be any subordinate employees to relieve the beneficiary from performing non-management duties (and there is no explanation as to how the beneficiary will be relieved from performing non-management duties). Rather, counsel indicated that the beneficiary would be the only individual to perform any marketing-related functions. Thus, it can only be assumed, and has not been established otherwise, that the beneficiary will perform all marketing functions, including those that would be normally associated with subordinate workers, and that, in the absence of such subordinates, would preclude the beneficiary from functioning in a primarily managerial role. Generally, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988).

Moreover, the petitioner failed to provide evidence of specific and definite work for the beneficiary. The evidence submitted does not provide a sufficient basis for the AAO to discern the substantive nature of the work comprising the proffered position. This fact is in itself sufficient to preclude the petitioner from establishing a specialty occupation. A position may be awarded H-1B classification only on the basis of evidence of record establishing that, at the time of the petition's filing, definite, non-speculative work would exist for the beneficiary for the period of employment specified in the Form I-129. The record of proceeding does not contain such evidence. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). A visa

petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The director denied the petition, finding that the petitioner had not satisfied the criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), and therefore had not established that the proposed position qualified for classification as a specialty occupation. On December 21, 2009, counsel for the petitioner submitted an appeal. Counsel claims that the director's basis for denial was erroneous, and contends that the petitioner satisfied all evidentiary requirements. In support of these assertions, counsel submitted a brief and additional evidence.

In his appeal brief, counsel provided another list of the job duties for the proffered position. These duties are listed below:

- Directing, implementing, acting on, tracking and supervising all marketing activities;
- Developing sound relationships with clients and prospective ones;
- Communicating and coordinating with other healthcare providers regarding service and financial agreements to ensure appropriate services;
- Developing pricing strategies – balancing firm objectives and customer satisfaction;
- Identifying, developing, and evaluating marketing strategy based on knowledge of established objectives, market characteristics, and cost and mark-up factors;
- Formulating, directing, and coordinating marketing activities and policies to promote Petitioner's products and services;
- Directing the hiring, training and performance evaluations of marketing staff and oversee their daily activities; and
- Meeting and exceeding the short and long-term sales goals as outlined in the Marketing Plan.

The job duties that counsel submitted on appeal are almost identical to the list of responsibilities counsel provided in response to the RFE. However, the duties have been reorganized and some of the job duties were removed.

Counsel also resubmitted the description of the duties the beneficiary would perform regarding market research and analysis (specifically conducting customer, company and competitor analysis); developing a marketing strategy; and implementing the marketing plan. This time, counsel removed the references to the company that is not the petitioner. In addition, the reference to the proffered position as a Quality Assurance Manager rather than as Marketing Manager was removed.

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. To make its

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

The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position.

The petitioner indicated that the beneficiary would be employed as a marketing manager. However, 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 description of the duties of the proffered position indicates generally that the beneficiary will be primarily involved in coordinating and implementing marketing communication projects as well as marketing activities. In this case, the AAO notes that the description of the duties of the proffered position is broad and generic and does not convey either the substantive nature of either the specific matters upon which the beneficiary would focus or the practical and theoretical level of knowledge that the beneficiary would have to apply to those matters.

The AAO recognizes the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁶ The section of the *Handbook* most relevant to this proceeding is the chapter "Advertising, Marketing, Promotions, Public Relations, and Sales Managers."⁷ Despite counsel's assumption to the contrary, marketing managers do not comprise an occupational group that categorically requires at least a bachelor's degree, or the equivalent, in a specific specialty. Thus, even if the generic statements that comprise the information about the proposed position and its duties were sufficient to demonstrate that the proposed position is that of a marketing manager, the *Handbook* does not indicate that entry into positions in the occupation normally requires at least a bachelor's degree, or its equivalent, in a specific specialty.

The introduction to the "Training, Other Qualifications, and Advancement" section of the chapter on "Advertising, Marketing, Promotions, Public Relations, and Sales Managers" in the *Handbook* states the following:

⁶ All of the AAO's references are to the 2010-2011 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

⁷ For this chapter, *see* Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2010-11 Edition, Advertising, Marketing, Promotions, Public Relations, and Sales Managers*, on the Internet at <http://www.bls.gov/oco/ocos020.htm> (visited November 22, 2011).

A wide range of educational backgrounds is suitable for entry into advertising, marketing, promotions, public relations, and sales manager jobs, but many employers prefer college graduates with experience in related occupations.

For marketing, sales, and promotions management positions, employers often prefer a bachelor's or master's degree in business administration with an emphasis on marketing. Courses in business law, management, economics, accounting, finance, mathematics, and statistics are advantageous. In addition, the completion of an internship while the candidate is in school is highly recommended. In highly technical industries, such as computer and electronics manufacturing, a bachelor's degree in engineering or science, combined with a master's degree in business administration, is preferred.

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.

For public relations management positions, some employers prefer a bachelor's or master's degree in public relations or journalism. The applicant's curriculum should include courses in advertising, business administration, public affairs, public speaking, political science, and creative and technical writing.

Most advertising, marketing, promotions, public relations, and sales management positions are filled through promotions of experienced staff or related professional personnel. For example, many managers are former sales representatives; purchasing agents; buyers; or product, advertising, promotions, or public relations specialists. In small firms, in which the number of positions is limited, advancement to a management position usually comes slowly. In large firms, promotion may occur more quickly.

Therefore, although a bachelor's degree in business administration, public relations, advertising or journalism may be preferred, the *Handbook* does not indicate that at least a bachelor's degree in a specific specialty is required for marketing, sales, promotions, advertising, or public relations managers. While the *Handbook* states that employers often seek individuals with a bachelor's degree level of education for particular positions, this merely indicates a preference, not a normal minimum requirement. Furthermore, the term "often" is not indicative that a particular position within the wide spectrum of jobs normally requires at least a bachelor's degree, or its equivalent, in a specific specialty (the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1)), or that a particular 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)).⁸ The *Handbook* does not indicate that at least a bachelor's

⁸ For instance, the definition of "often" in *Webster's New Collegiate College Dictionary* 731 (Third

degree in a specific specialty is required for the occupation. Rather, the occupation accommodates a wide spectrum of educational credentials, including less than a bachelor's degree in a specific specialty.

In addition, the AAO notes that the *O*NET OnLine* Summary Report, referenced by counsel, is insufficient to establish that the proffered position qualifies as a specialty occupation normally requiring at least a bachelor's degree or its equivalent in a specific specialty. Contrary to the assertions of counsel, *O*NET OnLine* does not state a requirement for a bachelor's degree. Rather, it assigns the occupation of Marketing Managers a Job Zone "Four" rating, which group it among occupations of which "most," but not all, "require a four-year bachelor's degree."⁹ Furthermore, the *O*NET OnLine* does not indicate that a four-year bachelor's degree for Job Zone Four occupations must be in a specific specialty closely related to the requirements of that occupation. Therefore, *O*NET OnLine* is not probative of the proffered position being a specialty occupation.

Furthermore in support of his assertion that the occupation of marketing managers is a specialty occupation, counsel claims that "a degree is unequivocally and uniformly required throughout Chicago and Illinois" and he then references the occupations "General and Operations Managers" and "Administrative Service Managers" listed in a document entitled "Illinois Occupational Outlook in Brief" (the Illinois Brief) to support his conclusion. It must be noted that General and Operations Managers fall under the OES/SOC code 11-1021; Administrative Service Managers fall under the OES/SOC code 11-3011; and Marketing Managers falls under the OES/SOC code 11-2021. These are three separate classifications of occupations. The occupation "Marketing Managers" is not included in the Illinois Brief. Counsel has failed to provide any basis for referencing the information provided in the Illinois Brief regarding "General and Operations Managers" and "Administrative Service Managers" in connection with this petition. Furthermore, it must be noted that the Illinois Brief does not indicate that a four-year bachelor's degree for the occupations listed must be in a specific specialty closely related to the requirements of that occupation (as required for H-1B classification).

The fact that a person may be employed in a position designated as that of a marketing manager and may apply some marketing principles in the course of his or her job is not in itself sufficient to establish the position as one that qualifies as a specialty occupation. Thus, it is incumbent on the petitioner to provide sufficient evidence to establish that the particular position that it proffers 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 marketing. To make this determination, the AAO turns to the record for information regarding the duties and the nature of the petitioner's business operations.

Edition, Hough Mifflin Harcourt 2008) is "Many times : frequently."

⁹ For this section, see *O*NET Online*, Marketing Managers, on the Internet at <http://www.onetonline.org/link/summary/11-2021.00> (visited November 22, 2011).

The petitioner in this matter provided a general overview of the beneficiary's proposed duties. The petitioner's job description for the proffered position provides a litany of generalized functions without providing sufficient information as to how such a broad spectrum of duties would actually apply to any specific projects to which the beneficiary would be assigned, and how the performance of the duties in the course of such projects would correlate to a need for at least a bachelor's degree in a specific specialty. Furthermore, the petitioner has failed to provide sufficient documentation to establish that the beneficiary's day-to-day duties and responsibilities necessitate the need for an individual with a bachelor's degree in a specific specialty. The evidence of record on the particular position here does not demonstrate a requirement for the theoretical and practical application of a level of highly specialized marketing-related knowledge. The duties for the proffered position appear routine and do not elevate the proffered position above that for which no particular educational requirements are demonstrated. Thus, the petitioner has not established that the beneficiary's actual duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation.

The AAO again notes that the job duties of the proffered position are described in terms of general functions, which, the AAO finds, do not convey either the substantive nature of either the specific matters upon which the beneficiary would focus or the practical and theoretical level of marketing knowledge that the beneficiary would have to apply to those matters. Furthermore, the record of proceeding fails to establish that the duties to be performed by the beneficiary would require the practical and theoretical application of a body of highly specialized marketing knowledge attained by at least a bachelor's degree, or the equivalent, in marketing, as required by the Act and its implementing regulations regarding a position's qualification as an H-1B specialty occupation. There is a lack of evidence in the record of proceeding substantiating the nature and educational level of marketing knowledge that would be required for the actual performance of the beneficiary's work.

Moreover, the petitioner requested the beneficiary be granted H-1B status for a period of three years. It is incumbent upon the petitioner to demonstrate it has sufficient work to require the services of a person with at least a bachelor's degree in a specific specialty, or the equivalent, to perform duties at a level that requires the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge on a year-round basis for the entire requested period. The AAO finds that the petitioner's generic description of the tasks of the proffered position do not relate any dimensions of complexity, uniqueness, and/or specialization that may or may not be inherent in the particular position proffered in this petition. Furthermore, the petitioner has not established that the beneficiary's overall day-to-day duties, for the entire period requested, would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation.

Therefore, even if viewed as falling within the general occupational category of marketing manager, the petitioner has failed to establish that the beneficiary's actual work in that capacity would require at least a bachelor's degree, or the equivalent, in marketing or a closely related specialty. 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)).

As noted above, the job description for the proffered position is broadly stated and vague regarding details of the level of support and actual actions that the beneficiary will be expected to perform. A petitioner may not establish a position as a specialty occupation by repeating the general description of a particular occupation (from various Internet sources) rather than providing specifics substantiated by the requirements of the petitioner. The petitioner has failed to provide substantive evidence regarding the actual work that the beneficiary would perform and sufficient details regarding the nature and scope of the beneficiary's employment. Moreover, without a comprehensive description of the specific duties the beneficiary will perform for the petitioner, USCIS is unable to discern the nature of the position and the level of sophistication and complexity the job might entail.

As the *Handbook* indicates that the proffered position does not belong to an occupational classification for which there is a categorical requirement for at least a bachelor's degree in a specific specialty, and as the duties of the proffered position as described in the record of proceeding do not indicate that the proffered position in this petition is one for which a baccalaureate or higher degree or its equivalent in a specific specialty is normally the minimum requirement for entry, the petitioner failed to satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

Next, the AAO reviews the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong requires a petitioner to establish that a bachelor's degree, in a specific specialty, 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. at 1102).

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. 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 below, the petitioner's reliance upon the job vacancy advertisements is misplaced.

As a preliminary matter, it must be noted that an entry requirement of a bachelor's degree in any field (rather than one that is directly relevant to the field) or in a generalized field or in a broad category that covers numerous and various disciplines is inadequate to establish that a position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *See Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

To demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).¹⁰

As previously mentioned, the petitioner is a for-profit, provider of healthcare services with 100 employees and a gross annual income of approximately \$6.5 million and a net annual income of approximately \$370,000. In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner provided several job announcements. However, upon review of the documents, the petitioner fails to establish that similar organizations to the petitioner routinely employ individuals with degrees in a specific specialty, in parallel positions.

Upon review of the job postings, it must first be noted that the job announcements are devoid of sufficient information regarding the organizations (such as the size, number of personnel, level

¹⁰ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. *See, e.g., Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; *cf. Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: otherwise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

Id.

of revenue, scope, scale of operations, business efforts and expenditures), thereby rendering it impossible to conduct a legitimate comparison of the business operations.

Moreover, the following deficiencies were observed upon reviewing the job postings.

- The petitioner provided a job posting from Vibra Hospital for a Clinical Liaison. The advertisement indicates that the occupational classification for the position is nursing. Thus, the posting is for a dissimilar position (nurse) for a dissimilar organization (hospital).
- A job posting was also provided from Autumn View Gardens for a Sales and Marketing Director. The advertisement indicates that the employer is a non-profit charitable organization. Thus, the position is for a dissimilar organization.
- An advertisement from Samsun Clinic for a Director of Marketing. The posting states that the employer is a non-profit charitable organization. Thus, the position is for a dissimilar organization.

The following advertisements establish, at best, that a bachelor's degree is generally required, but not at least a bachelor's degree or the equivalent in a *specific specialty*.

- The petitioner provided the following job postings, which do not indicate that a specific field of study is required for entry into the position: (1) MRI Network (recruitment organization) for a Marketing Manager; (2) American Access Care (medical practice) for a Territory Manager – Clinical Sales Marketing; (3) Crescent Pines (healthcare services) for a Marketing Account Manager; (4) IntegraCare Corporation (manager of assisted and independent living communities) for a Director of Sales and Marketing; (5) Partners Healthcare (hospitals) for a Web/Marketing Project Manager; (6) Regency Nursing and Rehabilitation Centers (healthcare services) for a Regional Marketing and Admissions Director; (7) Touchstone Health (healthcare services) for a Marketing Associate (Retention).
- Additionally, the petitioner provided the following job postings, which indicate that a bachelor's degree in a variety of fields (including business or business administration) is acceptable: (1) Bayada Nurses (home health care services) for a Marketing Manager; (2) BayCare Health System (community based hospitals) for a Marketing Manager Regions; (3) Shield Healthcare (supplier of medical products and services) for Marketing Analyst; (4) Greystone Communities (serve senior living industry) for a Regional Marketing Manager for Senior Living Communities; (5) Home & Hospice Advantage (healthcare services) for a Marketing and Sales Representative.

As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed.

It must be noted that even if all of the job postings indicated that a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from fifteen postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations.¹¹

The documents provided do not establish that a degree in marketing is the norm for entry into positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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 the particular position proffered in this petition is "so complex or unique" that it can be performed only by an individual with at least a bachelor's degree in a specialty occupation.

Counsel claims that the duties of the proffered position are complex and that the petitioner has provided sufficient documentation to satisfy this prong through the evidence submitted. However, a review of the record indicates that the petitioner failed to credibly demonstrate exactly what the beneficiary will do on a day-to-day basis such that complexity or uniqueness can even be determined. Furthermore, the petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of marketing manager.

In the RFE, the director requested the petitioner establish that the particular position is so complex or unique that it can be performed only by an individual with a degree. However, the

¹¹ According to the *Handbook's* detailed statistics on marketing managers, there were approximately 7,000 persons employed as marketing and sales managers in the industry of health care and social assistance in 2008. *Handbook*, 2010-11 ed., available at <http://www.bls.gov/oco/ocos020.htm> (last accessed November 22, 2011). Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from just 15 job postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the healthcare services industry. 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 job of marketing manager for a for-profit, provider of healthcare services (similarly situated to the petitioner) required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the 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.

petitioner failed to adequately respond to the director's RFE and establish that the proffered position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty.

A review of the record indicates that the petitioner and counsel have provided generic descriptions of the tasks of the proffered position. The petitioner failed to establish how the beneficiary's responsibilities and day-to-day duties are so complex or unique that the duties can be performed only by an individual with a bachelor's degree in a specific specialty. The petitioner failed to establish what differentiates the proffered position from other related "non-specialty occupation" positions. The petitioner did not adequately explain or describe which duties are more discretionary, demanding, complex, highly advanced, specialized or sophisticated to such a level that they exceed industry or normal position standards. The petitioner also failed to establish that its business is so specialized, distinctive and/or exceptional that it requires the services of an individual with a degree in a specific field of study to serve in the proffered position, even though it is not an industry minimum standard.

Furthermore, the AAO questions the level of specialization and complexity of the duties and responsibilities of the position based upon the Labor Condition Application (LCA) submitted with the Form I-129. More specifically, the petitioner indicated in the supporting documentation that the proffered position requires a bachelor's degree in marketing or related studies and two years of experience in sales/marketing. Furthermore, counsel repeatedly claims that the duties of the proffered position are complex and require in-depth preparation. In this regard, however, the AAO notes that the petitioner provided an LCA in support of the instant petition that indicates the occupational classification for the position is "Marketing Manager" at a Level 1 (entry level) wage.

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.¹² Prevailing wage determinations start with an entry level wage and progress to a wage that is commensurate with that of a Level 2 (qualified), Level 3 (experienced), or Level 4 (fully competent worker) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.¹³ The DOL emphasizes that these guidelines should not be

¹² DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance* (Revised Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

¹³ A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end),

implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received as described in the employer's job offer.

The DOL describes a Level 1 wage rate as follows:

Level 1 (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.

Counsel claims that the duties of the proffered position are specialized and complex requiring in-depth preparation and that the beneficiary will handle the marketing efforts of the petitioner on her own. However, the AAO must question the level of sophistication and complexity of the duties and responsibilities of the proffered position, the level of independent judgment required and the amount of supervision as the LCA is certified for a Level 1 entry-level position.

The LCA indicates the position is actually a low-level, entry position relative to others within the occupation. Based upon this wage rate, the beneficiary will be expected to perform routine tasks that require only a basic understanding of the occupation and limited exercise of judgment. The beneficiary will work under close supervision, her work will be closely monitored and she receive specific instructions on required tasks and expected results.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the

or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

[Italics added]. The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, it is questionable whether the petitioner has submitted a valid LCA that corresponds to the claimed duties of the proffered position.

Moreover, even though counsel claims that the duties of the proffered position are so complex that a bachelor's degree is required, the petitioner and counsel failed to sufficiently demonstrate how the marketing manager's duties require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it claims are so complex or unique. While a few courses in marketing may be beneficial in performing certain duties of a marketing manager position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in marketing or its equivalent are required to perform the duties of the particular position here proffered. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Upon review of the record of proceeding, the duties for the proffered position appear routine and do not elevate the proffered position above that for which no particular educational requirements are demonstrated. The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. In fact, the record of proceeding fails to adequately establish that the job duties described relate any dimensions of complexity and uniqueness such that a bachelor's degree in a specific specialty would be required.

Therefore, the evidence of record does not establish that this position is significantly different from other marketing manager positions such that it refutes the *Handbook's* information to the effect that there is a spectrum of educational backgrounds that is suitable for entry into such positions, including degrees not in a specific specialty. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent. Consequently, as the petitioner fails to demonstrate how the proffered position of marketing manager is so complex or unique relative to other positions that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion entails an employer demonstrating that it normally requires a degree or its equivalent for the position. The AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position. In the instant matter, the petitioner did not indicate whether or not it had previously hired anyone to serve in the position of marketing manager. No evidence was submitted regarding the petitioner's past recruiting and hiring practices. Therefore, the evidence does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty. Therefore, 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.

Counsel claims that the duties of the position are 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.

The AAO incorporates by reference and reiterates its earlier discussion that the generalized and generic nature of the description of the proposed duties submitted by the petitioner and counsel fails to adequately establish the actual work that the beneficiary would perform, let alone the relative specialization and complexity of any specific duties that would be involved. The petitioner has failed to establish that the duties of the proffered position are sufficiently specialized and complex that performance would require knowledge of marketing at a level associated with at least a bachelor's degree, or the equivalent, in marketing or a related specialty. Insufficient evidence was provided to demonstrate that the proffered position reflects a higher degree of knowledge and skill than would normally be required of employees who engage in some marketing duties and employ some marketing principles, but not at a level requiring the application of theoretical and practical knowledge of marketing that is usually associated with at least a bachelor's degree in marketing or a closely related specialty or its equivalent.

As previously noted, simply going on record without providing adequate 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbenu*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner failed to meet its burden of proof to establish that the duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. The AAO, therefore, concludes that the proffered position failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Without a comprehensive description of the beneficiary's actual duties in connection with the petitioner's business, or other evidence to support the petitioner's claim that the proffered position is a specialty occupation, the AAO is precluded from determining that the proffered position is a specialty occupation. The petitioner has failed to provide sufficient substantive evidence that the duties of the actual position require the theoretical and practical application of a body of highly specialized knowledge attained through a baccalaureate program in a specific discipline that relates to the proffered position. Accordingly, the petitioner has not established that the position meets any of the requirements for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii).

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 is a specialty occupation under 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.

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any one of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed, and the petition will be denied.

ORDER: The director's decision is affirmed. The petition is denied.