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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



D2

DATE: **OCT 06 2011** OFFICE: CALIFORNIA SERVICE CENTER FILE:

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,

Perry Rhew  
Chief, Administrative Appeals Office

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

The petitioner claimed on the Form I-129 to be an international relocation services company with one employee and a gross annual income of \$300,000. It seeks to employ the beneficiary as a business operations specialist 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 the basis of her determination that the petitioner had failed to demonstrate that the proposed position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request for additional evidence; (4) the director's decision denying the petition; and (5) the Form I-290B and supporting documentation. The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Upon review of the entire record, we find that the petitioner has failed to overcome the director's ground for denying this petition.

The sole issue before us on appeal is whether the proposed position qualifies for classification 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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

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 (5<sup>th</sup> 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 proposed 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.

In its June 24, 2009 letter of support, the petitioner stated that the beneficiary would spend fifty percent of his time working as a business operations specialist and fifty percent of his time working as a

logistics manager. The petitioner reported that the beneficiary would perform the following duties as a business operations specialist:

- Negotiating the prices and terms of contracts with relocating company representatives, freight companies, transportation companies, warehouse agents, and vendors;
- Liaising between clients and freight service providers to resolve client complaints or in-transit issues;
- Researching and preparing informational packets for clients who are relocating or shipping internationally;
- Studying each client's unique relocation policies;
- Educating and assisting employees in submitting internal reimbursement requests; and
- Observing cash flow, invoice collection time management, and due dates for vendor payments.

The petitioner reported that the beneficiary would perform the following duties as a logistics specialist:

- Directing and coordinating warehouse and freight activities in order to provide clients with *cost-efficient and timely relocation or transportation services*;
- Analyzing contractual commitments, customer specifications, in-transit issues, and other data to plan and develop relocation or transportation program activities;
- Developing and implementing program activities;
- Coordinating the efforts of vendors, subcontractors, and field service personnel;
- Resolving problems;
- Developing and initiating the preparation of handbooks, bulletins, and information systems in order to provide the most up-to-date information regarding each international relocation project for the company's reference purposes;
- Compiling data on the standardization and interchangeability of vendors in order to expedite in-transit activities;
- Determining time-phasing, problems arising due to location, and other factors; and
- On occasion, performing special research or technical studies critical to overcoming such factors.

In her July 1, 2009 request for additional evidence, the director requested a more detailed breakdown of the job duties proposed for the beneficiary. However, rather than providing additional details in response to the director's request the petitioner altered the proposed duties in its letter that accompanied counsel's July 31, 2009 response. Under his new job responsibilities, the beneficiary would spend sixty percent of his time researching market conditions in local, regional, and national areas in order to ascertain the market potential for the sale of relocation services to potential clients relocating to Japan. The remaining forty percent of his time would be spent cultivating new clients and expanding the petitioner's market share in "Japan-related" transportation and relocation services.

We consider the changes made by the petitioner in its response to the director's request for additional evidence a material alteration of the beneficiary's proposed duties rather than a mere clarification or more detailed description of the duties originally proposed. The purpose of a request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been

established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial job description, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). The new duties provided by the petitioner in response to the director's request for additional evidence did not clarify or provide more specificity to the original duties proposed for the beneficiary, but rather added new duties to the job description, and deleted others. As indicated, this is not permissible. Accordingly, our analysis of this matter will be based upon the job description contained in the petitioner's June 24, 2009 letter, which was the first time the petitioner described the job duties proposed for the beneficiary.

In making our determination whether the proposed position qualifies as a specialty occupation, we turn first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, a resource upon which we routinely rely for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

In reaching our conclusion regarding the degree requirements of the proposed position, we have relied upon the 2010-2011 edition of the *Handbook*, comparing the position's duties against those described for two separate occupations. Our review has found that virtually all of the proposed position's duties are listed among those described for truck transportation and warehousing managers and general and operations managers. In pertinent part, the *Handbook* states the following regarding the truck transportation and warehousing business:

*Specialized freight trucking* . . . This industry sector also includes the moving industry—that is, the transportation of household, institutional, and commercial furniture for individuals or companies that are relocating. . . .

Many goods are carried using intermodal transportation to save time and money. Intermodal transportation encompasses any combination of transportation by truck, train, plane, or ship. . . .

\* \* \*

Sales workers, often called *brokers*, sell the industry's services to companies who need goods shipped. They meet with prospective buyers, discuss the customers' needs, and suggest appropriate services. Travel may be required, and many analyze sales statistics, prepare reports, and handle some administrative duties. . . .

*Managers* provide general direction to firms. They staff, supervise, and provide safety and other training to workers in the various occupations. They also resolve logistical problems such as forecasting the demand for company services; ordering parts and equipment service support; and scheduling the transportation of goods.

*Handbook*, 2010-11 ed., available at <http://www.bls.gov/oco/cg/cgs21.htm> (last accessed September 20, 2011). The *Handbook's* discussion regarding the duties of general and operations managers also relates to the petitioner's proposed position, as follows:

All organizations have specific goals and objectives that they strive to meet. *Top executives* devise strategies and formulate policies to ensure that these goals and objectives are met. Although they have a wide range of titles—such as *chief executive officer, chief operating officer, general manager, president, vice president, school superintendent, county administrator, and mayor*—all formulate policies and direct the overall operations of businesses and corporations, public-sector organizations, nonprofit institutions, and other organizations.

\* \* \*

*General and operations managers* plan, direct, or coordinate the operations of companies and other public- or private-sector organizations. Their duties and responsibilities include formulating policies, managing daily operations, and planning the use of materials and human resources that are too diverse and general in nature to be classified into any one area of management or administration, such as personnel, purchasing, or administrative services. In some organizations, the tasks of general and operations managers may overlap those of chief executive officers.

*Id.* at <http://www.bls.gov/oco/ocos012.htm>. Based upon our reading of the *Handbook*, we conclude that the duties of the proposed position as described by the petitioner combine the duties of (1) managers in the trucking and warehousing businesses and; (2) general and operations managers, as those occupations are described in the *Handbook*. As noted, we will not consider the petitioner's duties added in response to the director's request for additional evidence, which introduced market research and general marketing responsibilities to the beneficiary's proposed duties. Accordingly, we do not agree with the director's determination that the duties of the proposed position are similar to those of market research analysts and marketing managers as those positions are described in the *Handbook*. Having made that determination, we turn next to the *Handbook's* discussion regarding the educational credentials necessary for entry into these fields. The *Handbook* states the following regarding the educational requirements for managers in the trucking and warehousing industries:

Most jobs in the truck transportation and warehousing industry require a high school education or less, although an increasing number of workers have at least some post-secondary education. Postsecondary education is especially important for those

seeking positions in management. Emphasis on formal education stems from the increasing use of technology in the industry. Nearly all operations involve computers and information management systems. . . .

\* \* \*

**Management, business, and financial occupations.** For managerial jobs in the truck transportation and warehousing industry, employers prefer persons with bachelor's degrees in business, marketing, accounting, industrial relations, or economics. Good communication, problem-solving, and analytical skills are valuable in entry-level jobs. Since trucking and warehousing firms may rely heavily on computer technology to aid in the distribution of goods, knowledge of information systems also is helpful for advancement. Although most managers must learn logistics through extensive training on the job, several universities offer undergraduate and graduate programs in logistics. These programs emphasize the tools necessary to manage the distribution of goods and may be associated with the business departments of schools. Marketing and sales workers must be familiar with their firm's products and services and have strong communication skills (emphasis in original).

*Id.* at <http://www.bls.gov/oco/cg/cgs21.htm>. Thus, the *Handbook* explains unequivocally that a bachelor's degree in a specific specialty is not the normal minimum requirement for entry as a manager in this field. An employer preference for an individual with a bachelor's degree is not equivalent to requiring a bachelor's degree in a specific specialty as a normal minimum entry requirement. The *Handbook* states the following with regard to the educational requirements for general and operations managers, which is contained within its discussion of the educational requirements for top executives:

The formal education and experience required by top executives vary as extensively as their responsibilities do, but many of these workers have at least a bachelor's degree and considerable experience. . . .

Many top executives have a bachelor's or master's degree in business administration, liberal arts, or a more specialized discipline. The specific type and level of education required often depends on the type of organization for which top executives work. . . .

\* \* \*

Many top executive positions are filled from within the organization by promoting experienced lower level managers when an opening arises. In industries such as retail trade . . . individuals without a college degree may work their way up within the company and become executives or general managers. . . .

*Id.* at <http://www.bls.gov/oco/ocos012.htm>. The *Handbook* finds that these positions generally impose no specific degree requirement on individuals seeking employment. The statement that many top executives have college degrees is not synonymous with the "normally required" standard imposed by this criterion. While the *Handbook* indicates that top management positions may be filled by individuals with a broad range of degrees, its subsequent discussion of the training and education

necessary for such employment clearly states that companies also hire executives based on lower-level experience within their own organizations or management experience with another business.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not rely simply upon a proposed position's title. The specific duties of the 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 beneficiary, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree *in the specific specialty* as the minimum for entry into the occupation, as required by the Act.

As discussed, we have determined that virtually all of the proposed position's duties as set forth originally are listed in the *Handbook* among the occupations of truck transportation and warehousing managers, and general and operations managers. Our review has found that neither of these occupations impose a normal minimum entry requirement of a bachelor's degree in a specific field of study as required by section 214(i)(1)(B) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, we find that the petitioner has failed to demonstrate that its proposed position qualifies for classification as a specialty occupation under the requirements of the first criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).<sup>1</sup>

We turn next to a consideration of whether the petitioner, unable to establish its proposed position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under one of the three remaining criteria: a degree requirement as the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position; or the duties of

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<sup>1</sup> Even if we were to consider the duties added by the petitioner in its response to the director's request for additional evidence the proposed position would still not qualify for classification as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(I). The petitioner asserts that those duties are similar to those of market research analysts and marketing managers as those positions are described in the *Handbook*. However, even if the generic duties described in the petitioner's letter that accompanied counsel's July 31, 2009 response to the director's request for additional evidence, which neither explained nor was accompanied by documentary evidence showing the particular methodologies and analytical tools that the beneficiary would employ, were sufficient to demonstrate that the proposed position is that of a market research analyst, the *Handbook* does not indicate that entry into positions in that occupation normally requires at least a bachelor's degree, or its equivalent, *in a specific specialty*. *Id.* at <http://www.bls.gov/oco/ocos013.htm>. Also, although a bachelor's degree in business administration may be preferred for marketing managers, the *Handbook* does not indicate that a minimum of a bachelor's degree *in a specific specialty* is normally required. *Id.* at <http://www.bls.gov/oco/ocos020.htm>. Nor would counsel's citation on appeal to 69 Fed. Reg. 77325, 77377 (Dec. 27, 2004), which pertains to the Department of Labor's (DOL) PERM regulations, overcome the director's denial, as those regulations contain no criteria for determining whether a proposed position qualifies for classification as a specialty occupation and therefore have no relevance to the matter before us on appeal.

the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree.

The petitioner has not satisfied the first of the two alternative prongs at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proposed position; and (2) located in organizations that are similar to the petitioner.

Again, 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).

As already discussed, the petitioner has not established that its proposed position is one for which the *Handbook* reports an industry-wide requirement of at least a bachelor's degree *in a specific specialty*. Nor has the petitioner submitted evidence that the industry's professional associations have made a degree a minimum requirement for entry. Nor has the petitioner submitted any job postings or similar evidence regarding parallel positions located in similar organizations. Accordingly, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner has also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." The duties of the proposed position are similar to those of truck transportation and warehousing managers, and general and operations managers as outlined in the *Handbook*, and the *Handbook* does not indicate that a baccalaureate degree in a specific field, or its equivalent, is a normal minimum entry requirement for those positions. The duties proposed by the petitioner are no more complex or unique than those outlined by the *Handbook*; to the contrary, the duties proposed by the petitioner largely mirror those outlined in the *Handbook*. The evidence of record does not refute the *Handbook's* information indicating that a bachelor's degree from a specific field of study is not the normal minimum entry requirement for positions such as the one proposed here.

We turn next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires that the petitioner demonstrate that it normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet the third criterion, we normally review the petitioner's past employment practices, as well as the histories, including the names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas.<sup>2</sup>

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<sup>2</sup> Even if a petitioner believes or otherwise asserts that a proposed position requires a degree, that opinion alone without corroborating evidence cannot establish the position 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 job so long as the employer

However, the record in this case indicates that this is a new position for which the employer has no previous hiring history.

The fourth criterion, 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), requires the petitioner to establish that the nature of its proposed position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in the specialty. As previously discussed, the *Handbook* indicates that a baccalaureate degree in a specific specialty is not a normal minimum entry requirement. The petitioner has failed to differentiate the duties of the proposed position from those described in the *Handbook* and, as such, has failed to indicate the specialization and complexity required by this criterion. The evidence of record does not distinguish the duties of the proposed position as more specialized and complex than those of truck transportation and warehousing managers, and general and operations managers, neither of which require or are usually associated with at least a bachelor's degree in a specific field. As a result, the record fails to establish that the proposed position meets the specialized and complex threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The proposed position does not qualify for classification as a specialty occupation under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4), and this petition was properly denied.

Counsel's appellate citation to *Young China Daily v. Chappell*, 742 F.Supp. 2d 552, 554 (N.D. Cal. 1989) is not persuasive. First, when the director referenced the petitioner's lack of "organizational complexity," she did not state that the proposed position would have been approvable if the petitioner were a larger company. Rather, she was implying that due to the petitioner's relatively small size, it appeared as though the beneficiary would be performing duties not typically performed by market research analysts, such as gathering market data, because the petitioner did not employ other individuals to perform such duties.<sup>3</sup>

Moreover, we note that *Young China Daily* does not stand for the proposition cited by counsel. In *EG Enterprises, Inc. v. Department of Homeland Security*, 467 F. Supp. 2d 728, 737 (E.D. Mich. 2006), the court stated the following:

What [the petitioner] fails to grasp is that the duties of the proffered position, *combined with* the position title and business size, are all components in the H-1B visa petition analysis [emphasis in original] . . . the Sixth Circuit, in an unpublished

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artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proposed 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"). Here, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

<sup>3</sup> This distinction is of little importance, however, as we do not accept the additional duties added by the petitioner in response to the director's request for additional evidence.

case, had also determined that the size of the employer is a relevant consideration, although not determinative:

[The court in *Young China Daily*], on which [the petitioner] relies for this allegation of error, made only the narrow ruling that the duties of a graphic designer at a small newspaper do not necessarily differ from those of a graphic designer at a major newspaper. This leads neither to the general conclusion that the skills required to be a manager of a small company are necessarily the same as those required to be a manager at a large company, nor to the specific conclusion that the size of [the petitioner's] business is not relevant to the nature of the duties of its manager. *China Chef, Inc. v. Puelo*, 12 F. 3d 211 (table), 1993 WL 524276 at \*2 (6<sup>th</sup> Cir. Dec. 15, 1993). . . .

[R]eliance in this case on *Young China* does not lead the court to the specific conclusion that the size of [the petitioner's] business is not relevant to the nature of [the beneficiary's] proffered duties. Although USCIS should not rely exclusively on the size of the employer's business when making a determination as to whether a position qualifies as a "specialty occupation," the Court does not find it an abuse of discretion for USCIS to consider size as just one factor in its analysis. It is reasonable to assume that the size of an employer's business has an impact of the duties of a particular position. . . .

Accordingly, we are not persuaded by counsel's citation of *Young China Daily*.

The petitioner has failed to demonstrate that the proposed position qualifies for classification as a specialty occupation. Accordingly, the beneficiary is ineligible for nonimmigrant classification under section 101(a)(15)(H)(i)(b) of the Act and this petition must remain denied.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden and the appeal will be dismissed.

**ORDER:** The appeal is dismissed.