

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)

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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**

[Redacted]

D2

Date: **JUN 12 2012** Office: CALIFORNIA SERVICE CENTER [Redacted]

IN RE: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:
[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael T. Kelly
for 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 February 3, 2011. The petitioner stated that it is a software publisher, established in 2010, with six employees and a gross annual income of approximately \$850,000. The petitioner did not provide its net annual income.

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 him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on December 1, 2011, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel asserts that the director's basis for the denial was erroneous and contends 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; and (5) the Form I-290B. The AAO reviewed the record in its entirety before issuing its decision.

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

Later in this decision, the AAO will also address two additional, independent grounds, not identified by the director's decision, that the AAO finds also precludes approval of this petition. Specifically, beyond the decision of the director, the AAO finds that the petitioner (1) failed to submit a Labor Condition Application (LCA) that corresponds to the petition; and (2) failed to establish that the beneficiary is qualified to serve in a specialty occupation position. For these additional reasons, the petition may not be approved, with each basis considered as an independent and alternative basis for denial.¹

In this matter, the petitioner stated on the Form I-129 and supporting documentation that it seeks the beneficiary's services as a marketing manager on a full-time basis. In response to the RFE,

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

the petitioner stated that the beneficiary would perform the following job duties in the proffered position (along with the approximate percentage of time performing each duty):

- Marketing Strategy Development and Execution (North American & Europe)
 - 50%
 - Hospital
 - Extended Care Facility
 - Patient/Family
 - Insurance Company

- Marketing Tactical Element Development and Execution – 25%
 - Public Relations
 - On-line Advertising
 - SEO Positioning
 - Direct Marketing (Mail & Email)
 - Sponsorships

- Sales Force/Advisory Board/Customer Input/Feedback/Relationship Building Initiatives – 20%

- Travel North America & Europe – 5%

Additionally, the petitioner provided the following responsibilities for the proffered position:

- Instill a marketing led ethos throughout the business[;]
- Research and report on external opportunities[;]
- Understand current and potential customers[;]
- Management of customer relationship[;]
- Develop the marketing strategy and plan[;]
- Manage marketing mix[;]
- Measure success[;]
- Manage budgets[;]
- Ensure timely delivery[;]
- Approve images[;]

- Develop guidelines[;]
- Make customer focused decisions[.]

Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The director denied the petition on December 1, 2011. Counsel for the petitioner submitted an appeal of the denial of the H-1B petition.

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. The AAO will first make some preliminary findings that are material to this decision's application of the H-1B statutory and regulatory framework to the proffered position as described in the record of proceeding.

More specifically, the AAO will now highlight an aspect of the petition that undermines the petitioner's credibility with regard to the actual nature and requirements of the proffered position. This particular aspect is the discrepancy between what the petitioner claims about the level of responsibility inherent in the proffered position, on the one hand, and, on the other, the contrary level of responsibility conveyed by the wage level indicated by the LCA submitted in support of the petition.

The petitioner repeatedly claims that the duties of the proffered position are complex, unique and/or specialized. The petitioner asserts that the beneficiary "will manage all aspects of the marketing function . . . including defining to whom and how products/services are going to be offered, market research, and guiding the marketing and sales department personnel" and that the beneficiary "will drive the marketing strategy."² The petitioner claims that the position is "demanding" and the will be "responsible for developing the marketing and branding strategy and implementation for national launch." Moreover, the petitioner stated that the beneficiary will offer clients "sophisticated services" and must have a "demonstrated sense of the market, current and anticipated trends and what it takes to participate in those markets." Counsel states that the proffered position requires a "skilled marketer" and someone with "highly specialized educational and experience." Counsel also asserts that the duties of the position are "discretionary, complex and sophisticated."

² As previously mentioned, the petitioner stated that its business operations consist of six employees. The director requested in the RFE that the petitioner submit a line-and-block organizational chart showing the petitioner's hierarchy and staffing levels, to include the names and job titles for those persons who would come under the control of the proposed position and to indicate who will direct the beneficiary. The petitioner did not submit this information. The petitioner's assertion that the beneficiary will be responsible for "guiding the marketing and sales department personnel" is questionable as the evidence of record does not identify any marketing department personnel for the beneficiary to "guide."

In this regard, the assertions of the petitioner and counsel are questionable when reviewed in connection with the LCA submitted with the Form I-129 petition. 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 Managers" - SOC (ONET/OES Code) 11-2021, 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.³ 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.⁴ The U.S. Department of Labor (DOL) emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels.⁵ A Level 1 wage rate is described by DOL 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

³ 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.

⁴ 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), 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.

⁵ 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.

worker in training, or an internship are indicators that a Level I wage should be considered.

The petitioner and counsel repeatedly claim that the duties of the proffered position are complex, unique and/or specialized. However, the AAO must question the level of complexity, independent judgment and understanding required for the position as the LCA is certified for a Level 1 entry-level position. The LCA's wage level indicates the position is actually a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

This aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the petitioner's assertions regarding the demands and level of responsibilities of the proffered position. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

As noted below, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) specifies that certification of an LCA does not constitute a determination that an occupation is a specialty occupation:

Certification by the Department of Labor of a labor condition application in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. The director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. The director shall also determine whether the particular alien for whom H-1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.

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 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, the petitioner has failed to submit a valid LCA that corresponds to the claimed duties of the proffered position, that is, specifically, that corresponds to the level of work and responsibilities that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and responsibilities in accordance with the requirements of the pertinent LCA regulations.

The petitioner's statements regarding the claimed level of complexity, independent judgment and understanding required for the proffered position are materially inconsistent with the certification of the LCA for a Level 1 entry-level position. This conflict undermines the overall credibility of the petition. The petitioner and counsel failed to provide any explanation for the inconsistencies in the record with regard to the wage level for the proffered position. The AAO finds that, fully considered in the context of the entire record of proceedings, the petitioner failed to establish the nature of the proffered position and in what capacity the petitioner actually intended to employ the beneficiary.⁶ As previously discussed, the petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

Thus, even if it were determined that the petitioner overcame the director's grounds for denying the petition (which it has not), the petition could still not be approved due to the petitioner's failure to submit an LCA that corresponds to the claimed duties of the proffered position and that is certified for the proper wage classification.

Next, the AAO will address the issue of whether the petitioner established that the proffered position is a specialty occupation. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation. For efficiency's sake, the AAO hereby incorporates

⁶ Counsel submitted a letter dated April 26, 2012, stating that DOL certified a Labor Certification Application filed by the petitioner on behalf of the petitioner. Counsel further stated that "DOL has indicated that the job position will require [the petitioner] to support a prevailing wage that exceeds \$125,000 – the assertion that such a position is not specialized . . . is simply not convincing." The petitioner and counsel did not include a copy of the submission it provided to DOL (including a description of the position). However, the AAO notes that counsel suggests that the position described in the certified Labor Certification Application is the same as the proffered position here (i.e., identical occupation, same job duties and responsibilities, consistent requirements). It must be noted that a determination that the position fell under an occupational category at a wage level of over \$125,000 further undermines the credibility of the H-1B petition with regard to the discrepancies in the record in connection with the petitioner's assertion of the demands and level of responsibilities of the proffered position in comparison with the wage-level designated on the LCA submitted in support of the petition.

the above discussion and analysis regarding the inconsistencies and discrepancies in the record of proceeding regarding the beneficiary's proposed employment.

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.⁷

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.

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 will first review the record of proceeding in relation to the criterion 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 stated 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

⁷ Counsel stated that "for purposes of qualification as a normal minimum entry into the occupation of [m]arketing manager, no 'specific specialty' is required by regulation and therefore, such evidence is unnecessary." Counsel provides no support for his assertion, and for the reasons stated above, the AAO is not persuaded by counsel's claim. As discussed, to interpret 8 C.F.R. § 214.2(h)(4)(iii)(A) as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in the illogical and absurd result of particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory definition at Section 214(i)(1) of the Act or regulatory definition at 8 C.F.R. § 214.2(h)(4)(ii). *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000).

rely on a position's title. As previously mentioned, the specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the 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 AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁸ The petitioner and counsel assert that the section of the *Handbook* most relevant to this proceeding is the chapter "Advertising, Promotions, and Marketing Managers."⁹ However, upon review of the chapter, it must be noted that the *Handbook* does not state that marketing managers comprise an occupational group that categorically requires at least a bachelor's degree, or the equivalent, in a specific specialty. Moreover, counsel acknowledges that the *Handbook* "does not necessarily require a baccalaureate level of education in a specific specialty for purposes of qualification as a normal minimum for entry into the occupation of [m]arketing manager." As previously discussed, USCIS consistently interprets the term "degree" to mean not just any baccalaureate or higher degree, but one in a *specific specialty* that is directly related to the position.

The *Handbook* provides the following information regarding the entry requirements for this occupational category:¹⁰

Education

A bachelor's degree is required for most advertising, promotions, and marketing management positions. For advertising management positions, some employers prefer a bachelor's degree in advertising or journalism. A relevant course of study might include classes in marketing, consumer behavior, market research, sales, communication methods and technology, visual arts, art history, and photography.

Most marketing managers have a bachelor's degree. Courses in business law, management, economics, accounting, finance, mathematics, and statistics are

⁸ 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/>.

⁹ U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Advertising, Promotions, and Marketing Managers, on the Internet at <http://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm#tab-1> (visited May 30, 2012).

¹⁰ U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 Edition*, Advertising, Promotions, and Marketing Managers, on the Internet at <http://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm#tab-4> (visited May 30, 2012).

advantageous. In addition, completing an internship while in school is highly recommended.

Work Experience

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

The *Handbook* does not state that a baccalaureate or higher degree or its equivalent, *in a specific specialty*, is normally the minimum requirement for entry into the proffered position. More specifically, this passage of the *Handbook* states that most marketing managers have a bachelor's degree, but it does not indicate that any specific specialty is normally required for these positions.¹¹ The *Handbook* also states that courses in business law, management, economics, accounting, finance, mathematics, and statistics are advantageous. The AAO notes that the courses that the *Handbook* indicates are advantages for marketing managers are in a wide-variety of disparate fields. The passage does not indicate that marketing managers normally require a bachelor's degree, or its equivalent, in a specific specialty for entry into the occupation.

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 a specific specialty. Here, the AAO incorporates by reference and reiterates its earlier discussion that the LCA submitted in connection with the H-1B petition indicates that the proffered position is a low-level, entry position relative to others within the occupation.¹² Based upon that wage rate, the LCA indicates that the beneficiary is only required to have a basic understanding of the occupation. The wage rate indicates that the beneficiary will perform routine tasks that require limited, if any, exercise of independent judgment, that he will be closely supervised and monitored, and that he will receive specific instructions on required tasks and expected results. In the instant case, there is a lack of credible evidence in the record of proceeding substantiating the nature and educational level of knowledge that would be required for the actual performance of the beneficiary's work in this particular position for this petitioner.

¹¹ Moreover, the first definition of "most" in *Webster's New Collegiate College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of marketing managers have a bachelor's degree, it could be said that "most" marketing managers possess such a degree. It cannot be found, therefore, that a statement that "[m]ost marketing managers have a bachelor's degree [with no specification as to the field of study]" would equate to establishing that a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum entry requirement for the occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist.

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.

The petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that there is a categorical requirement for at least a bachelor's degree in a specific specialty. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the position is one for which a baccalaureate or higher degree or its equivalent in a specific specialty is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent.

The petitioner provided several job announcements. However, upon review of the documents, the AAO finds that they do not establish that similar organizations to the petitioner routinely employ individuals with degrees in a specific specialty, in parallel positions. The petitioner claims that the advertisements represent "[a] common position required by similarly sized offices with similar annual incomes." Upon review of the advertisements, the AAO notes that all of the postings provided by the petitioner are devoid of sufficient information regarding the advertising organizations to conduct a legitimate comparison of the business operations. It is not sufficient to assert that the organizations are similar by simply claiming that the advertising organizations are "competitors" of the petitioner without providing documentation to substantiate those claims.

The petitioner described itself as a provider of software applications serving the healthcare industry, with six employees and a gross annual income of approximately \$850,000. The petitioner did not provide its net annual income. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 511210 – "Software Publishers."¹³ For the petitioner to establish that an advertising organization is similar, it must demonstrate that the petitioner and the organization share the same general

¹³ According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity. Each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last viewed May 30, 2012).

characteristics. Such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered).

It is noted that the petitioner acknowledges that the job announcements "indicate various Bachelor's degrees" are acceptable "in specialties including Marketing, Business, Economics, Finance, Statistics, Research, Management, or related discipline [and that] – many of the job listing[s] only require a Bachelor's Degree and do not specify a specific specialty." The AAO here reiterates that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a specific specialty that is directly related to the specialty occupation claimed in the petition. In general, it must be noted that provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields would not meet the statutory requirement that the degree be "in *the* specific specialty." *See* 214(i)(1)(b) of the Act (emphasis added).

The petitioner submitted the following job announcements:

- Advertisements for the company Allscripts for a Director of Marketing; Director of Sales, Information Business; Director, Strategic Marketing; Community Market Manager; Manager Campaign Marketing; Marketing Manager; and Segment Marketing Manager. The advertisements include a range of duties for the various positions for the same employer. Although the positions may involve some marketing-related duties, the petitioner has not established that all of these advertised positions are parallel to the proffered position.

The company website states that it has 24 locations in the United States, Asia, Australia, Canada, India, and the United Kingdom; that the company consists of over 6,000 team members; and that in 2011, its net income was \$75.5 million (GAAP) and its revenue was \$1.449 billion (GAAP).¹⁴ The advertisements are for an organization whose size and number of employees far exceeds the petitioner's.

Contrary to the purpose for which the advertisements were submitted, the postings state that a bachelor's degree is required, but do not indicate that a bachelor's degree in a *specific specialty* is required. Rather, the employer will accept a degree in a general field such as business. Although a general-

¹⁴ Allscripts company website available on the Internet at <http://www.allscripts.com/en/company/about-us.html> (last accessed May 30, 2012).

purpose bachelor's degree, such as a degree in business, 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). Additionally, for some of the positions, the employer indicated that it would accept a degree in a variety of fields.¹⁵ The AAO notes that the range of the degree requirements cited in the job advertisements are consistent with the *Handbook's* information to the effect that a bachelor's degree in a specific specialty is not normally a requirement for marketing manager positions.

The AAO notes that there is no independent evidence of how representative these job advertisements are of the particular advertising employer's recruiting history for the type of jobs advertised. Additionally, as they are only solicitations for hire, they are not evidence of the employer's actual hiring practices.

- An advertisement for a company called A Place for Mom for the position of regional sales manager. The posting states that the organization is the nation's largest elder care referral service. The content of the advertisement and the record's information about this petition's business operations are too limited and generalized to establish that the advertising organization is similar to the petitioner.

Additionally, the posting states that a bachelor's degree is required but does not specify a field of study. Thus, a bachelor's degree is required, but the advertisement does not indicate that a bachelor's degree in a *specific specialty* is required.

The posting also indicates that the position manages a sales team of 20 to 35 direct reports who work on commission. There is no evidence that the petitioner's proffered position has any direct reports and would be performing similar duties to the advertised position. The petitioner has not established that the advertised position is parallel to the proffered position.

- Three advertisements for PrincetonOne (a recruitment agency). The job postings are for PrincetonOne's clients and the companies are described as the following: (1) "one of the largest importers of home décor products in the US"; (2) a company that is involved in "online marketing and

¹⁵ As previously noted, there must be a close correlation between the required "body of highly specialized knowledge" and the position. A minimum entry requirement of a degree in disparate fields would not meet the statutory requirement that the degree be "in *the* specific specialty." See 214(i)(1)(b) of the Act (emphasis added).

personalization"; and (3) a "family-owned and operated business" whose "poultry is all natural." The postings appear to be for dissimilar organizations and, therefore, are outside the scope of consideration for this criterion, which encompasses only organizations similar to the petitioner. The record is devoid of sufficient information regarding the advertising organizations to conduct a legitimate comparison of the business operations and the petitioner failed to establish that the advertising organizations are similar to it. Thus, further review of the postings is not necessary.

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 these advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that the position required a bachelor's or higher degree in a specific specialty or its equivalent for organizations that are similar to the petitioner, 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 normally require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

The petitioner and counsel claim a degree requirement is common to the industry in parallel positions among similar organizations. In support of this conclusion, the petitioner provided also submitted several letters and claims that the letters are "from firms/individuals in the industry that attest that such firms routinely employ and recruit only degreed (or equivalency) individuals in a specific specialty (BBK-Brand Ex, Cleveland Medical Mart & Convention Center)." The AAO reviewed the letters and finds that the petitioner has not accurately described their content. Furthermore, the letters do not 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.

Upon review of the letters, the AAO notes that the letters lack sufficient information to reasonably conclude whether or not the writers of the letters are referring to parallel positions. The

letters fail to provide basic information regarding the positions, including the duties and responsibilities as well as the specific knowledge required to perform the duties.

More specifically, the petitioner submitted an unsigned letter from [REDACTED]. Without [REDACTED] signature as declarant, the declaration lacks any evidentiary force. See *In re Rivera*, 342 B.R. 435, 459 (D. N.J. 2006); *Blumberg v. Gates*, No. CV 00-05607, 2003 WL 22002739 (C.D.Cal.) (not selected for publication). Thus, the letter has no probative value. Nevertheless, the AAO reviewed the letter but finds that it is insufficiently detailed and does not establish that the proffered position is a specialty occupation.

[REDACTED] states that the letter serves "as a recommendation that [the petitioner] hire a qualified Marketing Manager to design and execute its market strategy." [REDACTED] provides a list of key skills that are extremely generic and routine, and provide no insight into the position. He further asserts that "someone that has the formal education and/or expertise in developing and executing a plan for a new enterprise, product or strategy should fill the Marketing Manager role." Thus, he states that such persons "should" possess formal education and/or expertise but does not provide any further clarification. Thus, his intended meaning for the term "should" is not clear from the letter.¹⁶

[REDACTED] signature line indicates that his job title is "Vice President of Leasing" but there is no information regarding the company or [REDACTED] job duties or his role at the company. Contrary to the petitioner's claim, [REDACTED] does not attest that [REDACTED] routinely employs and recruits only individuals with at least a bachelor's degree in a specific specialty for marketing manager positions. Furthermore, [REDACTED] does not state or provide any evidence that a requirement of at least a bachelor's degree in a specific specialty, or the equivalent, is common to the petitioner's industry in parallel positions among similar organizations.

As noted, [REDACTED] simply makes a recommendation that the petitioner "hire a qualified Marketing Manager" and that the person should possess "formal education and/or expertise." [REDACTED] does not quantify or provide any specific information (i.e., level of education) regarding the "formal education and/or expertise" that he recommends an employee possess for the position. [REDACTED] indicates that he has worked with many of the largest device, pharmaceutical and healthcare providers but he did not state his position or provide any details regarding this claimed experience. Upon review of the letter, there is no specific information in the record regarding his expertise on the issue here. Further, he does not provide any information regarding the specific elements of his knowledge and experience that he may have applied in reaching his recommendation. After reviewing the letter, the AAO finds that it is improperly executed, insufficiently detailed and lacks relevancy to this proceeding. Accordingly, it has no probative value.

¹⁶ The word "should" is defined as "1. Used to express duty or obligation <You should write a thank you note.> 2. Used to express probability or expectation <They should arrive here soon.>" *Webster's New Collegiate College Dictionary* 1046 (Third Edition, Hough Mifflin Harcourt 2008).

The petitioner also provided a letter from [REDACTED] [REDACTED] states it is her opinion that "[f]or companies such as [the petitioner] to effectively market in the health care IT space . . . the sales team and executive management of the sales and marketing organization must be a degreed person with a significant amount of experience in dealing with highly educated workforce members in a complex industry." While it may be beneficial for the petitioner to employ such a person, the AAO notes that this is not the issue in this proceeding. The issue here is whether the petitioner has established that its proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

[REDACTED] claims that her opinion is based upon her 15 years of experience in the legal arena and 10 years of experience as a hospital administrator. She does not provide the dates of her employment in these roles. [REDACTED] may, in fact, be a recognized authority on various topics; however, she has failed to provide sufficient information regarding the basis of her claimed expertise on this particular issue. Without further clarification, it is unclear how her education, training, skills or experience would translate to expertise or specialized knowledge regarding the *current recruiting and hiring practices* of for-profit enterprises engaged in software publishing serving the healthcare industry (or similar organizations) for *marketing manager* positions (or parallel positions). Based upon the information provided, she has not established that her education, training, skills or experience have provided her with expertise or specialized knowledge of this issue. The letter does not provide any information regarding her experience giving opinions on such matters, nor does it cite specific instances in which her past opinions have been accepted or recognized as authoritative regarding this issue.

[REDACTED] claims that it is her opinion that companies should employ persons with degrees and experience, but she does not further specify the type of degree (i.e., vocational degree, associate's degree, bachelor's degree) and/or level of experience. She does not indicate that at least a bachelor's degree in a specific specialty is common to the petitioner's industry in parallel positions among similar organizations. Accordingly, her opinion in this area merits no special weight and does not constitute probative evidence on the specialty occupation issue that is the subject of this case.

The petitioner also provided a joint letter from [REDACTED] and [REDACTED] of [REDACTED]. Upon review of the letter, the AAO notes that the letter does not "attest that such firms routinely employ and recruit only degreed (or equivalency) individuals in a specific specialty" as claimed by the petitioner.

[REDACTED] and [REDACTED] claim that it is "necessary for a start-up healthcare business to have a professional, experienced and academically-degreed marketing executive on the company's top management staff" and they provide a list of reasons for their assertion. The writers conclude that it is necessary for companies such as the petitioner's to have a "marketing executive . . . who has both marketplace experience and academic degrees." Again, while it may be beneficial for the petitioner to employ such a person, the issue here is whether the evidence submitted establishes that the proffered position constitutes a specialty occupation. The writers do not

provide sufficient details regarding their claim to establish that at least a bachelor's degree, in a specific specialty, or the equivalent is common to the petitioner's industry for parallel positions among similar organizations. For example, the letter is devoid of information regarding the type of degree (i.e. vocational degree, associate's degree, bachelor's degree) which they claim is necessary for the position.

Moreover, there is no indication that the writers possess any knowledge of the petitioner's proffered position beyond, perhaps, simply the job title. There is no evidence that the writers reviewed the petitioner's job description and the writers do not demonstrate or assert in-depth knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise. Furthermore, it must be noted that there is no indication that the petitioner and counsel advised the writers that the petitioner characterized the proffered position as an entry-level position, for a beginning employee who has only a basic understanding of the occupation (as indicated by the wage-level on the LCA). It appears that writers would have found this information relevant for their advisory opinion. Based upon the wage-level of the proffered position, it does not appear that the beneficiary will be serving "at a high level within the company's management ranks" and be part of the "company's top-management staff" (as the position is described by the writers of the advisory opinion). Thus, the writers have not demonstrated that they possess the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately determine parallel positions based upon job duties and responsibilities.

Although the writers provided a brief paragraph at the end of the letter regarding each of their credentials, they did not provide any documentation to establish their credentials as recognized authorities on relevant industry-hiring standards. The writers claim to possess expertise in the area of hospital marketing, but they did not identify the specific elements of their knowledge and experience that they may have applied in reaching their conclusions here. The writers do not indicate that they relied on any authoritative sources to support their assertions. They do not include the results of outside formal surveys, research, statistics, or any other objective quantifying information to substantiate their opinions. Their opinions are not supported by independent, objective evidence demonstrating the manner in which they reached such conclusions.

The petitioner also submitted a letter from [REDACTED] of Seattle Pacific University. The professor states that the petitioner "requires at least a Bachelor's Degree or equivalent in Management, Marketing, Business or Sales."¹⁷ He states that in conducting his review of the petitioner's proposed position, he "used the position duties and qualifications for marketing

¹⁷ As previously discussed, the requirement of a bachelor's degree in business administration 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).

Managers contained in the Occupational Outlook Handbook, O*Net (Occupational Information Network) and job requirements in job announcements for similar positions as reference points."

states that he reviewed the job description for the proffered position and that the proffered position requires "advanced analysis"; "a sophisticated understanding" of various concepts; and "special expertise" in the "highly technical area of software." He further states that the position is "complex and specialized." However, there is no indication that the petitioner and counsel advised that the petitioner characterized the proffered position on the LCA as an entry-level position, for a beginning employee who had only a basic understanding of the occupation. The wage-rate indicates that the beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results. It appears that would have found this information relevant for his advisory opinion on the proffered position.

claims that his opinion letter is "based upon 33 years of academic professional professorship, professional association and research, as well as industry consulting." He specifies that he has been "an instructor in business administration for 33 years, 31 of which have been " Based upon the information provided, the vast majority of his experience, including his current work, is in the academic setting. According to his resume, his most recent "scholarly activity" was in October 2007 when he refereed proceedings at a national conference entitled " An extension of the proposition that the purpose of business is to serve" at His resume indicates that his most recent other professional activity (other than teaching experience) was as a seminar leader from 1988 to 1990.

The professor may, in fact, be a recognized authority on various topics in the field of teaching business administration principles; however, he has failed to provide sufficient information regarding the basis of his expertise on this particular issue. The AAO notes that, despite his extensive resume, he has not established his expertise pertinent to the hiring practices of firms seeking to fill positions similar to the proffered position in the instant case. There is no indication that he has published any work or conducted any research or studies pertinent to the educational requirements for marketing managers (or parallel positions) in the petitioner's industry for similar organizations, and no indication of recognition by professional organizations that he is an authority on those specific requirements. That is, based upon the information provided, has not established that his education, training, skills or experience have provided him with expertise or specialized knowledge of the *current* requirements for marketing managers (or parallel positions) employed for software publishers (as designated by the petitioner by the NAICS code in the Form I-129 and LCA) among organizations that are similar to the petitioner. There is no specific information in the record regarding his claimed expertise on the issue here, i.e., the hiring practices and recruitment of marketing managers (or parallel positions) with for-profit enterprises engaged in providing software applications for the healthcare industry (or similar organizations).

█ claims that he reviewed "position duties and qualifications for marketing Managers contained in the Occupational Outlook Handbook, O*Net (Occupational Information Network) and job requirements in job announcements for similar positions as reference." It is noted that █ briefly describes the job announcements that he reviewed and they appear to be four of the announcements for Allscripts and the posting for A Place for Mom that were discussed earlier in the decision. As previously discussed, the *Handbook* and job announcements do not establish that the petitioner's proffered position is a specialty occupation.¹⁸ However, █ did not address DOL's contrary information in the *Handbook* or the deficiencies in the job postings. █ does not indicate that he relied on any other authoritative sources to support his assertions.

█ does not provide a substantive explanation of the specific analytic process by which his conclusions were reached. For example, the opinion letter contains no evidence that it was based on scholarly research conducted by █ in the specific area upon which he is opining. In reaching this determination, █ provides no documentary support for his ultimate conclusion regarding the education required for the position (i.e., statistical surveys, authoritative industry publications, or professional studies). █ asserts a general industry educational standard for firms similar to the petitioner, without referencing any supporting authority or any empirical basis for the pronouncement. Likewise, he does not provide a substantive, analytical basis for his opinion and ultimate conclusion. His opinion does not relate his conclusion to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for the conclusion about the educational requirements for the particular position here at issue. Here again, there is no evidence that the writer of the advisory opinion has visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. As █ has not established his credentials as a recognized authority on relevant industry-hiring standards, his opinion in this area merits no special weight and does not constitute probative evidence on the specialty occupation issue that is the subject of this case.

The AAO may, in its discretion, use as advisory opinions or statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). As a reasonable exercise of its discretion the AAO discounts the advisory opinion letters as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, counsel claims that "the beneficiary has occupied

¹⁸ █ also states that he reviewed marketing professional career resource sites. The AAO reviewed the websites and found that the first website provided by █ is regarding market analysts, not marketing managers. Both the *Handbook* and O*NET OnLine classify market research analysts as a separate and distinct occupational category from marketing managers. The petitioner does not assert that the duties of its proffered position fall under the occupational category of market research analysts. Thus, the information provided by █ regarding market analysts appears to be irrelevant to this proceeding.

almost identical position with other companies for the past five years [and] only now has USCIS found that this new job position with [the petitioner] is not a 'specialty occupation' warranting the grant of an H-1B."

The AAO notes that the beneficiary was granted L-1A status from August 15, 2005 to August 15, 2010 and finds no merit in counsel's contention that the grant of L-1A classification is relevant to these proceedings. Counsel cites no statutory or regulatory authority, case law, or precedent decision to support it. Moreover, neither the statutory nor regulatory provisions governing USCIS adjudication of Form I-129 H-1B specialty-occupation petitions provide for the approval of an H-1B specialty-occupation petition on the grounds argued by the petitioner's counsel, or even indicate that USCIS decisions on L-1A adjudications are relevant to USCIS adjudications of Form I-129 H-1B specialty-occupation petitions. The petitioner is required to establish that the proffered position qualifies as a specialty occupation within the meaning of the controlling statutory and regulatory provisions. It may not rely on a previous grant of L-1A status to establish eligibility for H-1B classification.

The petitioner claims that thereafter, the beneficiary was granted H-1B status valid from October 1, 2009 to serve in an international marketing manager position with another employer. However, the petitioner and counsel failed to submit a copy of the petition. If a petitioner wishes to have unpublished service center or AAO decisions considered by USCIS in its adjudication of a petition, the petitioner is permitted to submit copies of such evidence that it either obtained itself and/or received in response to a Freedom of Information Act request filed in accordance with 6 C.F.R. Part 5. As the record of proceeding does not contain any evidence of the allegedly approved petition, there were no underlying facts to be analyzed and, therefore, no prior, substantive determinations could have been made to determine what facts, if any, were analogous to those in this proceeding.

When any person makes an application for a "visa or any other document required for entry, or makes an application for admission [. . .] the burden of proof shall be upon such person to establish that he is eligible" for such relief. 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I. & N. Dec. 190 (Reg. Comm'r 1972). Furthermore, any suggestion that USCIS must review unpublished decisions and possibly request and review each case file relevant to those decisions, while being impractical and inefficient, would also be tantamount to a shift in the evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361. Accordingly, neither the director nor the AAO was required to request and/or obtain a copy of the allegedly approved petitions cited by counsel.

Moreover, although the AAO did not review the other employer's H-1B petition, it is noted that the AAO reviewed the LCA wage-level designated for the prior H-1B position that counsel claims is "almost identical."¹⁹ The petitioner in the instant case designated the proffered position

¹⁹ The Foreign Labor Certification Data Center website is accessible on the Internet at <http://www.flcdatacenter.com/CaseH1B.aspx>. The website states that the employer-specific case information that appears on FLCDataCenter.com is provided to DOL by employers who submit foreign

as a Level 1 position, indicating that it would be a low-level, entry position relative to others within the occupation. The prior employer designated its H-1B position as a more senior-level position, with a corresponding higher wage-level than the proffered position. As previously noted, DOL guidance indicates that some of the factors that should be considered when determining a wage-level 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.²⁰ While counsel claims that the positions are alike, he has provided no evidence to substantiate his assertion.

Nevertheless, even if this evidence had been submitted and even if it had been determined that the facts in the prior H-1B case was analogous to those in this proceeding, the decision is not binding on USCIS. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Moreover, if the previous nonimmigrant petition was approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petition, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), cert. denied, 122 S.Ct. 51 (2001).

Thus, based upon a complete review of the record, the petitioner has not established that at least a bachelor's degree in a specific specialty 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.

A review of the record indicates that the petitioner has failed to credibly demonstrate the duties the beneficiary will be responsible for or perform on a day-to-day basis constitute a position so

labor certification applications.

²⁰ 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.

complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

Again, the AAO incorporates by reference and reiterates its earlier discussion that the LCA indicates that the position is a low-level, entry position relative to others within the occupation. Based upon the wage rate, the beneficiary is only required to have a basic understanding of the occupation. Moreover, that wage rate indicates that the beneficiary will perform routine tasks that require limited, if any, exercise of independent judgment. The beneficiary's work will be closely supervised and monitored and he will receive specific instructions on required tasks and expected results. His work will be reviewed for accuracy. The petitioner therefore failed to establish how the beneficiary's responsibilities and day-to-day duties are so complex or unique that the position can be performed only by an individual with a bachelor's degree in a specific specialty. Thus, based upon the record of proceeding, including the LCA, it does not appear that the proffered position is so complex or unique that it can only be performed by an individual who has completed a baccalaureate program in a specific discipline that directly relates to the proffered position. Furthermore, the petitioner has not established that 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 in a specific specialty.

It is further noted that although the petitioner asserts that a bachelor's degree is required to perform the duties of the proffered position, the petitioner failed to sufficiently demonstrate how the duties of the marketing manager position 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. That is, the record of proceeding does not establish that the petitioner's requisite knowledge for the proffered position can only be obtained through a baccalaureate or higher degree program in a specific specialty, or the equivalent.

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 related courses may be beneficial in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty or its equivalent is required to perform the duties of the proffered position.

The description of the duties for the marketing manager position does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. 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 of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree, or the equivalent, in a specific specialty 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.

To merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position. Further, it should be noted that the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty.

While a petitioner may believe or otherwise assert that a proffered 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 occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d 384. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

The petitioner did not provide any documentary evidence regarding current or past recruitment

efforts for this position. Furthermore, the petitioner did not submit any information regarding employees who have previously held the position. The petitioner also did not provide any information or documentation regarding its methods for recruiting the beneficiary for the position. The record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty.

Upon review of the record, the petitioner has not provided any evidence to establish that it normally requires at least a bachelor's degree, or the equivalent, in a specific specialty for the proffered position. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

The AAO again incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position on the LCA as a low-level, entry position relative to others within the occupation. Therefore, it is simply not credible that the position is one with specialized and complex duties as such a position would be classified at a higher-level, requiring a significantly higher prevailing wage. The petitioner has not provided sufficient documentary evidence 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.

Upon review of the record, the petitioner has not met 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).

For the reasons related in the preceding discussion, the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. Thus, the appeal will be dismissed and the petition denied for this reason also.

Beyond the decision of the director, the AAO finds that the petitioner failed to establish that the beneficiary is qualified to serve in a specialty occupation position. The statutory and regulatory framework that the AAO must apply in its consideration of the evidence of the beneficiary's qualifications to serve in a specialty occupation follows below.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,

- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and
 - (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The degree referenced by section 214(i)(1)(B) of the Act, 8 U.S.C. § 1184(i)(1)(B), means one in a specific specialty that is characterized by a body of highly specialized knowledge that must be theoretically and practically applied in performing the duties of the proffered position.

In implementing section 214(i)(2) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must also meet one of the following criteria in order to qualify to perform services in a specialty occupation:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that are equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The record does not establish that the beneficiary possesses (1) a U.S. bachelor's or higher degree from an accredited college or university, (2) a foreign degree determined to be equivalent to such a degree, or (3) a pertinent license. Thus, the only remaining avenue for the beneficiary to qualify for the proffered position is pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C)(4). Under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), the petitioner must establish both (1) that the beneficiary's combined education, specialized training, and/or progressively responsible experience are equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and (2) that the beneficiary has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

For purposes of 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), the provisions at 8 C.F.R. § 214.2(h)(4)(iii)(D) require one or more of the following to determine whether a beneficiary has achieved a level of knowledge, competence, and practice in the specialty occupation that is equal to that of an individual who has a baccalaureate or higher degree in the specialty:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;²¹
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. . . .

The petitioner did not submit evidence to satisfy the criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(D)(2)-(4). In the present matter, the petitioner relies upon two evaluations of the beneficiary's qualifications. However, upon review of the record, the petitioner has failed to establish that the beneficiary is qualified to serve in a specialty occupation position.

Specifically, the petitioner submitted an evaluation from [REDACTED] of the Foundation for International Services, Inc. regarding the beneficiary's "employment experience in the marketing field." However, it must be noted that there is no independent evidence in the record from appropriate officials, such as deans or provosts, to establish that, at the time of the evaluation, that [REDACTED] was, in the language of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(1), "an official [with] authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for

²¹ The petitioner should note that, in accordance with this provision, the AAO will accept a credentials evaluation service's evaluation of *education only*, not experience.

granting such credit based on an individual's training and/or work experience." In fact, [REDACTED] does not even assert such authority.

That is, [REDACTED] does not claim or provide any documentation to indicate that she has the authority to grant college-level credit for *work experience* in the specialty (nor does she indicate that she is affiliated with a university that has a program for granting such credit based on an individual's work experience). Thus, [REDACTED] has not established that she is competent under 8 C.F.R. § 214.2(h)(4)(iii)(D)(I) to evaluate the educational equivalency of the beneficiary's work experience.

The petitioner also submitted an evaluation from [REDACTED] regarding the beneficiary's qualifications.²² The evaluation is accompanied by a letter from the SPU Registrar, dated September 27, 2010, which states that SPU faculty have the authority to grant credit "for training and experience both in the areas of training and more generally in general education and university degree requirements for [the] academic program." However, the letter does not state that the faculty has the authority to grant college-level credit for "work" experience, nor that SPU has a program for granting such credit based on an individual's work experience. More specifically, the second paragraph of the letter does not include "work" experience, stating the following:

Faculty make decisions of course equivalency and college level experience for all students. This includes transfer credits, assessing credentials from other institutions both from other nations and within the US according to our academic policies.

The petitioner also submitted a letter from [REDACTED] dated July 12, 2004. However, as this letter predates the evaluation by approximately seven years, its accuracy and applicability at the time of the evaluation is not established. Thus, [REDACTED] has not established that he is competent under 8 C.F.R. § 214.2(h)(4)(iii)(D)(I) to evaluate the educational equivalency of the beneficiary's work experience.

The evaluators have not established that they are competent under 8 C.F.R. § 214.2(h)(4)(iii)(D)(I) to evaluate the educational equivalency of the beneficiary's work experience. Accordingly, the AAO accords no weight to the assessments of the beneficiary's work experience, and no weight to the ultimate conclusion of the evaluators that the beneficiary holds the equivalent of a U.S. bachelor's degree.

Aside from the decisive fact that the evidence of record does not establish the evaluators as competent under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) to evaluate training and/or experience, the

²² The evaluator provides conflicting information, initially stating that the evaluation is based solely on the beneficiary's progressive professional work experience and concluding that the evaluation is based upon the beneficiary's academic and professional work experience. The evaluator references the beneficiary's academic experience twice, but there is no evidence of the beneficiary's academic credentials. Thus, it appears that the evaluator made these statements in error.

AAO finds that the content of the evaluation of the beneficiary's work experience would merit no weight even if they were qualified under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1).

Both evaluators indicated that the beneficiary provided a curriculum vitae and letters, which were relied upon to for the evaluations.²³ The petitioner submitted a copy of the beneficiary's curriculum vitae to USCIS along with letters from the beneficiary's former employers, as well as two letters from companies associated with one of the beneficiary's former employers. Upon review of the letters, the AAO finds that the letters provide insufficient information regarding the beneficiary's work history and duties (i.e., 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).²⁴ The letters provide extremely brief descriptions of the beneficiary's responsibilities and do not present an adequate factual foundation for the evaluations. Thus, the AAO finds the evaluations fail to establish that the beneficiary possesses the equivalent of a bachelor's degree based upon the information provided regarding his work-related duties and responsibilities. In light of the lack of a sufficient factual foundation discussed above, the evaluations are insufficient even if they had been rendered by an official qualified under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1).

As previously discussed, USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). The petitioner has failed to satisfy any of the criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(D)(1)-(4), and the AAO will next perform a Service evaluation pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

When USCIS determines an alien's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge

²³ The petitioner should note that the evidentiary weight of the beneficiary's curriculum vitae or resume is insignificant. It represents a claim by the beneficiary, rather than evidence to support that claim. As such, its evidentiary weight does not exceed the cumulative corroborative information other documents of record provide about the beneficiary's work experience. This record of proceeding lacks documentary evidence that establishes or corroborates the substantive nature of the beneficiary's work experience. 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)).

²⁴ Specifically, the letter from [REDACTED] provides the beneficiary's dates of employment but does not include his job title, duties or any further information. The letter from [REDACTED] provides the beneficiary's dates of employment and job title but does not provide any additional details. The letters from [REDACTED] are supplemental letters to confirm the beneficiary's experience with Merkel products. However, these letters along with the letter from System Seals describe the beneficiary's duties in terms of generalized and generic functions that do not convey the substantive nature of the work that the beneficiary performed.

required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation²⁵;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

Upon review of the record, the petitioner has not provided sufficient corroborating evidence as outlined in 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). Thus, the AAO cannot conclude that the beneficiary's past work experience included the theoretical and practical application of a body of highly specialized knowledge in a field related to the proffered position or that the beneficiary has recognition of expertise in the industry.

As such, since evidence was not presented that the beneficiary has at least a bachelor's degree or the equivalent in a specific specialty, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

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

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

²⁵ *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

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

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed, and the petition will be denied.

ORDER: The appeal will be dismissed. The petition will be denied.