



U.S. Citizenship
and Immigration
Services

D2

DATE: OCT 10 2012

OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE:

Petitioner:

Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 in accordance with the instructions on 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,


Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner describes itself as a business engaged in television, music, entertainment, and multimedia production, established in 2010 with 23 employees with a gross annual income of \$5,000,000. In order to employ the beneficiary in what it designates as a Television Program and Marketing Manager/Director, it seeks to classify the beneficiary 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 the grounds that the petitioner failed to establish that the proffered position qualifies for classification as a specialty occupation.

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

The issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment offered to the beneficiary meets the applicable statutory and regulatory requirements. The AAO adopts the decision of the director, and finds that the petitioner did not meet its burden of proving eligibility for the benefit sought. Of significant importance to this case is the fact that the proffered position's job duties encompass more than one occupation.

Later in this decision, the AAO will also address an additional, independent ground, 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 failed to submit a Labor Condition Application (LCA) that complies with the applicable statutory and regulatory provisions.

In deciding whether a proffered position qualifies as a specialty occupation, the AAO analyzes the evidence of record according to the statutory and regulatory framework below.

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

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the *necessary and sufficient conditions for meeting the definition of specialty occupation* would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S.

Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

In the petition received on April 7, 2011, the petitioner indicated that it wished to employ the beneficiary as a Television Program and Marketing Manager/Director, and it identified the following position duties:

- Plan and schedule programming and event coverage based on broadcast length, time availability, community needs, ratings data and viewer demographics;
- Monitor and review programming to ensure that schedules are met, guidelines are adhered to and performances are of adequate quality;
- Direct and coordinate activities of personnel engaged in broadcast news, sports and programming;
- Check completed program logs for accuracy and conformance with Federal Communication (FCC) rules and regulations and resolve program log inaccuracies;
- Establish work schedules and assign work to staff members;
- Coordinate activities between departments such as news and programming;
- Perform personnel duties such as hiring staff and evaluating work performance;
- Evaluate new and existing programming to assess suitability and the need for changes;
- Develop budgets for programming and broadcasting activities and monitor expenditures to ensure that they remain within budgetary limits; and
- Confer with directors and production staff to discuss issues such as production, casting problems, budgets, policies and news coverage.

Within the position description, the letter of support contains sections entitled, "Sales and Marketing," "Communications and Media," "Administration and Management," and "Customer and Personal Service." After each section, there is a listing of applicable general knowledge. The "Sales and Marketing" section states, "Knowledge of principles and methods for showing, promoting, and selling products or services. This includes marketing strategy and tactics, product demonstration, sales techniques, and sales control systems." Notably, the petitioner does not explicitly draw a correlation between these knowledge competencies and how they would apply to the proffered position. As there is no discussion of the marketing duties, but merely a perfunctory inclusion of marketing knowledge, the AAO finds that any marketing duties might only be incidental to the position upon reading the initial job description. Also, the petitioner did not state the minimum educational requirements necessary for the position.

On April 14, 2011, the director's RFE requested additional evidence pertaining to the proffered position and set forth the legal standard for a specialty occupation position. In particular, the

director asked the petitioner to provide a more detailed description of the work to be performed, and an explanation as to why a bachelor's degree in the specific specialty would be required to execute the job duties. The director's request asked for the inclusion of specific job duties, the percentage of time to be spent on each duty, the level of responsibility, hours per week of work and the minimum education, training, and experience necessary to do the job. Additionally, the director requested an organizational chart showing the petitioner's hierarchy and staffing levels, with a clear identification of the proffered position on the organizational chart in relation to other employees.

In a timely response to the RFE on April 20, 2011, the petitioner submitted an RFE response letter and an organizational chart listing the proffered position. Both documents provided the job title, "Marketing Director/Manager" for the proffered position, which is a departure from the job title of "Television Program and Marketing Manager/Director" used in the I-129 petition, initial support letter, and Labor Condition Application (LCA). The title change is not explained by the petitioner. In a similar fashion, the petitioner provides new duties that emphasize the marketing aspects of the position, and the duties described by the petitioner are below:

- Marketing Director/Manager reports directly to the CEO and must be able to effectively deal with a variety of personality types and to drive teams to product high-quality deliverables.
- Marketing Director/Manager is accountable for assuring consistency in terms of our overall approach to marketing among all offices. Position requires the ability to create and communicate effective outlines and schedules [for] television [and] advertising program[ming] and to complete work on-time under tight deadlines.
- Position will gather information on potential clients and projects and scheduling meetings with new, existing or past clients to uncover opportunities.
- Marketing Director/Manager design[s] and implement[s] a marketing strategy for an organization, [and] determines demand, analyzes the competition, identifies the customer, develops pricing strategies, ensures customer satisfaction, oversees development and assesses the need for new products or services.
- Monitor[s] and review[s] programming to ensure that schedules are met, guidelines are adhered to, and performances are of adequate quality.
- Plan[s] and schedule[s] programming and event coverage, based on broadcast length, time availability, and other factors, such as community needs, ratings data, and viewer demographics.
- Monitor[s] and review[s] programming to ensure that schedules are met, guidelines are adhered to, and performances are of adequate quality.
- Evaluate[s] new and existing programming to assess suitability and the need for changes, using information such as audience surveys and feedback.
- Develop[s] budgets for programming and broadcasting activities and monitor[s] expenditures to ensure that they remain within budgetary limits.
- Work[s] closely with COO and sales teams in order to ensure that all components are in line with the overall marketing strategy.

The petitioner stated in the RFE-response letter that the position requires a bachelor's degree in marketing or business administration, and asserts that this is the industry standard. In support of its claim, the petitioner cited the occupational classification section on "Marketing Managers" in the

2010-2011 edition of the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (hereinafter referred to as the *Handbook*). In pertinent part, the section cited by the petitioner states, "For marketing, sales, and promotions management positions, employers often prefer a bachelor's or master's degree in business administration with an emphasis on marketing." In addition to the RFE response letter, the petitioner submitted a job announcement dated February 15, 2011. Within the job announcement, the position is titled "Television Program and Marketing Director/Manager" at the top of the job announcement, but it is referred to as a Marketing Director/Manager throughout the body of the announcement.

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO first turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position.

The AAO will now look at the *Handbook*, which the AAO recognizes as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹ The AAO finds that the petitioner describes duties associated with two distinct occupations: marketing managers and program directors.²

The "Advertising, Promotions, and Marketing Managers" chapter in the 2012-1013 edition of the *Handbook* describes the duties of a marketing manager, in part, as follows:

Marketing managers estimate the demand for products and services that an organization and its competitors offer. They identify potential markets for the organization's products.

Marketing managers also develop pricing strategies to help organizations maximize

¹ All of the AAO's references are to the 2012-2013 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO>.

² Although not material to the outcome of this appeal, it is noted that where a petitioner seeks to employ a beneficiary in two distinct occupational categories, the petitioner may wish to consider filing two separate petitions, requesting concurrent, part-time employment for each occupation. Such action might be useful in light of the possibility that, where a single petition is filed for what are essentially jobs of two different occupational categories, the job aspects belonging to only one occupational category would meet the specialty-occupation requirements, while the job aspects of the other occupational category would not. In such a situation, which is not the case here, USCIS would be required to deny the entire petition as the pertinent regulations do not permit the partial approval of only a portion of a proffered position and/or the limiting of the approval of a petition to perform only certain duties. See generally 8 C.F.R. § 214.2(h). Furthermore, and as is the case here, the petitioner would need to ensure that it separately meets all requirements relevant to each occupation and the payment of wages commensurate with the higher paying occupation. See generally 8 C.F.R. § 214.2(h); DOL, *Employment and Training Administration's Prevailing Wage Determination Policy Guidance (Revised Nov. 2009)*. Thus, filing separate petitions would help ensure that the petitioner submits the requisite evidence pertinent to each occupation and would help eliminate confusion with regard to the proper classification of the position being offered.

profits and market share while ensuring that the organizations' customers are satisfied. They work with sales, public relations, and product development staff.

For example, a marketing manager may monitor trends that indicate the need for new products and services. Then they oversee the development of that new product.

U.S. Department of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-2013 ed., at <http://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm> (accessed September 18, 2012).

Under the section on "How to Become an Advertising, Promotions, or Marketing Manager," the *Handbook* states the following educational requirements:

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

Id. The "Producers and Directors"³ chapter in the 2012-2013 edition of the *Handbook* describes the

³ The AAO would like the record to reflect that the 2012-2013 edition of the Handbook does not have a section on "Program Directors," but notes that the Foreign Labor Certification Data Center Online Wage Library which addresses "Producers and Directors" with an SOC code of 27-2012.00, 27-2012.03 27-2012.03 shows that "Program Directors" with an SOC 27-2012.03, is a subset of the same occupational category. See the Internet site at <http://www.flcdatacenter.com/OesQuickResults.aspx?code=27-2012&area=42044&year=10&source=1>.

The corresponding tasks and job duties associated with "Program Directors" as reported by *O*Net* are very similar to the job duties reported by the petitioner in the initial support letter:

- Plan and schedule programming and event coverage, based on broadcast length, time availability, and other factors, such as community needs, ratings data, and viewer demographics.
- Monitor and review programming to ensure that schedules are met, guidelines are adhered to, and performances are of adequate quality.
- Direct and coordinate activities of personnel engaged in broadcast news, sports, or programming.
- Check completed program logs for accuracy and conformance with Federal Communications Commission (FCC) rules and regulations and resolve program log inaccuracies.
- Establish work schedules and assign work to staff members.
- Coordinate activities between departments, such as news and programming.

duties of a director, in part, as follows:

Directors are responsible for the creative decisions of a production. They select cast members, conduct rehearsals, and direct the work of the cast and crew. During rehearsal, they work with the actors to help them portray their characters better.

Directors work with designers to build a project's set. During a film's postproduction phase, they work closely with film editors to make sure that the final product comes out the way the producer and director want.

Although directors are in charge of the creative aspects of a show, they ultimately answer to the executive producer.

U.S. Department of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-2013 ed., at <http://www.bls.gov/ooh/entertainment-and-sports/producers-and-directors.htm#tab-2>.

The "How to Become a Producer or Director" section of the *Handbook* discussing education requirements states that:

Education

Producers and directors usually earn a bachelor's degree. There are no formal training programs for producers or film directors, but some major in writing, acting, journalism, or communication while in college. Some producers earn a degree in business, arts management, or nonprofit management.

Many stage directors complete a degree in theater, and some go on to receive a Master of Fine Arts (MFA) degree. Classes may include directing, playwriting, and set design, as well as some acting classes.

Id. Contrary to the petitioner's assertion, the *Handbook* does not indicate that "Marketing Managers" comprise an occupational group that categorically requires at least a bachelor's degree, or the equivalent, in a specific specialty. The *Handbook* specifically states that a bachelor's degree is not always a requirement for entry into the occupation, and it does not indicate that a bachelor's or higher degree, or the equivalent, in a specific specialty is normally required for entry into this occupation. While the *Handbook* indicates that directors usually earn a bachelor's degree, it clearly does not report that a bachelor's or higher degree, or the equivalent, is normally required for entry

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- Perform personnel duties, such as hiring staff and evaluating work performance.
 - Evaluate new and existing programming to assess suitability and the need for changes, using information such as audience surveys and feedback.
 - Develop budgets for programming and broadcasting activities and monitor expenditures to ensure that they remain within budgetary limits.
 - Confer with directors and production staff to discuss issues such as production and casting problems, budgets, policies, and news coverage.

See the Internet site at <http://www.onetonline.org/link/summary/27-2012.03>.

into the occupation, nor does it specify a particular specialty.

Because it indicates that a bachelor's degree or its equivalent in a specific specialty is not normally the minimum requirement for entry into either of the occupations associated with the proffered position, the *Handbook* does not support a finding that the petitioner has satisfied this first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). Further, the record of proceeding contains no probative evidence from any other authoritative source that the proffered position satisfies this criterion.

As the evidence in the record of proceeding has not established that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of this petition, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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

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

Despite having the opportunity to develop its case at the outset and in its response to the director's RFE, the petitioner now claims on appeal that the degree requirement is common to the industry in parallel positions among similar organizations, and offers in support the petitioner's statements, which are not supplemented by substantive and sufficiently detailed documentary evidence, as to its inquiries to a number of companies and its research on Monster.com. The petitioner also lists companies that placed advertisements for marketing positions with a bachelor's degree as a minimum requirement. However, the petitioner has not supplemented the record with documentation establishing the range and methodology of its inquiries and research of the aforementioned web-site and showing how those initiatives and their results are relevant to establishing an industry-wide recruiting and hiring practice for the particular type of position here proffered, and so proffered by organizations similar to the petitioner. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

For the reasons discussed above, the petitioner failed to satisfy the first of the two alternative prongs at 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.

The petitioner does not assert or provide any documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty. While this lack of probative evidence related to this criterion is itself decisive and precludes a finding that the petitioner has satisfied this criterion, the AAO further notes that the LCA's wage level is not indicative of the relative complexity or uniqueness required to satisfy this criterion.

The LCA indicates a wage level based upon the occupational classification "Program Directors" at a Level II (qualified) wage.⁴

Wage levels should be determined only after selecting the most relevant *O*NET* occupational code classification. Then, a prevailing-wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation. Prevailing wage determinations start with an entry level wage (i.e. Level I) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (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. 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 as indicated by the job description.

The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. A Level II wage rate is described by DOL as follows:

Level II (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the *O*NET* Job Zones.

See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy*

⁴ The AAO reviewed the petitioner's LCA, and noticed that the petitioner erroneously selected Level III, when in fact, the wage offered to the employee did not meet the Level III wage. The wage offered to the employee was \$66,700, which met and exceeded the Level II wage of \$60,611 per year. However, the \$66,700 wage offered to the employee fell short of the Level III wage of \$77,168.

Guidance, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

The AAO observes that the wage-rate element of the LCA is indicative of a comparatively low, position relative to others within the occupation that requires limited judgment. According to the DOL information on the four wage levels, the Level II wage rate would be appropriate for a position that only demands a good understanding of the occupation, and one in which the position holder would be expected to perform moderately complex tasks that require limited exercise of judgment.

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 particular position 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 proffered 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 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 any element of the position. 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, the petitioner also fails to demonstrate that the proffered position is more complex or unique than other similarly constituted positions that do not require at least a baccalaureate degree in a specific specialty or its equivalent.

As the evidence in the record of proceeding has not established that the particular position proffered in this petition is so complex or unique that it can be performed only by a person with at least a bachelor's degree in a specific specialty, or the equivalent, the petitioner has not 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's review of the record of proceeding under this criterion always necessarily includes whatever evidence the petitioner has submitted with regard to its past recruiting and hiring practices and employees who previously held the position in question.

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 a specific specialty, 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 only persons with at least a bachelor's degree, or the equivalent, in a specific specialty for the proffered position. As the record contains insufficient information on point, the petitioner has not met the burden at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Now, the AAO looks to the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), which 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.

Upon review of the record, the AAO observes that the petitioner does not assert that the nature of the specific duties of the proffered position is specialized and complex. Aside from the petitioner's silence on the issue, the AAO finds that the petitioner did not submit evidence developing the proposed duties with sufficient detail and substantive content to show that their nature is so specialized and complex that their performance would require knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

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 additional, supplemental requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications.

The AAO will now address that additional, independent ground for denial of the petition, not identified by the director's decision, to which the AAO alluded early in this decision, which also precludes approval of this petition. The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Specifically, beyond the decision of the director, the AAO finds that the petitioner failed to submit an LCA that corresponds to the petition. On the LCA, the petitioner specified that the occupational classification for the proffered position falls under "Program Directors" and listed the SOC (O*NET/OES) Code as 27-2012.03. As discussed above, the proffered position encompasses a combination of two occupations: program director and marketing manager. The AAO notes that by completing and submitting the LCA, and by signing the LCA, the petitioner attested that the information contained in the LCA was true and accurate.

With respect to the LCA, DOL provides clear guidance for selecting the most relevant O*NET occupational code classification.⁵ The "Prevailing Wage Determination Policy Guidance" states the following:

In determining the *nature of the job offer*, the first order is to review the requirements of the employer's job offer and determine the appropriate occupational classification. The O*NET description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification If the employer's job opportunity has worker requirements described in a combination of O*NET occupations, the SWA should default directly to the relevant O*NET-SOC occupational code for the highest paying occupation. For example, if the employer's job offer is for an engineer-pilot, the SWA shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

The AAO observes that the prevailing wage for the position "Marketing Managers" with the SOC (O*NET/OES) Code of 11-2021 at a Level II wage is significantly higher at \$100, 214 per year than the Level II wage of \$60, 611 for "Program Directors." Thus, according to DOL guidance, if the petitioner believed its position was appropriately described in "Marketing Managers" or was a combination of "Marketing Managers" and "Program Directors," it should have chosen the relevant occupational code for the highest paying occupation, in this case "Marketing Managers." However, the petitioner chose the occupational category for the lower paying occupation "Program Directors" for the proffered position on the LCA.

While the Department of Labor (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 (emphasis added):

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*

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.

model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

For this additional reason also, the petition must be denied.

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).

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.

ORDER: The appeal is dismissed. The petition is denied.