

(b)(6)



U.S. Citizenship
and Immigration
Services

[REDACTED]

Date: APR 01 2013

Office: CALIFORNIA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

[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 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,

Ron Rosenberg

Acting Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner stated that it is a "Direct Sales, Health & Wellness Products" firm with 20 employees. To employ the beneficiary in what it designates as a "Vice President of International Sales and Marketing" position, the petitioner endeavors 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, finding that the petitioner failed to establish that (1) it would employ the beneficiary in a specialty occupation position, and (2) if the proffered position were found to be a specialty occupation position, the beneficiary would be qualified for the position. On appeal, counsel asserted that the director's bases for denial were erroneous and contended that the petitioner satisfied all evidentiary requirements.

As will be discussed below, the AAO has determined that the director did not err in her decision to deny the petition on each of the bases specified in her decision. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's submissions on appeal.

The issues before the AAO are (1) whether the proffered position qualifies for classification as a specialty occupation, and (2) whether the petitioner has established that the beneficiary is qualified to perform the duties of a specialty occupation.

U.S. Citizenship and Immigration Services (USCIS) is required to follow long-standing legal standards and determine first, whether the proffered position is a specialty occupation, and second, whether an alien beneficiary is qualified for the position at the time the nonimmigrant visa petition is filed. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation]."). Therefore, the AAO will first determine whether the proffered position is a specialty occupation.

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, 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 providing

supplemental criteria that must be met in accordance with, and not as alternatives to, 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. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

With the visa petition, counsel provided *inter alia*, evidence pertinent to the beneficiary's previous employment and an evaluation by [redacted] dated November 17, 2010, that states that the beneficiary has acquired, through his previous employment, the equivalent of a bachelor's degree in business administration.

Counsel also provided a letter, dated November 18, 2010, from the petitioner's president. The petitioner's president stated:

[The beneficiary] will be responsible for identifying, developing and managing new and ongoing business opportunities in various key countries such as Asia, Australia, Europe, and Canada. This role includes sales management of department staff and customers with various levels of revenue opportunities and different market segments. This position is responsible for a significant sales quota and is based in the United States. The objective of this position is to expand the [petitioner's] global reach beyond its presence in the United States.

Reporting to the President, and CEO, [the beneficiary] will lead the [petitioner's] International Sales and Service teams to grow market share and profitability. The successful candidate will manage the sales force, establish and oversee the sales force compensation program, manage pricing and develop and implement market strategies. In addition, the VP of International Sales and Marketing will be responsible for attracting and developing high performance independent distributors and assisting in the recruitment of key employees as needed and, will take care of over 8,000 . . . distributors nation-wide.

The petitioner's president also provided the following list of duties:

- Assist in recruiting, organization, management, and training of large independent distributor sales force, both inside and outside of US
- Touring with independent distributors, will travel extensively inside and outside US, facilitating corporate sponsored business briefings and assisting in the recruitment of new independent distributors and product users
- Corporate PR related to international expansion (Primary corporate contact for any media exposure related to international)
- Organization and management of small regional offices (Sales, Customer/Distributor Support, Product Distribution)
- Oversee planning, forecasting and budgeting for international sales & marketing
- Work with independent distributors inside the US as needed
- Assist 8,000 US distributors with contacting and recruiting distributors outside the US
- Communication with independent distributors outside US
- Team building training and support
- Motivation and incentive management
- Participate in the following company managements [sic] teams: Sales & Marketing, Annual International Convention
- Research all new international markets and recommend avenues to successfully enter new markets (which country and in which order of entry)
- Develop comprehensive market entry strategy for each country
- Analyze existing products and global markets of key competitors and clearly define the company's unique selling proposition
- Recommend modifications to existing products, tools, and systems based on an understanding or [sic] cultural differences and preferences in specific countries
- Assist in developing international policies and procedures, product pricing, and international trade practices
- Act as liaison with international lawyers
- Manage any international personnel (once company hires additional positions)
- Business opportunity meetings (live events & webinars)
- Manager of some international contract manufacturers and suppliers
- Build brand integrity and loyalty with independent distributors, customers, vendor partners, employees, charitable organizations, as well as the international network marketing industry.
- Advise the company executive on development of relationships with international independent distributors
- Assure protection of company brand, trademarks, patents, and trade secrets outside the US.
- Clearly define all new market possibilities, distribution channels and international points of contact

The petitioner's president also listed various requirements of the proffered position, none of which involve any level of education.

Counsel also provided an organizational chart showing that the petitioner has 17 workers, including the beneficiary. The positions listed include the petitioner's president and CEO, and, immediately below him, its executive vice president, CFO/COO, Chief Logistics Officer, Chief Marketing Officer, and the beneficiary, who is listed as one of the petitioner's founders and as its Chief International Officer.

The submitted Labor Condition Application (LCA) was certified for a "Vice President of International Sales & Marketing" under SOC code 11-1011.00 Chief Executives.

On January 4, 2011, the service center issued an RFE in this matter. The service center requested additional evidence to demonstrate that (1) the petitioner would employ the beneficiary in a specialty occupation, and (2) the beneficiary is qualified to perform the duties of a specialty occupation. The director outlined the specific evidence to be submitted.

In response, counsel provided two additional evaluations. One of those evaluations, prepared by Dr. [REDACTED] is accompanied by evidence that Dr. [REDACTED] is an assistant professor at [REDACTED] in New York, New York. Dr. [REDACTED] stated:

Companies seeking to employ a Vice President of International Sales and Marketing require prospective candidates to have a strong foundation in the field of Business Administration and Marketing which can only be obtained through a Bachelor's degree or progressively responsible experience in the field of Business Administration and Marketing, or a closely related field. The skills, knowledge, and analytical thinking acquired through the acquisition of a Bachelor's degree or its equivalent, is considered necessary by people in the industry seeking to hire a Vice President of International Sales and Marketing in the field of Business Administration and Marketing, and thus the degree is considered an industry standard requirement for the position.

* * *

It is my opinion that the [proffered] position is clearly a specialty position, and requires the services of someone with advanced training through a Bachelor's program in Business Administration, Marketing, or a closely related field.

Dr. [REDACTED] also opines that the beneficiary's work experience is equivalent to a U.S. bachelor's degree in business administration with a concentration in marketing.

The other evaluation, which is by [REDACTED], states that the beneficiary's work experience is equivalent to a bachelor's degree in business administration with a concentration in marketing.

Counsel also provided a brief. That brief cites the evaluations by Mr. [REDACTED] and Dr. [REDACTED] as evidence that the beneficiary has the equivalent of a U.S. bachelor's degree in business administration with a concentration in marketing. Counsel also cites the evaluation by Dr. [REDACTED] as evidence that the beneficiary has the equivalent of a U.S. bachelor's degree in business administration.

The director denied the petition on March 29, 2011, finding, *inter alia*, as was noted above, that the petitioner had not demonstrated that the proffered position qualifies as a position in a specialty occupation by virtue of requiring a minimum of a bachelor's degree in a specific specialty or its equivalent. More specifically, the director found that the petitioner had satisfied none of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). The director also found that the beneficiary is not qualified to perform the duties of a specialty occupation.

On appeal, counsel submitted letters from each of the three evaluators. Counsel asserted that the evidence demonstrated that the proffered position requires a minimum of a bachelor's degree in a specific specialty or its equivalent. In that appeal, counsel asserted that the proffered position is a chief executive position as described in O*NET, that it is therefore a Job Zone 5 position as described in O*NET, and that it therefore qualifies as a specialty occupation position.

The AAO will now discuss the application of the additional, supplemental requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

The AAO will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which is satisfied if a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position.

The AAO recognizes the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹ In the "Top Executives" chapter, the *Handbook* provides the following descriptions of the duties of those positions:

Top executives devise strategies and policies to ensure that an organization meets its goals. They plan, direct, and coordinate operational activities of companies and public or private-sector organizations.

Duties

¹ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2012 – 2013 edition available online.

Top executives typically do the following:

- Establish and carry out departmental or organizational goals, policies, and procedures
- Direct and oversee an organization's financial and budgetary activities
- Manage general activities related to making products and providing services
- Consult with other executives, staff, and board members about general operations
- Negotiate or approve contracts and agreements
- Appoint department heads and managers
- Analyze financial statements, sales reports, and other performance indicators
- Identify places to cut costs and to improve performance, policies, and programs

The responsibilities of top executives largely depend on an organization's size. For example, an owner or manager of a small organization, such as an independent retail store, often is responsible for purchasing, hiring, training, quality control, and day-to-day supervisory duties. In large organizations, on the other hand, top executives typically focus more on formulating policies and strategic planning, while general and operations managers direct day-to-day operations.

The following are examples of common types of top executives:

Chief executive officers (CEOs), who are also known by titles such as **executive director**, **president**, and **vice president**, provide overall direction for companies and organizations. CEOs manage company operations, formulate policies, and ensure goals are met. They collaborate with and direct the work of other top executives and typically report to a board of directors.

Companies may also have chief officers who lead various departments or focus on specific areas of work:

- **Chief financial officers** are accountable for the accuracy of a company's or organization's financial reporting, especially among publicly traded companies. They direct the organization's financial goals, objectives, and budgets. For example, they may oversee the investment of funds and manage associated risks.
- **Chief information officers** are responsible for the overall technological direction of an organization, which includes managing the information technology and computer systems. They organize and supervise information-technology-related workers, projects, and policies.

- **Chief operating officers** oversee other executives who direct the activities of various departments, such as human resources and sales. They also carry out the organization's guidelines on a day-to-day basis.
- **Chief sustainability officers** address sustainability issues by enacting or overseeing a corporate sustainability strategy. For instance, they may manage programs and policies relating to environmental issues and ensure that the organization complies with environmental or other government regulations.

Mayors, along with **governors**, **city managers**, and **county administrators**, are chief executive officers of governments. They typically oversee budgets, programs, and uses of resources. Mayors and governors must be elected to office, and managers and administrators typically are appointed.

School superintendents and **college or university presidents** are chief executive officers of school districts and postsecondary schools. In addition to overseeing operations, they also manage issues, such as student achievement, budgets and resources, and relations with government agencies and other stakeholders.

General and operations managers oversee operations that are too diverse and general to be classified into one area of management or administration. Responsibilities may include formulating policies, managing daily operations, and planning the use of materials and human resources. They make staff schedules, assign work, and ensure projects are completed. In some organizations, the tasks of chief executive officers may overlap with those of general and operations managers.

U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Top Executives," <http://www.bls.gov/ooh/Management/Top-executives.htm#tab-2> (last visited Mar. 28, 2013).

On the other hand, in its "Sales Managers" chapter, the *Handbook* provides the following descriptions of the duties of those positions:

What Sales Managers Do

Sales managers direct organizations' sales teams. They set sales goals, analyze data, and develop training programs for the organization's sales representatives.

Duties

Sales managers typically do the following:

- Oversee regional and local sales managers and their staffs
- Resolve customer complaints regarding sales and service

- Prepare budgets and approve budget expenditures
- Monitor customer preferences to determine the focus of sales efforts
- Analyze sales statistics
- Project sales and determine the profitability of products and services
- Determine discount rates or special pricing plans
- Plan and coordinate training programs for sales staff

Sales managers' responsibilities vary with the size of the organization they work for. However, most sales managers direct the distribution of goods and services by assigning sales territories, setting sales goals, and establishing training programs for the organization's sales representatives.

In some cases, they recruit, hire, and train new members of the sales staff. For more information about sales workers, see the profiles on retail sales workers and wholesale and manufacturing sales representatives.

Sales managers advise sales representatives on ways to improve their sales performance. In large multiproduct organizations, they oversee regional and local sales managers and their staffs.

Sales managers also stay in contact with dealers and distributors. They analyze sales statistics that their staff gathers, both to determine the sales potential and inventory requirements of products and stores and to monitor customers' preferences.

Sales managers work closely with managers from other departments. For example, the marketing department identifies new customers that the sales department can target. The relationship between these two departments is critical to helping an organization expand its client base. Because sales managers monitor customers' preferences and stores' and organizations' inventory needs, they work closely with research and design departments and warehousing departments.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Sales Managers," <http://www.bls.gov/ooh/management/sales-managers.htm#tab-2> (last visited Mar. 28, 2013).

It is noted that many of the duties of the proffered position are consistent with the duties of a sales manager as described in the *Handbook*. For the purpose of this analysis, however, the AAO will assume that the proffered position is a top executive position as described in the *Handbook* and as claimed by the petitioner in the LCA.²

² Had the position been analyzed as a sales manager position, the decision in this matter would have been no more favorable to the petitioner, as the *Handbook* does not indicate that sales managers constitute an occupational group for which normally the minimum requirement for entry is a specialty occupation level of education, that is, at least a U.S. bachelor's degree *in a specific specialty*, or its equivalent. See U.S. Dep't of

While the *Handbook* reports that many top executives have a bachelor's or master's degree in business administration, it does not indicate that such a degree is a minimum entry requirement or, more importantly, that the degrees held by such workers must be in a specific specialty that is directly related to the work, as would be required for the occupational category to qualify as a specialty occupation, as that term is defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). See *Handbook*, 2012-13 ed., "Top Executives," <http://www.bls.gov/ooh/Management/Top-executives.htm#tab-4> (last visited Mar. 28, 2013).

That the *Handbook* does not indicate that top executive positions normally require at least a bachelor's degree in a specific specialty or its equivalent for entry into the occupation is also evident in the following discussion in the "Education" section of its chapter on "Top Executives," which does not specify a particular major or academic concentration:

Although education and training vary widely by position and industry, many top executives have at least a bachelor's degree and a considerable amount of work experience.

Education

Many top executives have a bachelor's or master's degree in business administration or in an area related to their field of work. College presidents and school superintendents typically have a doctoral degree in the field in which they originally taught or in education administration. Top executives in the public sector often have a degree in business administration, public administration, law, or the liberal arts. Top executives of large corporations often have a Master of Business Administration (MBA).

Top executives who are promoted from lower level managerial or supervisory positions within their own firm often can substitute experience for education. In industries such as retail trade or transportation, for example, people without a college degree may work their way up to higher levels within the company and become executives or general managers.

Id.

That top executives often have a college degree does not indicate that it is a requirement. In fact, the *Handbook* indicates that some top executives do not have a college degree. The second quoted

Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Sales Managers," <http://www.bls.gov/ooh/management/sales-managers.htm#tab-4> (last visited Mar. 28, 2013). While the *Handbook* states that "[m]ost sales managers have a bachelor's degree," it does not indicate that the bachelor's degree must be in a specific specialty. *Id.*

paragraph makes explicit that people without such a degree may ascend to a top executive position. Further, even as to those top executive-positions that may require a bachelor's or higher degree, the *Handbook* indicates that a degree in business administration or liberal arts may suffice.

A degree with a generalized title, such as business administration or liberal arts, without further specification, is not a degree in a specific specialty. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). As such, an educational requirement that may be satisfied by an otherwise undifferentiated bachelor's degree in business administration or liberal arts is not a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent.

For the reasons shown above, the *Handbook* does not support the proposition that top executive positions require a minimum of a bachelor's degree in a specific specialty or its equivalent. Further, the AAO finds that, to the extent that they are described in the record of proceeding, the numerous duties that the petitioner ascribes to the proffered position indicate a need for a range of knowledge, but do not establish any particular level of formal education leading to a bachelor's or higher degree in a specific specialty as minimally necessary to attain such knowledge.

As the evidence of record does not establish that the particular position here proffered is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty, 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 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. 1095, 1102 (S.D.N.Y. 1989)).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or any other authoritative, objective, and reliable resource, reports an industry-wide requirement of at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions.

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

It is also noted that Dr. [REDACTED] opinion is not based upon sufficient information about the vice president of international sales and marketing position proposed here. 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'r 1988).

Specifically, the content of Dr. [REDACTED] letter does not demonstrate that his opinion is based upon sufficient information about the particular position at issue. First, the evaluation reveals that his knowledge of the position is limited to the duties provided to him by the petitioner. Second, Dr. [REDACTED] does not relate any personal observations of the petitioner's operations or of the work that the beneficiary would perform, nor does he state that that he has reviewed any projects or work products related to the proffered position. Third, Dr. [REDACTED] opinion does not relate his conclusions to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for his conclusions about the educational requirements for the particular position here at issue. The

³ As noted above, the two other evaluations provided address only the beneficiary's qualifications.

⁴ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

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

evaluation does not list any reference materials on which the evaluator relied as a basis for his conclusion that the proffered position requires a bachelor's degree. The evaluator cited no studies, reports, statistics, other authoritative references, or any substantive basis for his conclusions. The evaluator appears not to have based his opinion on any objective evidence, but instead to have relied on his own subjective judgment.

For the above reasons, the AAO accords no probative weight to Dr. [REDACTED] evaluation of the proffered position. 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 Sea, Inc.*, 19 I&N Dec. 817, 820 (Comm'r 1988).

The petitioner has not demonstrated that a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent is common to the petitioner's industry in parallel positions among similar organizations, and has not, therefore, 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 establishes that, notwithstanding that other top executive positions in the petitioner's industry may not require a minimum of a bachelor's degree in a specific specialty or its equivalent, the particular position proffered in the instant case is so complex or unique that it can be performed only by an individual with such credentials.

The record contains no evidence that would differentiate the work of the proffered position from the work of top executive positions in general. The duties of the proffered position (such as assisting in recruiting, organizing, managing, and training a sales force; facilitating briefings; communicating with, and assisting in the recruitment of, distributors; and public relations duties) are described in terms of generalized functions, and so have not been shown to be more complex or unique than the duties of other top executive positions, some of which, the *Handbook* indicates, may not require a minimum of a bachelor's degree in a specific specialty or its equivalent.

Thus, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The record contains no evidence that the petitioner has previously hired anyone to fill the proffered position, and the petitioner has not, therefore, provided any evidence for analysis under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).⁵

⁵ 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

Finally, the AAO will address the alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which is satisfied if the petitioner establishes that the nature of the specific duties is so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent.

Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. Developing marketing strategies for various countries; recommending modifications based on cultural differences; analyzing the products and markets of competitors; assisting in developing policies, procedures, and pricing for international trade; acting as liaison to international lawyers; managing personnel; etc., contain no indication that they are so specialized and complex that the knowledge required to perform them is usually associated with a bachelor's degree in a specific specialty or its equivalent. In other words, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than top executive positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent. The petitioner has not, therefore, satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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

It must be noted that a designation of Job Zone 5 does not demonstrate that at least a bachelor's degree in a specific specialty or its equivalent is required, and does not, therefore, demonstrate that a position so designated is a specialty occupation as defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). See O*NET OnLine Help Center, at <http://www.onetonline.org/help/online/zones> (confirming that Job Zone 5 does not indicate any requirements for degrees in specific specialties) (last visited Mar. 28, 2013). The explanation of Job Zone 5 shown on O*NET is, "Most of these occupations require graduate school. For example, they may require a master's degree, and some require a Ph.D., M.D., or J.D. (law degree)." *Id.* Therefore, while a designation of Job Zone 5 indicates that a position requires "extensive preparation, it does not, however, demonstrate that all such positions require a minimum of a bachelor's degree *in a specific specialty* or its equivalent.

Even if the petitioner had established that the proffered position qualifies as a specialty occupation, the director correctly determined that the beneficiary is not qualified to perform the duties of a specialty occupation.

possessed a baccalaureate or higher degree in the specific specialty or its equivalent. See *Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the 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").

The statutory and regulatory framework that the AAO must apply in its consideration of the evidence of the beneficiary's qualification 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.

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.

Therefore, to qualify an alien for classification as an H-1B nonimmigrant worker under the Act, the petitioner must establish that the beneficiary possesses the requisite license or, if none is required,

that he or she has completed a degree in the specialty that the occupation requires. Alternatively, if a license is not required and if the beneficiary does not possess the required U.S. degree or its foreign degree equivalent, the petitioner must show that the beneficiary possesses both (1) education, specialized training, and/or progressively responsible experience in the specialty equivalent to the completion of such degree, and (2) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

It is noted that the record reveals that the beneficiary does not have a bachelor's degree. Absent (1) an actual 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, 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;⁶
- (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;

⁶ The petitioner should note that, in accordance with this provision, the AAO will accept a credentials evaluation service's evaluation of *education only*, not training and/or work experience.

- (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. . . .

Counsel relies upon three evaluations of the beneficiary's work experience to show that the beneficiary has *the equivalent* of a bachelor's degree. However, the evaluations submitted by the petitioner are insufficient to establish that the beneficiary possesses the equivalent of a U.S. bachelor's degree in any specific specialty.

As noted above, Dr. [REDACTED] states in her evaluation that the beneficiary has work experience that is the equivalent of a bachelor's degree in business administration, otherwise undifferentiated. Dr. [REDACTED] states in his evaluation that the beneficiary has work experience that is equivalent to a bachelor's degree in business administration with a concentration in marketing. Mr. [REDACTED] evaluation states that the beneficiary has work experience that is equivalent to a bachelor's degree in business administration and marketing.

The AAO observes that if the petitioner had demonstrated that the proffered position required a minimum of a bachelor's degree in a specific specialty or its equivalent, the petitioner would be obliged, in order for the visa petition to be approvable, to demonstrate, not only that the beneficiary has a bachelor's degree or its equivalent, but that the beneficiary has a minimum of a bachelor's degree or its equivalent *in that specific specialty*. See *Matter of Ling*, 13 I&N Dec. 35 (Reg. Comm'r 1968).

The AAO finds that the content of the evaluations of the beneficiary's experience merit no weight as each evaluation only summarizes information provided by the beneficiary's accountant, [REDACTED] in Australia. Each of the evaluations appear to rely solely on the accountant's letters, dated November 11, 2010, and February 23, 2011, which state that the beneficiary was self-employed and that the accountant has been "associated with [the beneficiary] for the last seventeen (17) years and [is] privy to attest to [the beneficiary's] professional business experience as of 1993 to the present time." Mr. [REDACTED] states that his knowledge of the beneficiary's work experience "comes from [his] position as [the beneficiary's] Business Accountant." While Mr. [REDACTED] attests to his relationship with the beneficiary as his accountant, there is no indication in his letters that he ever worked with the beneficiary and that he is aware of what the beneficiary did on a day-to-day basis. It is further noted that while Mr. [REDACTED] states that he is able to "attest to [the beneficiary's] professional business experience," there is no documentary evidence in the record verifying the beneficiary's work history relayed by Mr. [REDACTED] in his letters such as personnel records, payroll information, tax records, and letters from the beneficiary's companies and employees.

The AAO finds that the letters do not contain sufficient detail to establish that the beneficiary's experience was gained while working with peers, supervisors, and subordinates who have at least a

bachelor's degree, or its equivalent, in a specific specialty. As the letters are not probative of the beneficiary's attainment, through experience, of the degree-equivalency to which the evaluations attested, the evaluations do not establish a substantive basis for their conclusions.

It must also be noted with respect to Dr. [REDACTED] evaluation that a general degree in business administration alone is insufficient to qualify the beneficiary to perform the services of a specialty occupation, unless the academic courses pursued and knowledge gained is a realistic prerequisite to a particular occupation in the field. *Id.* Consistent with the decision in *Matter of Michael Hertz Associates, supra*, an otherwise undifferentiated degree in business administration is not equivalent to a degree in a specific specialty.

As 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).

With regard to an equivalency determined by USCIS, 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) states, in part, the following:

For purposes of determining equivalency to a baccalaureate degree in the specialty, 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 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 occupation;⁷
- (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;

⁷ *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. 8 C.F.R. § 214.2(h)(4)(ii). 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. *Id.*

- (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.

It is always worth noting that, by its very terms, 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) is a matter strictly for USCIS application and determination, and that, also by the clear terms of the rule, experience will merit a positive determination only to the extent that the record of proceeding establishes all of the qualifying elements at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) – including, but not limited to, a type of recognition of expertise in the specialty occupation.

As discussed earlier, the record contains no documentary evidence of the beneficiary's previous employment. Also, there is no evidence in the record that the beneficiary has recognition of expertise in the industry, membership in a recognized association in the specialty occupation, or published material by or about the beneficiary. Thus, absent corroborating evidence as outlined in 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), 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. Moreover, absent this evidence of recognition of expertise in the specialty, the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) would not have been established in any event and, therefore, it could not be found that the beneficiary was qualified to perform the duties of a specialty occupation, notwithstanding the satisfaction of any one of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(D).

The petitioner, therefore, has failed to establish that the beneficiary is qualified to perform the duties of any specialty occupation. For this additional reason, the petition will be denied.

The director's decision will be affirmed and the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.