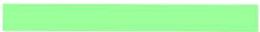


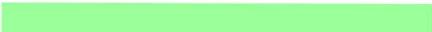


U.S. Citizenship
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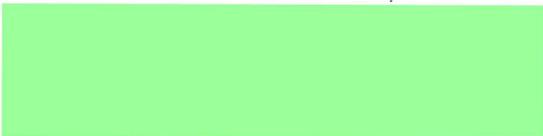


DATE: **APR 02 2013** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

If you believe the 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. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

In the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a "Marketing/Advertising" firm with one employee. To employ the beneficiary in what it designates as a part-time advertising and promotions manager position, the petitioner endeavors to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 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 director's RFE; (4) the notice of decision; (5) the Form I-290B and supporting materials; (6) the AAO's RFE; and (7) the petitioner's response to the AAO's RFE. The AAO reviewed the record in its entirety before issuing its decision.

The primary issue for consideration 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 it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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. *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.

In a support letter dated March 9, 2010, the petitioner stated that it is a "marketing and promotions company" that was "founded in 2009 for the purpose of providing marketing and promotions services to the film, television and performing arts industry in and around [REDACTED]". The petitioner stated that the proffered position requires a "Bachelor's degree (or equivalent) in Marketing, Creative/Fine Arts, or a similar field and a minimum of two (2) years of marketing and promotions experience." The petitioner stated the following with respect to the petitioner's business:

In particular [the petitioner] focuses on planning marketing campaigns; designing and executing marketing and promotional creative materials; promoting sports and dance courses and programs; events planning and organizing; data analysis; and translations (German-English-German) on TV spots and trailers for feature films.

Counsel also submitted the following, *inter alia*, with the petition: (1) a copy of a memorandum of understanding signed by the beneficiary, on behalf of the petitioner, and "[REDACTED]" on behalf of "[REDACTED]"; (2) a copy of a memorandum of understanding signed by the beneficiary, on behalf of the petitioner, and "[REDACTED]"; and (3) an evaluation of the beneficiary's foreign academic qualifications and professional experience equivalency by [REDACTED] dated June 26, 2009.

The evaluation by [REDACTED] opines that "[o]n the basis of the credibility of [REDACTED] School and its higher educational program, and considering the more than nine years of work experience and professional training in Media Studies" the beneficiary holds the equivalent of a bachelor of arts degree in media studies.

Counsel also submitted a Labor Condition Application (LCA) with the petition. The LCA was certified (1) for an advertising and promotions manager, (2) pursuant to O*NET/OES code 11-2011.00, (3) within Los Angeles County, California, and (4) at a Level I prevailing wage of \$30.33 per hour.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on September 21, 2010. The petitioner was asked to submit documentation to establish that a specialty occupation position exists for the beneficiary. The director outlined the specific evidence to be submitted.

In a letter dated September 30, 2010, counsel for the petitioner stated that the "type of work and responsibility performed by [the petitioner's] Advertising and Promotions Manager necessitates the employee possess a Bachelor's degree." Counsel submitted the following in response to the director's RFE: (1) copies of twelve job advertisements posted on the Internet; and (2) a description of the proffered position.

The petitioner's description of the proffered position provided the following "key responsibilities":

- Work with new and potential clients to negotiate and accept contracts and work orders. (Approx. time 25%)

- Identify and contact potential clients regarding marketing and promotional needs. (Approx. time 25%)
- Design, market, and execute marketing and promotional creative materials. (Approx. time 30%)
- Identify and recruit additional skilled professionals on an as-needed basis. (Approx. time 10%)
- Attend conferences and events related to the film and television industry to promote company's services. (Approx. time 10%)

The description also stated that the proffered position requires a "Bachelors [sic] degree in Marketing, Advertising or equivalent."

The director denied the petition on February 9, 2011, finding that the proffered position does not qualify as a specialty occupation.

On appeal, the petitioner's counsel contends that the petitioner demonstrated that the proffered position qualifies for classification as a specialty occupation. Counsel also counters the director's finding that the proffered position's duties reflect the duties of a promotions manager as listed under the title Advertising, Marketing, Promotions, Public Relations, and Sales Managers, as described in the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (hereinafter the *Handbook*). Counsel contends that the director should have relied instead on the *Handbook's* description of account managers in the chapter on Advertising and Public Relations Services.

On November 5, 2012, the AAO requested additional evidence in an RFE. The AAO noted in the RFE that the petitioner's address is also the beneficiary's home address and that petitioner indicated that the beneficiary would work at that location which also happened to be a condominium in a multi-unit residential building. The AAO also noted that the petitioner's corporate status was "suspended" and that it could not be established whether the petitioner made a bona fide offer of employment to the beneficiary. To that end, the AAO requested the following evidence:

1. A copy of the lease between the owner of the condominium and the petitioner or similar evidence establishing that the petitioner is legally permitted to occupy and use [REDACTED] as its business premises;
2. Evidence establishing that the beneficiary and all of the petitioner's other employees can lawfully be employed in the condominium per local zoning laws and regulations;
3. Photographs of the work spaces for all of the petitioner's employees;
4. A line-and-block organizational chart showing all of the petitioner's employees' names, titles, and work locations;
5. Evidence from the State of [REDACTED] Secretary of State demonstrating that the petitioner is currently a business entity in good standing;

6. Evidence that the petitioner was an active business and operating as a marketing and advertising firm on the date that the petition was filed such as receipts, invoices, and contracts;
7. Evidence that the petitioner continues to be an active business and is currently operating as a marketing and advertising firm such as receipts, invoices, and contracts;
8. Evidence that the petitioner has the finances necessary to pay the required wage to the beneficiary;
9. W-2s for all of the employees employed by the petitioner in 2010 and 2011;
10. Certified copies of the beneficiary's 2010 and 2011 state and federal tax returns; and
11. Certified copies of the petitioner's 2010 and 2011 state and federal quarterly tax returns.

In response to the AAO's RFE, counsel stated that the petitioner was founded by the beneficiary, however, "[s]ince [the beneficiary's] status in the United States remains unsettled due to this pending appeal, [the petitioner] has postponed hiring additional staff until [the beneficiary's status is finalized]." Counsel further explained that the petitioner "did not operate and file [redacted] State Tax Returns for 2010 and 2011." Counsel also stated that the petitioner "could not operate during the pendency of [the beneficiary's] application and appeal" and "did not file tax returns for years in which [the petitioner] conducted no business."

Counsel also submitted the following, *inter alia*, in response to the AAO's RFE: (1) emails from recent graduates seeking employment with the petitioner; (2) a proposal for [redacted] Pre-School; (3) a list of "[The petitioner] and [redacted] Forecasted and Confirmed Projects on International Releases of Feature Films for 2013"; (4) a copy of a memorandum of understanding between [redacted] (UK) Ltd. and [redacted], Inc.; and (5) copies of the petitioner's bank statements for periods 06/23/2009 – 06/30/2009, 09/01/2010 – 09/30/2010, and 01/01/2011 – 01/31/2011.

As an initial matter, upon a *de novo* review of all of the evidence in the record, the AAO finds that the petitioner was not conducting business at the time that the petition was filed. It is noted that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). As such, eligibility for the benefit sought must be assessed and weighed based on the facts as they existed at the time the instant petition was filed and not based on what were merely speculative facts not then in existence.

The agency made clear long ago that speculative employment is not permitted in the H-1B program. A 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new

customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998).

As noted, counsel stated that the petitioner did not operate in 2010 and 2011. Furthermore, while the petitioner submitted, *inter alia*, a proposal for [REDACTED] Pre-School and a list "forecasted confirmed" projects for 2013 the petitioner has not demonstrated that it was conducting business at the time of filing the H-1B petition; therefore, it is impossible for USCIS to determine whether the petitioner has made a *bona fide* offer of employment to the beneficiary and that it has sufficient work for the beneficiary to perform for the duration of the petition. While a proposal and a list of projects may indicate that the petitioner *intends* to have work available for the beneficiary during the requested validity period, they are not evidence of doing business or actual work that is available to the beneficiary. To prove its job offer is *bona fide*, the petitioner must demonstrate that it is capable of paying the proffered wage to the beneficiary at the time that the petition is filed. The petitioner did not submit any tax returns or evidence of actual work that it has available for the beneficiary; therefore, the AAO cannot find, absent evidence to the contrary, that the petitioner had demonstrated its realistic ability to comply with the law and pay at least the prevailing wage to the instant beneficiary for whom the petitioner filed this nonimmigrant petition in 2010.

Furthermore, the regulation at 8 C.F.R. § 214.2(h)(11)(ii), *Immediate and automatic revocation*, states: "The approval of any petition is immediately and automatically revoked if the petitioner goes out of business" Thus, it would be absurd to approve a petition that is subject to automatic revocation from the moment of approval. In view of the foregoing, the petitioner has not demonstrated that it was conducting business at the time the petition was filed. Accordingly, the petition shall be dismissed for this reason.

Next, to make its determination whether the proffered position qualifies as a specialty occupation, the AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty a minimum entry requirement; and whether letters or affidavits

from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO will first address the requirement under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1): A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹ The petitioner claims in the LCA that the proffered position falls under the occupational category "Advertising and Promotions Managers." The *Handbook* describes the occupation of "Advertising, Promotions, and Marketing Managers" as follows:

What Advertising, Promotions, and Marketing Managers Do

Advertising, promotions, and marketing managers plan programs to generate interest in a product or service. They work with art directors, sales agents, and financial staff members.

Duties

Advertising, promotions, and marketing managers typically do the following:

- Work with department heads or staff to discuss topics such as contracts, selection of advertising media, or products to be advertised
- Gather and organize information to plan advertising campaigns
- Plan the advertising, including which media to advertise in, such as radio, television, print, online, and billboards
- Negotiate advertising contracts
- Inspect layouts, which are sketches or plans for an advertisement
- Initiate market research studies and analyze their findings
- Develop pricing strategies for products to be marketed, balancing the goals of a firm with customer satisfaction
- Meet with clients to provide marketing or technical advice
- Direct the hiring of advertising, promotions, and marketing staff and oversee their daily activities

Advertising managers create interest among potential buyers of a product or service for a department, for an entire organization, or on a project basis (account). They work in advertising agencies that put together advertising campaigns for clients, in media firms that sell advertising space or time, and in organizations that advertise heavily.

¹ The director's decision referred to the 2010-2011 edition of the *Handbook*. 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/>.

Advertising managers work with sales staff and others to generate ideas for an advertising campaign. They oversee the staff that develops the advertising. They work with the finance department to prepare a budget and cost estimates for the advertising campaign.

Often, advertising managers serve as liaisons between the client requiring the advertising and an advertising or promotion agency that develops and places the ads. In larger organizations with an extensive advertising department, different advertising managers may oversee in-house accounts and creative and media services departments.

In addition, some advertising managers specialize in a particular field or type of advertising. For example, *media directors* determine the way in which an advertising campaign reaches customers. They can use any or all of various media, including radio, television, newspapers, magazines, the Internet, and outdoor signs.

Advertising managers known as *account executives* manage clients' accounts, but they don't develop or supervise the creation or presentation of the advertising. That becomes the work of the creative services department.

Promotions managers direct programs that combine advertising with purchasing incentives to increase sales. Often, the programs use direct mail, inserts in newspapers, Internet advertisements, in-store displays, product endorsements, or special events to target customers. Purchasing incentives may include discounts, samples, gifts, rebates, coupons, sweepstakes, and contests.

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 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. For more information on sales or public relations, see the profiles on sales managers, public relations managers and specialists, and market research analysts.

The *Handbook* does not indicate that advertising, promotions, and marketing 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. This is also evident from the discussion in the "How to Become an Advertising, Promotions, and Marketing Manager" section of its chapter "Advertising, Promotions, and Marketing Manager." This section of the *Handbook* states the following regarding the requirements for this occupation:

How to Become an Advertising, Promotions, or Marketing Manager

A bachelor's degree is required for most advertising, promotions, and marketing management positions. These managers typically have work experience in advertising, marketing, promotions, or sales.

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.

Work Experience

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

Important Qualities

Analytical skills. As the advertising industry changes with the rise of digital media, advertising, promotions, and marketing managers must be able to analyze industry trends to determine the most promising strategies for their organization.

Creativity. Advertising, promotions, and marketing managers must be able to generate new and imaginative ideas.

Decision-making skills. Managers often must choose between competing advertising and marketing strategies put forward by staff.

Interpersonal skills. These managers must deal with a range of people in different roles, both inside and outside the organization.

Management skills. Advertising, promotions, and marketing managers must manage their time and budget efficiently while directing and motivating staff members.

U.S. Department of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., at <http://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm#tab-4> (last visited Mar. 7, 2013).

While the *Handbook* reports that a baccalaureate degree is the minimum educational requirement for *most* advertising, promotions, and marketing management jobs, it does not indicate that such a degree is a minimum entry requirement or, more importantly, that the degrees or equivalencies held by such workers must be in a specific specialty that is directly related to advertising, promotions, and marketing management, as would be required for the occupational category to qualify as a specialty occupation, as that term is defined in section 214(i) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). *See id.* With no indication that such knowledge must be equivalent to a U.S. bachelor's or higher degree in a specific specialty, the *Handbook* is not sufficient evidence in and of itself that the particular position proffered here qualifies as a specialty occupation.

As the evidence of record does not establish that the particular position proffered here is one for which normally the minimum requirement for entry is a baccalaureate or higher degree, in a specific specialty directly to the position's duties, or its equivalent, 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.

As stated earlier, 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).

Here, and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement of at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions. Furthermore and for the reasons discussed below, the petitioner's reliance upon the job vacancy advertisements it submitted

is misplaced.

For the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, documentation submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and an organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner and counsel to claim that an organization is similar and in the same industry without providing a legitimate basis for and sufficient corroborating evidence to support such an assertion. 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)).

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner submitted copies of twelve advertisements as evidence that its degree requirement is standard amongst its peer organizations for parallel positions. Specifically, the petitioner submitted advertisements for the following positions posted on the Internet:

1. Account Manager for an unknown "interactive technology firm";
2. Promotions Manager for [REDACTED]
3. Promotions Manager for [REDACTED]
4. Advertising Manager for [REDACTED]
5. Product Marketing Manager for [REDACTED]
6. Manager, Media Research for [REDACTED]
7. Marketing Manager – Advertising Sales for [REDACTED]
8. Promotions Manager for [REDACTED]
9. Promotions Manager for [REDACTED]
10. Advertising and Promotions Manager for [REDACTED]
11. Marketing & Promotions Manager – Music for [REDACTED]
12. Direct Marketing and Promotions Director for [REDACTED]

The advertisements provided, however, establish at best that a bachelor's degree is generally required for most of the positions posted, but a bachelor's degree in a *specific specialty* or its equivalent is not.

Specifically, the first, second, third, fourth, eighth, tenth, and eleventh advertisements state only that a bachelor's degree without any specific specialty is required for the advertised positions. The fifth advertisement states that a "[m]inimum BA/BS Computer Science or related technical degree" is required and that "3+ years experience in Product Marketing EDA software or Semiconductor Industry Lithography or computational lithography experience strongly preferred." There is no evidence that the petitioner requires a bachelor of arts or science in computer science or a related

technical degree or that it has a strong preference for "3+ years experience in Product Marketing EDA software or Semiconductor Industry Lithography or computational lithography"; thus, the advertised position in the fifth advertisement cannot be found to be a parallel position in a similar organization.

The sixth and seventh advertisements respectively state that a "BA/BS degree in Communications, Marketing, or a related field" and a bachelor's degree in marketing or its equivalent is required. However, the advertised positions are for experienced managers whereas the proffered position is an entry level position for an employee who has only basic understanding of the occupation, as indicated on the LCA where the petitioner designated the proffered position as a Level I position. See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf. As such, the record lacks sufficient evidence demonstrating that the advertised position is a parallel position. Moreover, without further evidence to the contrary, the advertisements appear to be for organizations that are not similar to the petitioner, and the petitioner has not provided any probative evidence to suggest otherwise. In fact, the petitioner failed to supplement the record of proceeding to establish that any of the twelve advertising organizations are similar to it. That is, the petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organizations.

The ninth advertisement only states that it prefers a bachelor's degree. Obviously a *preference* for an individual with a degree is not an indication of a *requirement* for at least a bachelor's degree. In any event, as there must be a close correlation between the required specialized studies and the position, the mere requirement of a degree, without further specification, does not establish the position as a specialty occupation. Cf. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988) ("The mere requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility."). Thus, the advertised position cannot be found to be a parallel position in a similar organization.

The twelfth advertisement requires a bachelor's degree in marketing *and* "four to six years related casino marketing experience and/or training, or an equivalent combination of education and experience." There is no evidence that the petitioner requires similar experience or that it is similar to a casino; thus, the advertised position in the twelfth advertisement cannot be found to be a parallel position in an organization similar to the petitioner.

The documentation provided does not establish that a bachelor's degree (or higher) in a specific specialty, or its equivalent, is common to the industry in parallel positions among similar organizations.²

² Although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from just twelve job advertisements with regard to determining the common educational requirements for entry into parallel positions in similar companies. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no

The petitioner also has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." A review of the record indicates that the petitioner has failed to credibly demonstrate that the duties the beneficiary will be responsible for or perform on a day-to-day basis entail such complexity or uniqueness as to constitute a position so complex or unique that it can be performed only by a person with at least a bachelor's degree in a specific specialty.

Specifically, the petitioner failed to demonstrate how the duties described 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. The AAO has reviewed the information on marketing career paths at universities such as the [REDACTED] however, the petitioner did not establish how such a curricula is necessary to perform the duties of the proffered position. While a few related courses may be beneficial, or even required, in performing certain duties of the proffered position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here.

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

Next, the record of proceeding does not establish a prior history of recruiting and hiring for the

indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that the position of advertising and promotions manager for a one-employee marketing and advertising firm required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

proffered position persons with at least a bachelor's degree in a specific specialty or its equivalent. Therefore, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).³

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that 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. In other words, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than positions within the same occupational category that are not usually associated with a degree in a specific specialty.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.

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence 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 whether it will require a baccalaureate or higher degree in a specific

³ While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F.3d 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").

⁴ Moreover, as noted above, the petitioner has designated the proffered position as a Level I position on the submitted Labor Condition Application (LCA), indicating that it is an entry-level position for an employee who has only basic understanding of the occupation. *See* U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf. Therefore, it is simply not credible that the position is one with specialized and complex duties, as such a higher-level position would likely be classified at a higher level, such as a Level IV position, requiring a significantly higher prevailing wage. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

specialty or its equivalent. Absent this determination that a baccalaureate or higher degree in a specific specialty or its equivalent is required to perform the duties of the proffered position, it also cannot be determined whether the beneficiary possesses that specialty degree or its equivalent. Therefore, the AAO need not and will not address the beneficiary's qualifications further, except to note that, in any event, the combined evaluation of the beneficiary's education and work experience submitted by the petitioner is insufficient to establish that the beneficiary possesses the equivalent of a U.S. bachelor's degree in any specific specialty. Specifically, as the claimed equivalency was based in part on experience, there is no evidence that the evaluator 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 and that the beneficiary also has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty. See 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) and (D)(1). As such, since evidence was not presented that the beneficiary has at least a U.S. bachelor's degree in any specific specialty, or its equivalent, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

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