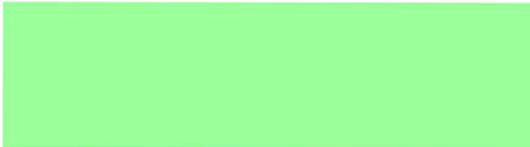




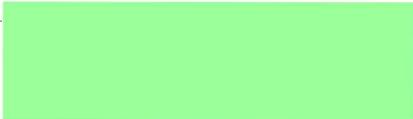
U.S. Citizenship
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Services

(b)(6)



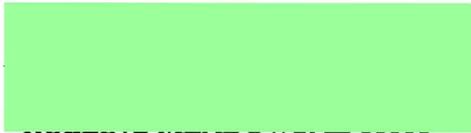
DATE: **JAN 11 2013** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

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:



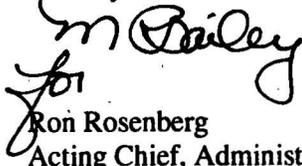
D₂
101(a)(15)(H)(i)(b)

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,


for
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.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on September 20, 2011. In the Form I-129 visa petition, the petitioner describes itself as a travel agency established in 1982. In order to employ the beneficiary in what it designates as a marketing manager position, the petitioner seeks 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 (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on March 16, 2012, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

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

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed. The petition will be denied.

Later in the decision, the AAO will address an additional, independent ground, not identified by the director's decision, that the AAO finds also precludes approval of this petition. Specifically, beyond the decision of the director, the AAO finds that the petitioner failed to submit a Labor Condition Application (LCA) that complies with the applicable statutory and regulatory provisions. Thus, the petition cannot be approved for this reason as well, with each ground considered as an independent and alternative basis for denial.

In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services as a marketing manager to work on a part-time basis (27 hours per week). In a letter dated August 29, 2011, the petitioner provided the following description of the duties of the proffered position:

Perform special sales promotions to Asian ethnic immigrants from Southeast Asia, Japan, and China. Direct and coordinate marketing activities to promote [company]'s services to Asian-American customer markets. Coordinate promotional activities and sales events, working with sales agents to market [company's] service. Works with sales agents in [the company] to generate ideas for the campaign, oversee to develop advertising, and work[s] with team managers to prepare a budget and cost estimates for the marketing activities. Identify, develop, and evaluate marketing strategy, based on knowledge of establishment objectives, market characteristics, and cost and markup factors.

Develop more attractive products and service such as bulk pricing airfare tickets, more affordable travel plans for American travelers toward Asian destinations. In collaboration with sales agents, monitor trends that indicate the need for new travel products and service. Estimate the demand for products and identify potential markets for [company] products. Use sales forecasting and strategic planning to ensure the sale and profitability of current service analyzing business developments and monitoring market trends.

In addition, the petitioner stated that the candidate for the proffered position "needs comprehensive, college level understanding in various topics including marketing, advertising, logistics, and transportation." The petitioner further added "college graduates with a high level of creativity, and strong communication and computer skills are needed to handle [the petitioner]'s marketing duties." The petitioner further stated that the "complex duties can not [sic] be handled by [a] basic entry level marketing professional."

In another letter (also dated August 29, 2011) provided with the H-1B petition, the petitioner claimed that the "position requires a Bachelor's degree in Business Administration, Marketing or in other related fields or the equivalent."

The petitioner also submitted an LCA in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "Marketing Managers" – SOC (ONET/OES Code) 11-2021, at a Level I (entry-level).

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on November 17, 2011. The director outlined the specific evidence to be submitted. The AAO notes that the director specifically requested the petitioner submit probative evidence to establish that the proffered position is a specialty occupation. In the RFE, the petitioner was asked to provide a more detailed description of the work to be performed by the beneficiary for the entire period requested, including the specific job duties, the percentage of time to be spent on each duty, level of responsibility, etc.

In response to the RFE, the petitioner and counsel submitted a brief and additional evidence.¹ The AAO notes that counsel provided a chart that compares the duties of the proffered position and duties of an entry-level marketing staff to establish that the duties of the proffered position are

¹ The AAO notes that some of the documentary evidence submitted by the petitioner is in a foreign language and is not accompanied by a full English language translation that has been certified by the translator as complete and accurate, and that the translator is competent to translate from the foreign language into English. Because the petitioner failed to submit a certified translation of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. See 8 C.F.R. § 103.2(b)(3). The AAO notes that the director reminded the petitioner and counsel of this requirement in the RFE. However, the petitioner elected not to comply with the requirement. Accordingly, the evidence that is in a foreign language that does not comply with 8 C.F.R. § 103.2(b)(3) is not probative and will not be accorded any weight in this proceeding. The AAO will not attempt to decipher or "guess" the meaning of documents that are not accompanied by a full, certified English language translation.

(b)(6)

specialized and complex. The petitioner also provided a revised description of the duties of the proffered position, along with the percentage of time that the beneficiary would spend performing each duty. Notably, while there are a few related tasks in common, the duties of the marketing manager as described by counsel are not identical to the responsibilities that the petitioner claims that the beneficiary will perform in the proffered position. Counsel's brief was not endorsed by the petitioner and the record of proceeding does not indicate the source of the duties and responsibilities that counsel attributes to the proffered position. Thus, counsel's expanded description of the duties of the proffered position submitted in response to the RFE is not probative evidence as the description was provided by counsel, not the petitioner. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Further, while counsel claims that the duties of the proffered position are more "complex and difficult" than those associated with entry-level marketing staff, the AAO notes that the LCA designated the wage level for the proffered position at Level I, which is designated for entry-level positions. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

As noted above, in a letter dated January 16, 2012, the petitioner provided a revised description of the duties of the proffered position. Specifically, the petitioner provided the following information:

Service Minimum education necessary	Job Detail	Percentage
Market Research and Plan	-Analyze frame market trends, growth, market size, market share, market competition (e.g. SWOT analysis), B/C Analysis, channel mapping identities of key channels, drivers of customers loyalty and satisfaction, brand perception, satisfaction levels, current competitor-channel relationship analysis, etc.), etc.;	10
-Bachelor degree in Marketing or Business Administration	-Determine travel agency market segment, market target, market forecast and market position	5
-Under President's direction	-Combine those analysis with the East-West business plan/business model analysis to suggest updated plan.	10
	-Manage staffs in Marketing and Development Team of East-West Travel.	15
Business Development Activities	-Cooperate with sales staff in East-West to modify current marketing methods;	10
-Bachelor	-Feedback modified business plan periodically;	5
	-Prepare various online marketing campaigns;	15

degree in Business Administration (Logistics Management)	-Perform various marketing campaigns such as product introduction conferences, internet marketing and exhibition participation;	15
-Under President's direction	-Prepare and participate exhibitions for developing new clients;	5
	-Make correspondence with present clients to enforce the relationship.	5
	-International business travel	5

The AAO notes that the petitioner claimed that the minimum education necessary is a "Bachelor's degree in Marketing or Business Administration." In addition, the petitioner claimed that travel agencies "developed an internet presence of their own by creating travel websites, with detailed information and online booking capabilities." The petitioner also noted that travel agencies use compute reservation companies such as SABRE, Amadeus CRS, Galileo CRS and Worldspan, and "under this industry change, more educated and skilled marketing staff who understands current online marketing is needed to survive tough competitions."

Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The director denied the petition on March 16, 2012. Counsel submitted an appeal of the denial of the H-1B petition.

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. The AAO will first discuss some findings that are material to this decision's application of the H-1B statutory and regulatory framework to the proffered position as described in the record of proceeding.

In the instant case, the petitioner claimed in its August 29, 2011 letter that the "position requires a Bachelor's degree in Business Administration, Marketing or in other related fields or the equivalent." The petitioner also stated its requirements for the proffered position in its January 16, 2012 letter, asserting that the education necessary for the position is a "Bachelor degree in Marketing or Business Administration." The AAO notes that the petitioner's claim that a bachelor's degree in "Business Administration" is a sufficient minimum requirement for entry into the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

To demonstrate 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. 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).²

Again, the petitioner in this matter claims that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree, i.e., a bachelor's degree in business administration. This assertion is tantamount to an admission that the proffered position is not in fact a specialty occupation. The director's decision must therefore be affirmed and the petition denied on this basis alone.

Furthermore, upon review of the record of proceeding, the AAO notes that there are numerous inconsistencies and discrepancies in the petition and supporting documents, which undermine the petitioner's credibility with regard to the services the beneficiary will perform, as well as the actual nature and requirements of the proffered position. When a petition includes numerous discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions.

When determining whether a position is a specialty occupation, the AAO must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. To ascertain the intent of a petitioner, USCIS looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

² Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* the following:

[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.

Id.

For H-1B approval, the petitioner must demonstrate a legitimate need for an employee exists and to substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. It is incumbent upon the petitioner to demonstrate it has sufficient work to require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent, to perform duties at a level that requires the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty for the period specified in the petition.

In response to the RFE, counsel states that the duties of the proffered position are more specialized and complex because its "core clientele consists of foreign travelers located in Asian countries and the U.S. that require bi[-]lingual abilities of marketing professional." On appeal, the petitioner asserts that its "ethnic background business model requires [a] more educated marketing specialist" and that the beneficiary's "bilingual skills, Asian background, and college graduate degree unlike other sales agents are essential for this marketing manager job." The AAO acknowledges that the petitioner views various skills and qualities (i.e., bilingual skills, Asian background) as essential to the position. However, while these aspects may be important to the petitioner, the AAO observes that the petitioner has not established that these skills and qualities entail or require the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent).

Further, the AAO notes that aside from the fact that the petitioner's core clientele is located in Asian countries and that it requires bilingual abilities, the duties as stated by the petitioner are generalized and generic as they fail to provide sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance within the petitioner's business operations. Moreover, the stated tasks do not establish the relative complexity, uniqueness and or specialization of the position. For example, the petitioner states in its initial description that the beneficiary will "perform special sales promotions" and "direct and coordinate marketing activities" but fails to reflect any specific details as they relate to this particular position and the nature of the work. In the revised description submitted in response to the RFE, the petitioner claims that the beneficiary will "make correspondence with present clients to enforce the relationship" and travel internationally. These statement fails to provide any significant insights into the nature and scope of the beneficiary's employment or specific details regarding the actual work the beneficiary will perform. According to the petitioner, the beneficiary will "coordinate promotional activities and sales events" and "analyze frame market trends, growth, market size, market share, market competition" but the petitioner does not explain the beneficiary's specific role and how this analysis will be conducted and/or applied within the scope of the proffered position. According to the petitioner, a significant amount of the beneficiary's time will be spent "prepar[ing] various online marketing campaigns" and "perform[ing] various marketing campaigns such as product introduction conferences, internet marketing and exhibition participation." Thus, as so generally described, the task description does not illuminate the substantive application of knowledge involved or any particular educational attainment associated with such application. This is further illustrated by the petitioner's statement that the beneficiary will "prepare and participate exhibitions for developing new clients." The petitioner does not sufficiently define how this translates to specific duties and responsibilities as

the phrase "prepare and participate exhibition" does not delineate the actual work the beneficiary will perform.

The petitioner has failed to provide sufficient details regarding the nature and scope of the beneficiary's employment or any substantive evidence regarding the actual work that the beneficiary would perform. Without a meaningful job description, the record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires a specialty occupation's level of knowledge in a specific specialty. The tasks as described fail to communicate (1) the actual work that the beneficiary would perform, (2) the complexity, uniqueness and/or specialization of the tasks, and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. The petitioner's assertions with regard to the position's educational requirement are conclusory and unpersuasive, as they are not credibly supported by the job descriptions or substantive evidence. Upon review of the record of proceeding, the AAO finds that the petitioner has not provide sufficient documentation to substantiate the claimed job duties and responsibilities of the proffered position.

Moreover, the record of proceeding contains discrepancies between what the petitioner claims about the level of responsibility inherent in the proffered position set against the contrary level of responsibility conveyed by the wage level indicated by the LCA submitted in support of petition.

In the instant case, the petitioner provided an LCA in support of the instant petition that indicates the occupational classification for the position is "Marketing Managers" at a Level I (entry level) wage. Wage levels should be determined only after selecting the most relevant Occupational Information Network (O*NET) occupational code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.³ Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.⁴ The U.S. Department of Labor (DOL)

³ For additional information on wage levels, see DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

⁴ A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is described as follows:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

Throughout the record of proceeding, the petitioner and counsel claim that the proffered position involves complex, unique and/or specialized duties. For example, in describing the duties of the proffered position in the support letter dated August 29, 2011, the petitioner states that the job duties are "specialized and complex, which needs comprehensive, college level understanding of various topics." According to the petitioner, the proffered position requires "a high level of creativity and marketing skills Those complex duties can not [sic] be handled by basic entry level marketing personnel." Furthermore, in response to the RFE, counsel reports that the "duties can not [sic] be performed by the entry-level normal marketing employee who has just experience on [sic] the field." Counsel also repeatedly asserts in her support letter that the duties of the proffered position are "specialized and complex" and "those complex duties [cannot] be handled by basic entry level marketing personnel." In response to the RFE, counsel claims that the duties of the proffered position "are more specialized and complex than others." On appeal, the petitioner states that the "job duties of marketing manager are unique and complex, which requires college degree holder," and the beneficiary is "ideally fit for [its] unique marketing duties."⁵

⁵ The petitioner and counsel indicated that bilingual skills are essential for the proffered position. A language requirement other than English in a petitioner's job offer generally is considered a special skill for all occupations, with the exception of Foreign Language Teachers and Instructors, Interpreters, and Caption Writers. See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. May 9, 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf. In the instant case, it does not appear that the petitioner's foreign language requirement has been reflected in the wage-level for the proffered position. As such, the petitioner has not established that it would pay the beneficiary an adequate salary for her work, as required under the Act, if the petition were granted.

The AAO must question the level of complexity, independent judgment and understanding required for the proffered position as the LCA is certified for a Level I entry-level position. The characterization of the position and the claimed duties and responsibilities as described in the record of proceeding conflict with the wage-rate element of the LCA selected by the petitioner, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

This aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the petitioner's assertions regarding the demands, level of responsibilities and requirements of the proffered position. As previously mentioned, 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. 591-92.

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

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

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

The regulation at 20 C.F.R. § 655.705(b) therefore requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. In the instant case, the record

establishes that, at the time of filing, the petitioner had not obtained a certified LCA for the proper occupational category and prevailing wage that applied at the time the petition was filed. Therefore, the petitioner has failed to comply with the filing requirements at 8 C.F.R. §§214.2(h)(4)(i)(B) and 214.2(h)(i)(2)(B) by providing a certified LCA that corresponds to the instant petition. For this reason also, the petition may not be approved.

The AAO finds that, fully considered in the context of the entire record of proceedings, the petitioner failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed. A review of the enclosed LCA indicates that the information provided does not correspond to the claimed level of work and requirements that the petitioner ascribed to the proffered position. As a result, even if it were determined that the petitioner overcame the director's basis for denial of the petition (which it has not), the petition could not be approved for this independent reason.

The AAO will now address the director's basis for denial of the petition, namely that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation. It should be noted that, for efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the duties and requirements of the proffered position into each basis discussed below for dismissing the appeal.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. 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.

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO now turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO will first review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position.

The AAO recognizes DOL's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁶ In the Form I-129 petition, the petitioner designated the proffered position as a "Marketing Manager." The petitioner submitted an LCA in support of the petition identifying the occupational category as "Marketing Managers."

The AAO reviewed the chapter of the *Handbook* entitled "Advertising, Promotions, and Marketing Managers," including the sections regarding the typical duties and requirements for this occupational category. However, the *Handbook* does not indicate that "Advertising, Promotions, and Marketing Managers" comprise an occupational group for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation.

The subchapter of the *Handbook* entitled "How to Become an Advertising, Promotions, and Marketing Manager" states, in pertinent part, the following about this occupation:

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.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Advertising, Promotions, and Marketing Managers, on the Internet at <http://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm#tab-4> (last visited January 9, 2013).

⁶ 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/>.

When reviewing the *Handbook*, the AAO must again note that the petitioner designated the proffered position as a Level I (entry level) position on the LCA. As previously discussed, this designation is indicative of a comparatively low, entry-level position relative to others within the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate is assigned to job offers for beginning level employees who have only a basic understanding of the occupation. That is, based upon this wage rate, there is an expectation that the beneficiary will perform routine tasks that require limited, if any, exercise of judgment; she will work under close supervision and receive specific instructions on required tasks and expected results; and her work will be closely monitored and reviewed for accuracy. DOL guidance indicates that a job offer for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

As previously discussed, the petitioner failed to provide sufficient information and documentation regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance within the petitioner's business operations. Thus, it is not possible to conduct a legitimate comparison of the duties of the proffered position and the typical duties associated with the occupation "Marketing Managers." However, even assuming *arguendo* that the occupational category "Marketing Managers" is relevant to this proceeding, the AAO notes that the *Handbook* does not support a finding that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation.

In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties.⁷ Section 214(i)(1)(B) of the Act (emphasis added).

Here, although the *Handbook* indicates that most marketing managers have a bachelor's degree, the *Handbook* also states that courses in business law, management, economics, accounting, finance, mathematics, and statistics are advantageous. The *Handbook* does not state that entry into the occupation normally requires a minimum of a baccalaureate (or higher degree) in a *specific specialty* directly related to the duties and responsibilities of the position. Notably, the *Handbook* recognizes courses in disparate fields (i.e., business law, management, economics, accounting,

⁷ Whether read with the statutory "the" or the regulatory "a," both readings denote a singular "specialty." Section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Still, the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. As just stated, this also includes even seemingly disparate specialties provided the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

finance, mathematics, and statistics) as advantageous for entry into this occupation. Absent evidence to the contrary, these fields are not closely related specialties. Accordingly, as such evidence fails to establish that normally the minimum requirement for entry into the occupation is at least a bachelor's degree *in a specific specialty* or its equivalent, the *Handbook* does not support the assertion that the proffered position qualifies as a specialty occupation and, in fact, supports the opposite conclusion.

Moreover, the fact that "most" marketing managers have a bachelor's degree does not equate to a normal minimum entry requirement. For instance, the first definition of "most" in *Webster's New Collegiate College Dictionary 731* (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of marketing managers have a bachelor's degree, it could be said that "most" marketing managers possess such a degree. It cannot be found, therefore, that a statement that "most" employees in a given occupation have a bachelor's degree equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. (As previously discussed, the petitioner designated the proffered position in the LCA as a Level I position, which signifies that it is a low, entry-level position relative to others within the occupation.) Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "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." § 214(i)(1) of the Act.

In response to the RFE, counsel stated that "the Department of Labor classified the position of Marketing Manager in Job Zone Four, requiring SVP level of 7 to 8." Counsel asserted that "the SVP level of 7 to 8 can be met with a bachelor's degree or an associate's degree plus number of years of professional experience in the area of employment." However, contrary to the assertions of counsel, a Job Zone Four rating does not state a requirement for a bachelor's degree. According to DOL, a Job Zone Four rating is assigned to a group of occupations of which "most," but not all, "require a four-year bachelor's degree." Further, this assignment does not indicate that a degree must be in a specific specialty closely related to the requirements of the occupation. Thus, a designation of Job Zone Four does not demonstrate that at least a bachelor's degree in a *specific specialty* is normally the minimum requirement for entry, and does not, therefore, demonstrate that a position so designated is in a specialty occupation as defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).

Furthermore, the AAO finds that the assignment of an SVP rating of 7 or 8 is not indicative of a specialty occupation. This is obvious upon reading Section II of the *Dictionary of Occupational Title(DOT)*'s Appendix C, Components of the Definition Trailer, which addresses the Specialized Vocational Preparation (SVP) rating system.⁸ The section reads:

II. SPECIFIC VOCATIONAL PREPARATION (SVP)

⁸ Section II of the *DOT*'s Appendix C, Components of the Definition Trailer, can be found on the Internet at the website http://www.occupationalinfo.org/appendxc_1.html#II.

Specific Vocational Preparation is defined as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation.

This training may be acquired in a school, work, military, institutional, or vocational environment. It does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs.

Specific vocational training includes training given in any of the following circumstances:

- a. Vocational education (high school; commercial or shop training; technical school; art school; and that part of college training which is organized around a specific vocational objective);
- b. Apprenticeship training (for apprenticeable jobs only);
- c. In-plant training (organized classroom study provided by an employer);
- d. On-the-job training (serving as learner or trainee on the job under the instruction of a qualified worker);
- e. Essential experience in other jobs (serving in less responsible jobs which lead to the higher grade job or serving in other jobs which qualify).

The following is an explanation of the various levels of specific vocational preparation:

Level	Time
1	Short demonstration only
2	Anything beyond short demonstration up to and including 1 month
3	Over 1 month up to and including 3 months
4	Over 3 months up to and including 6 months
5	Over 6 months up to and including 1 year
6	Over 1 year up to and including 2 years
7	Over 2 years up to and including 4 years
8	Over 4 years up to and including 10 years
9	Over 10 years

Note: The levels of this scale are mutually exclusive and do not overlap.

Thus, an SVP rating of 7 or 8 does not indicate that at least a four-year bachelor's degree is required, or more importantly, that such a degree must be in a specific specialty directly related to the duties and responsibilities of that occupation. Therefore, the *DOT* information is not probative of the proffered position being a specialty occupation.

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

Next, the AAO reviews the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Thus, the AAO incorporates by reference the previous discussion on the matter. The record of proceeding also does not contain any evidence from an industry professional association to indicate that a degree is a minimum entry requirement.

In support of the petitioner's assertion that the proffered position is a specialty occupation position, the record of proceeding contains several job announcements. However, upon review of the evidence, the AAO finds that the petitioner's reliance on the job announcements is misplaced.

In the Form I-129, the petitioner stated that it is a travel agency with approximately 13 employees.⁹ The petitioner also reported its gross annual income as approximately \$2.3 million and its net annual income as -\$17,120. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 561510¹⁰ The AAO notes that this NAICS

⁹ In the support letter dated August 29, 2011, counsel indicated that the petitioner has 16 employees. No explanation for the variance was provided.

¹⁰ According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity and, each establishment is

code is designated for "Travel Agencies." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

This U.S. industry group comprises establishments primarily engaged in acting as agents in selling travel, tour, and accommodation services to the general public and commercial clients.

See U.S. Dep't of Commerce, U.S Census Bureau, 2007 NAICS Definition, 561510-Travel Agencies, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last viewed January 9, 2013).

For the petitioner to establish that an advertising organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, postings submitted by a petitioner are 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 the advertising 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 the organizations are similar and in the same industry without providing a legitimate basis for such an assertion. As previously discussed, 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. 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

The AAO reviewed the job advertisements submitted by the petitioner. Notably, the petitioner and counsel did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices. Upon review of the documents, the AAO finds that they do not establish that a requirement for a bachelor's degree, in a specific specialty, is common to the petitioner's industry in similar organizations for parallel positions to the proffered position.

The petitioner submitted the following job postings:

- An advertisement for a Digital Marketing Manager for ([redacted]) in Cambridge, MA. According to the printout, the employer is part of EF Education First, the world's largest private language and educational tour organization with over 100 offices in 53 countries around the world. The advertising employer listed its industry as "Education." The petitioner did not provide any additional information to establish that the advertising company and the petitioner share the same general characteristics, such as evidence that the organizations are similar in level of revenue or staffing. The petitioner has not provided any information

classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last viewed January 9, 2013).

regarding which aspects or traits (if any) it shares with the advertising organization. Without further information, the advertisement appears to be for an organization that is not similar to the petitioner, and the petitioner has not provided any probative evidence to suggest otherwise.

Moreover, the position appears to be a more senior position than the proffered position. That is, the advertising employer stated the "career level" of the advertised position as "Manager (Manager/Supervisor of Staff)." Additionally, the position requires a degree and 2-4 years of applicable work experience. (As previously discussed, the Upon review of the advertised position, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised position are parallel to the proffered position.

Furthermore, the employer requires a bachelor's degree, but does not indicate that a degree in specific specialty is necessary. Thus, contrary to the purpose for which the advertisement was submitted, the posting does not indicate that a bachelor's degree in a *specific specialty* that is directly related to the occupation is required. Thus, further review of the advertisement is not necessary.

- An advertisement from [REDACTED] for a Marketing Manager in Flagstaff, AZ. The advertising employer listed its industry as "All." The advertisement states that the role of the marketing manager is to "increase the bottom line profitability of the shopping center." The advertisement does not contain sufficient information regarding the nature of type of organization and/or information regarding its business operations. However, it does not appear that the advertising organization is similar to the petitioner. The record is devoid of sufficient information regarding the advertising organization to conduct a legitimate comparison of the organization to the petitioner. The petitioner did not provide any additional information to establish that the advertising company and the petitioner share the same general characteristics, such as evidence that the organizations are similar in nature or type of organization. The petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organization. Without further information, the advertisement appears to be for an organization that is not similar to the petitioner, and the petitioner has not provided any probative evidence to suggest otherwise.

Moreover, the position appears to be a more senior position than the proffered position since it requires a degree and 2-4 years of experience in related field. More importantly, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised position are parallel to the proffered position.

Furthermore, the employer requires a bachelor's degree, but does not indicate that a degree in a specific specialty is required for the position. Thus, contrary to the purpose for which the advertisement was submitted, the posting does not indicate

that a bachelor's degree in a *specific specialty* that is directly related to the occupation is required. Thus, further review of the advertisement is not necessary.

- An advertisement from [REDACTED] USA for a Marketing Coordinator. The employer describes itself as leading online provider of live event tickets nationwide. The petitioner did not provide any additional information to establish that the advertising company and the petitioner share the same general characteristics, such as evidence that the organizations are similar in nature or type of organization. The petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organization. Without further information, the advertisement appears to be for an organization that is not similar to the petitioner, and the petitioner has not provided any probative evidence to suggest otherwise.

Moreover, the advertising employer will accept a bachelor's degree in marketing, communications, business or a related field. As previously discussed, USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147. Thus, further review of the advertisement is not necessary.

- An advertisement from [REDACTED] for a Manager, Travel Agency Sales. The advertising employer listed its industry as retail, transportation, travel. Although the advertisement states that the position is with [REDACTED] Brands travel agencies, no further specific information regarding the advertising organization is provided. The advertisement does not contain sufficient information regarding the nature of type of organization and/or information regarding its business operations. Consequently, the record is devoid of sufficient information regarding the advertising organization to conduct a legitimate comparison of the organization to the petitioner. The petitioner did not provide any additional information to establish that the advertising company and the petitioner share the same general characteristics, such as evidence that the organizations are similar in nature or type of organization. The petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organization. Without further information, the advertisement appears to be for an organization that is not similar to the petitioner, and the petitioner has not provided any probative evidence to suggest otherwise.

Moreover, the position appears to be a more senior position than the proffered position since it states that the successful candidate will have a degree, along with a proven track record and a minimum of five years of experience in traditional travel agencies. The duties include "[o]verall sales responsibility for meeting

revenue and cost targets for Discretionary revenue through Traditional Agency Channels." The petitioner has not sufficiently established that the primary duties and responsibilities of the advertised position are parallel to the proffered position.

In addition, while the employer requires a bachelor's degree, it does not indicate that a specific specialty is necessary for the advertised position. Contrary to the purpose for which the advertisement was submitted, the posting does not indicate that a bachelor's degree in a *specific specialty* is required. Thus, further review of the advertisement is not necessary.

- An advertisement from [REDACTED] Cuba for a Marketing Manager-Travel. The advertising organization stated that its industry is "Nonprofit Charitable Organizations." According to the job posting, the employer is a division of [REDACTED] a leading provider of licensed travel to Cuba for U.S. citizens. The petitioner did not provide any additional information to establish that the advertising company and the petitioner share the same general characteristics, such as evidence that the organizations are similar in level of revenue or staffing. The petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organization. Without further information, the advertisement appears to be for an organization that is not similar to the petitioner, and the petitioner has not provided any probative evidence to suggest otherwise.

Moreover, the position appears to be a more senior position than the proffered position since it requires a degree and 4+ years of professional experience in marketing communications. The advertising employer stated that the career level of the position is "Experienced (Non-Manager)." Upon review of the posting, the petitioner has not established that the primary duties and responsibilities of the advertised position are parallel to the proffered position.

In addition, while the employer requires a bachelor's degree, it does not indicate that a specific specialty is necessary. Contrary to the purpose for which the advertisement was submitted, the posting does not indicate that a bachelor's degree in a *specific specialty* is required. Thus, further review of the advertisement is not necessary.

As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed.

Further, it must be noted that even if all of the job postings indicated that a bachelor's degree in a specific specialty, or its equivalent, is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid

inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.¹¹

Thus, based upon a complete review of the record, the petitioner has not established 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. For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner shows that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty or its equivalent.

To begin with and as discussed previously, the petitioner itself does not require at least a baccalaureate degree or its equivalent in a *specific specialty*, but accepts a general-purpose degree, i.e., a degree in business administration. Moreover, a review of the record indicates that the petitioner has failed to credibly demonstrate the duties the beneficiary will be responsible for or perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty, or its equivalent.

The AAO acknowledges that the petitioner claims that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty or its equivalent. In support of this assertion, the petitioner submitted various documents, including documentation regarding its business operations (including tax returns), a Power Point presentation (entitled "Business Plan for Emerging Market") created by the beneficiary, and

¹¹ According to the *Handbook's* detailed statistics on advertising, promotion, and marketing managers, there were approximately 216,800 persons employed in 2010. *Handbook*, 2012-13 ed., available at <http://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm#tab-1> (last accessed January 9, 2013). Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the industry. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that organizations similar to the petitioner in its industry commonly require, for positions parallel to the one here proffered, at least 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 statistics-based findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not normally require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

promotional materials.¹² The AAO reviewed the documentation. However, the evidence fails to establish how the beneficiary's responsibilities and day-to-day duties are so complex or unique that the position can be performed only by an individual with a bachelor's degree in a specific specialty, or its equivalent. The AAO finds that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. The LCA indicates a wage level at a Level I (entry level) wage. As previously mentioned, the wage-level of the proffered position indicates that the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.¹³ Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing

¹² The AAO reviewed the beneficiary's business plan but notes that it provides rather general information. This is exemplified by a slide entitled "Sales and Distribution Plan," which states the following:

- Takes calls from customers and reserve seats that best-fit
- Explains an ongoing special promotion that customers might be interested in

The last slide is entitled "Advertising and Promotions Plan" and includes the following information:

- Online advertising
 - Company's website
 - Email marketing
- Offline advertising
 - Newspapers
 - Magazines
 - Telephone books and directories
 - Brochures and pamphlets
- Special advertising
 - Sponsor a community event
 - Distribute coupons
- Words [sic] of mouth

The AAO observes that (without further evidence) the beneficiary's business plan does not establish that the petitioner's business operations or the duties of the proffered position entail any particular level of complexity, uniqueness and/or specialization.

¹³ As mentioned earlier, in response to the RFE, counsel provided a chart that compared the duties of the proffered position to the duties of an entry-level marketing employee to establish that the duties of the proffered position are complex and difficult. However, as noted earlier, the petitioner designated the proffered position in the LCA as a Level I position, which is indicative of a low, entry-level position. Thus, counsel's assertion is inconsistent with the LCA and is not supported by the evidence in the record of proceeding.

wage. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."¹⁴ It is further noted that although the petitioner asserts that a bachelor's degree is required to perform the duties of the proffered position, the petitioner failed to sufficiently demonstrate how the duties require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. That is, the record of proceeding does not establish that the petitioner's requisite knowledge for the proffered position can only be obtained through a baccalaureate or higher degree program in a specific specialty, or its equivalent. For example, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it claims are so complex or unique. While a few related courses may be beneficial, or even required, in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty or its equivalent is required to perform the duties of the proffered position.

The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent. The petitioner has not credibly demonstrated that this position, which the petitioner characterized in the LCA as an entry-level position, is so complex or unique that it can be performed only by an individual with at least a baccalaureate degree in a specific specialty, or its equivalent.

Consequently, as the petitioner fails to demonstrate how the proffered position is so complex or unique relative to other positions that do not require at least a baccalaureate degree in a specific specialty, or its equivalent, for entry into the occupation in the United States, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. The AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

To satisfy this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

¹⁴ For additional information regarding wage levels as defined by DOL, see Employment and Training Administration (ETA), *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

While a petitioner may believe or otherwise assert that a proffered position requires a specific 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 petitioner 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 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if 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 petitioner stated in the Form I-129 petition that it has approximately 13 employees and that it was established in 1982 (approximately 30 years prior to the H-1B submission). The petitioner did not provide the total number of people it has employed to serve in the proffered position. The petitioner also did not submit any documentation regarding the academic credentials of employees who currently or in the past served in the proffered position. Moreover, the petitioner did not submit probative evidence of its recruiting and hiring practices. The record is devoid of information to satisfy this criterion of the regulation.

Further, based on the statement made by the petitioner with regard to its own claimed educational requirements for the position (i.e., the acceptance of a degree in business administration), it is clear that a general bachelor's degree is sufficient to perform the duties. As previously noted, 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 147.

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

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

Upon review of the record of the proceeding, the AAO notes that the petitioner has not provided probative evidence to satisfy this criterion of the regulations. In the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than budget analyst positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent.

As reflected in this decision's earlier comments and findings with regard to the generalized level at which the proposed duties are described, the petitioner has not presented the proposed duties with sufficient specificity and substantive content to even establish relative specialization and complexity as distinguishing characteristics of those duties, let alone that they are at a level that would require knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, also, the proposed duties have not been described with sufficient specificity to establish their nature as more specialized and complex than the nature of the duties of other positions in the pertinent occupational category whose performance does not require the application of knowledge requiring attainment of at least a bachelor's degree in a specific specialty, or its equivalent. Furthermore, although the petitioner submitted various documents (including evidence regarding its business operations), the documentation is insufficient to satisfy this criterion of the regulations.

The AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a low, entry-level position relative to others within the occupation. The petitioner designated the position as a Level I position (the lowest of four assignable wage levels), which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, it is simply not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level IV position, requiring a significantly higher prevailing wage. A Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

The petitioner has submitted inadequate probative evidence to satisfy this criterion of the regulations. Thus, the petitioner has not established that the nature of the specific duties of the position is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. The AAO, therefore, concludes that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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

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

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's

enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

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