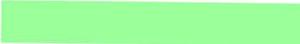


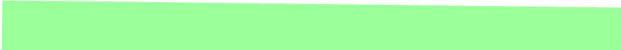


U.S. Citizenship
and Immigration
Services

(b)(6)



Date: **JUN 27 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 IN THE FORM I-129 PROCEEDING:

SELF-REPRESENTED

INSTRUCTIONS:

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

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,



Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner describes itself as a gas station with a food and grocery outlet established in 2004, with four employees and an ordinary business income of \$65,329 in 2010 and \$44,264 in 2011.¹ In order to employ the beneficiary in what it designates as a marketing manager position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to demonstrate that the proffered position qualifies as a specialty occupation. On appeal, the petitioner asserted that the director's basis for denial was erroneous and submitted a brief and additional evidence in support of the appeal.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; (5) the Form I-290B and supporting materials; and (6) the petitioner's response to the AAO's Request for Additional and Missing Evidence. The AAO reviewed the record in its entirety before issuing its decision.

The LCA submitted by the petitioner in support of the petition was certified for a Level I advertising, promotions, and marketing manager position, Standard Occupational Classification (SOC) code 11-2011.

The issue on appeal is whether the 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 following statutory and regulatory requirements.

¹ According to California corporate records, the petitioner's actual corporate name appears to be [REDACTED]. The petitioner explains in a letter dated April 26, 2013 that the law firm that prepared the petition misspelled the petitioner's name on the Form I-129. As this explanation is corroborated by other evidence in the record, the AAO finds that the petitioner's name on the Form I-129 is more likely than not a misspelling and that it is not a separate legal entity from [REDACTED].

On a separate note, the description of the petitioner as a gas station with a food and grocery outlet would give it a North American Industry Classification System (NAICS) code of 447110. It is noted that, while the NAICS code used on the 2010 and 2011 federal tax returns reads 447100, this appears to be a typographical error, as no such code currently exists. Therefore, it appears instead that the petitioner meant to put NAICS code 447110, or gasoline station with convenience store, which would match the description of the petitioner's business elsewhere in the record and the NAICS code as used on the Form I-129 H-1B Data Collection Supplement.

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

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

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

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489

U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and 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 determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

In the initial I-129 filing, the petitioner provided a job description as an addendum to the Form I-129. The AAO observes that the petitioner did not state the baccalaureate-level of highly specialized marketing knowledge that would be applicable to the stated job duties, nor did the petitioner state a specific degree requirement for the proffered position. Moreover, the petitioner did not sufficiently set forth the nature of the petitioner's business, a four-employee gas station with a convenience store, such that it would establish a need for the services of a marketing manager.

The director found the initial evidence insufficient to establish eligibility for the benefit sought,

and issued an RFE on October 5, 2011. Within the RFE, the director outlined the specialty occupation regulatory criteria and requested specific documentation to establish that the proffered position qualifies for classification as a specialty occupation.

The petitioner submitted a response to the director's RFE, which included a letter dated June 2, 2011. This letter provided a job description that restated the initially presented tasks associated with the proffered position, along with some additional and previously undisclosed responsibilities. Specifically, it identified the following as duties of the proffered position:

Will research market conditions in local, regional, and national area to determine potential sales of products and services; establish research methodology and design formats for data gathering such as surveys and open poles [sic]; examine and analyze statistical data [sic] to forecast future marketing trends; gather data to forecast future marketing trends; gather data on competitors and analyze prices, sales and methods of marketing and distribution. Collect data on customer preference and consumer buying habits, conduct research studies of organizational structure, communication systems, group interactions, motivational systems and recommends [sic] changes to improve efficiency and effectiveness of individual and organizational units. Organize training programs applying principals of learning and individual differences and evaluate effectiveness of training methods by statistical analysis of production rate, reduction of accident, absenteeism and turn over [sic]. Study consumer reactions to new products and package design, using surveys, tests and measure effectiveness of advertising media to aid in sales of goods and service. Will prepare reports and graphic illustrations of funding and submit them to management for review. Formulate, direct and coordinate marketing activities and policies to promote products and services, working with advertising and promotion managers. Identify, develop, and evaluate marketing strategy, based on knowledge of establishment objectives, market characteristics, and cost and markup factors. Evaluate the financial aspects of product development, such as budgets, expenditures, research and development appropriations, and return-on-investment and profit-loss projections. Develop pricing strategies, balancing firm objectives and customer satisfaction. Initiate market research studies and analyze their findings. Coordinate and participate in promotional activities and trade shows, working with developers, advertisers, and production managers, to market products and services. Consult with buying personnel to gain advice regarding the type of products or services expected to be in demand.²

The petitioner asserts on appeal that the above-described duties constitute complex responsibilities, and as such, they require the application of specialized knowledge ordinarily attained through the completion of a bachelor's or higher degree. Of note, the AAO again

² The AAO notes that on appeal, the petitioner presented the same duties, but deleted approximately the final nine lines of the duties listed above.

observes that the petitioner does not state the specific specialty (or its equivalent) as a minimum for entry into the proffered position. Rather, the petitioner states that the beneficiary is qualified by virtue of his education, which has been evaluated to be the equivalent of a U.S. master's degree in business administration.

To support the contention that the proffered position is a specialty occupation, the petitioner submitted Occupation Information Network (O*NET) documentation for the 11-2021.00 – Marketing Managers occupational category, noting that the occupation has a Job Zone 4 rating. The petitioner also submitted a document from the Foreign Labor Certification Data Center Online Wage Library describing the Job Zone 4 category as a category encompassing occupations that require experience plus a bachelor's or higher degree. Additionally, the petitioner submitted a document from the State of California Career One Stop that provides an occupational profile for Marketing Managers, and reports that 47.7% of Marketing Managers in California possess a bachelor's degree.

Although the petitioner claims 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 or practical application of at least a bachelor's degree-level of highly specialized knowledge in a specific specialty. The director denied the petition on June 30, 2011. The director determined that the duties of the proffered position reflect the duties as described in the *Handbook* under the title "Advertising, Marketing, Promotions, Public Relations, and Sales Managers."³

On appeal, the petitioner contends that the decision was erroneous and that the petitioner meets the evidentiary criteria.⁴ In particular, the petitioner asserts that the director erred in finding that:

³ 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/>.

⁴ Upon the initial review of the appeal, a "Business Search" on the Internet site of the California Secretary of State revealed that the status of the California domestic business corporation was "suspended." The AAO sent the petitioner a Notice of Derogatory Information, and the petitioner cured the issue and provided documentation evidencing that it is currently a California domestic business corporation in "active" status.

Further, the AAO notes that when the petitioner submitted documentation evidencing its active status, it also submitted a different LCA and Form I-129 for the beneficiary that did not bear the same dates as the initially presented petition forms. The petitioner's request to amend the petition on appeal is not properly before the AAO. The regulations at 8 C.F.R. § 214.2(h)(2)(i)(E) state in pertinent part:

The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition.

the position does not qualify as a specialty occupation and submits brief and new evidence on appeal. The crux of the petitioner's assertions on appeal is that the petitioner's corporate members have grown in their acquisitions in the United States, and that the guidance of a capable Marketing Manager is imperative for the petitioner's continued business growth, as well as the growth of the companies acquired by the petitioner's members.

In support of the petitioner's assertions that the petitioning entity's members have acquired additional companies, the petitioner submitted federal tax returns for entities other than the petitioner. The AAO observes that the financial documentation on file lists FEIN numbers that do not match the petitioning entity's FEIN number. As these other entities are separate legal entities, any evidence pertaining to their operations is irrelevant to the instant matter. The AAO further notes that, although the petitioner stated that the beneficiary would be performing duties for the newly acquired companies that share members connected to the petitioning entity, the petitioning company is the only relevant employer to the instant Form I-129 petition. If the beneficiary were scheduled to be employed by any other company, each respective company would need to submit a separate Form I-129 petition for the portion of the beneficiary's time to be spent performing duties for each separate employer. *See* 8 C.F.R. § 214.2(h)(1)(i) (stating in pertinent part that "an alien may be authorized to come to the United States temporarily to perform services or labor for . . . an employer, if petitioned for by that employer.").

In any event and as a preliminary matter, even if the petitioner had substantiated a claim that a bachelor's or higher degree in business administration is a minimum requirement for entry into the proffered position – which it has not – that would be inadequate to establish that the proposed position qualifies as a specialty occupation.⁵ A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

To prove that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree,

The request to amend the original petition on appeal is, therefore, rejected, and the documents pertinent to that request will not be considered.

⁵ While the petitioner does not specifically identify what specialty baccalaureate or higher degree it claims to be necessary to perform the duties of the proffered position, it appears, based on the qualifications of the beneficiary, that the petitioner is at least asserting that the duties of the proffered position may be performed by someone with only a general bachelor's or higher degree in business administration.

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 147.⁶

Again, the petitioner appears to assert 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.

Moreover, it also cannot be found that the proffered position is a specialty occupation due to the petitioner's failure to satisfy any of the supplemental, additional criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). To reach this conclusion, the AAO first turned to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I): a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

The AAO recognizes the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (the *Handbook*) as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. The AAO finds that the duties described by the petitioner appear to comport closest with the duties of "Advertising, Promotions, and Marketing Managers," as described in the *Handbook*. The *Handbook* describes the Advertising, Promotions, and Marketing Managers occupational classification as follows:

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:

⁶ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

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

- 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.

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.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Advertising, Promotions, and Marketing Managers," <http://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm#tab-2> (last visited June 25, 2013).

As indicated in the excerpt below, review of the *Handbook's* information about the education and training requirements for this occupational category, however, indicates that employers do not normally require at least a bachelor's degree in a specific specialty or its equivalent for entry into the position. In pertinent part, the *Handbook* states:

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.⁷

⁷ 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 advertising, promotions, and marketing manager positions require at least a bachelor's degree in business administration or a closely related field, it could be said that "most" advertising, promotions, and marketing manager positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. 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.

Education

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

Most marketing managers have a bachelor's degree. Courses in business law, management, economics, accounting, finance, mathematics, and statistics are advantageous. In addition, completing an internship while in school is highly recommended.

Id. at <http://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm#tab-4> (last visited June 25, 2013).

Here, although the *Handbook* indicates that a bachelor's or higher degree is required for most positions within the occupational category, as noted above, a requirement for "most" does not equate to a standard entry requirement for the occupational category. Even if it did, a requirement for a general bachelor's degree 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.

With regard to specific degrees, the *Handbook* only indicates that "some employers prefer" those with bachelor's degrees in advertising or journalism. That some employers prefer a bachelor's degree in advertising or journalism does not support a finding that such a degree is a standard, minimum entry requirement for this occupation.

Otherwise, the *Handbook* only indicates the type of coursework that may be advantageous for entering the occupation. First, there is no evidence presented that taking certain courses in seven or so subjects equate to a bachelor's degree in a specific specialty or thereby indicate that such a degree would be required for entry into the occupation, especially as the underlying coursework is only "advantageous," not required. Even if it did, the courses of study indicated as being advantageous by the *Handbook* cover distinctly different focus and academic concentrations from each other such that it is unclear what, if any, specialty would be derived from this combination of coursework.

Accordingly, the *Handbook* does not indicate that working as a marketing manager normally requires at least a bachelor's degree in a specific specialty or its equivalent for entry into the occupation and, therefore, it does not support the proffered position as being a specialty occupation.

The petitioner asserts that the Occupation Information Network (O*NET) states that the Advertising, Promotions, and Marketing Managers occupational category is designated a Job Zone 4 rating and, as such, the petitioner seems to imply that a bachelor's degree is the normal requirement for entry into the profession. The AAO notes that the O*NET Summary Reports, referenced by the petitioner, are insufficient to establish that the proffered position qualifies as a specialty occupation normally requiring at least a bachelor's degree or its equivalent in a specific specialty. On June 25, 2013, the AAO accessed the pertinent section of the O*NET OnLine Internet site relevant to 11-2021.00 – Marketing Managers. See <http://www.onetonline.org/link/summary/11-2021.00>. Contrary to the assertions of the petitioner, O*NET OnLine does not state a requirement for a bachelor's degree. Rather, it assigns this occupation a Job Zone 4 rating, which groups it among occupations of which "most," but not all, "require a four-year bachelor's degree." More importantly, however, O*NET OnLine does not indicate that four-year bachelor's degrees required by Job Zone 4 occupations must be in a specific specialty directly related to the occupation. Therefore, O*NET OnLine information is not probative of the proffered position being a specialty occupation.

The AAO notes that the petitioner declined the opportunity, explicitly provided in the RFE, to specifically and substantially expand upon the substantive nature of the beneficiary's duties, the position that they constitute, and the petitioner's business operations. The AAO finds that, in the absence of such evidence, and as evident in the duty description quoted above, the petitioner limited its description of the position and its constituent duties to general functions that do not in themselves reveal the substantive nature of the actual work that would be involved, substantial information about any applications of a body of highly specialized knowledge in any specialty that would be required to perform such work, or a necessary correlation between such work and the necessity for the beneficiary to hold at least a bachelor's degree in a specific specialty or its equivalent directly related to the nature of the proffered position as it would actually be performed.

As a corollary to the record of proceeding's lack of substantive information about the proposed duties and the position they are said to constitute, the AAO also finds that the petitioner has not provided a factual foundation sufficient to establish that the proffered position or its duties are particularly complex, unique and/or specialized relative to other marketing manager positions.

Further, the AAO notes that the record of proceeding lacks probative evidence describing work with sales, public relations, and product development staff, as discussed in the relevant section in the *Handbook*. There is no supporting evidence within the record of proceeding regarding specific work assignments during the period of proposed employment, and there is no evidence, such as a line and block organizational chart, that would suggest that the petitioner has the organizational complexity that would require the services of a marketing manager. Consequently, this precludes the AAO from further examining the nature of the beneficiary's duties and thus finding that the duties will be those of a specialty occupation.

For the foregoing reasons, the AAO finds that the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

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

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

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. Additionally, the petitioner did not submit any advertisements in support of the contention that a bachelor's or higher degree in the specific specialty is required for entry into the occupation within the petitioner's industry.

In sum, the petitioner has not submitted sufficient documentation on point. Therefore, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will now analyze whether the petitioner has 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."

The petitioner submits that it meets the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) because of the sophisticated and advanced nature of the position. This claim is not supported by any documentation that would demonstrate that this 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. The AAO notes again that the petitioner selected the NAICS code to classify its business as a gas station with a convenience store. The petitioner did not supplement the record with any evidence that would support a finding that there is anything particularly unique or complex about its business operations or its business model, a four-employee gas station with a convenience store, such that the duties of its marketing manager position would be so complex or unique that they could be performed only by an individual with a bachelor's or higher degree in a specific specialty or its equivalent. This lack of probative evidence related to this issue precludes a finding that the petitioner has satisfied this criterion.

In specific regard to the above-quoted job duties as a whole, both the duties initially presented and the additional duties presented in response to the RFE, the AAO finds that they neither provide, nor refer to any portion of the record of proceeding with, probative evidence that establishes substantive work that the beneficiary would perform that would not just involve marketing management at some generic level, but that would involve marketing management demonstrably 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 directly related to the proffered position, as is necessary to establish an H-1B specialty occupation under the controlling statutory and regulatory framework.

Specifically, even though the petitioner claims that the proffered position's duties are so complex and unique that a bachelor's degree is required, the petitioner failed to demonstrate how the marketing manager 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. For instance, 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 and unique. As indicated by the *Handbook, supra*, while certain college-level courses may be advantageous in performing some duties of a marketing manager 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 proffered.

Therefore, the evidence of record does not establish that this position is significantly different from other marketing manager positions such that it refutes the *Handbook's* information to the effect that there is a spectrum of preferred degrees acceptable for Marketing Manager 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 marketing management or other closely related positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent. Consequently, as the petitioner fails to demonstrate how the proffered position of marketing coordinator is so complex or unique relative to other marketing manager 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).

Of particular significance to this finding, the AAO notes that the petitioner has submitted in support of the petition an LCA that was certified as a Level I wage-rate position, a designation for an entry-level position for an employee who has only a 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. This Level I LCA wage level is not indicative of the relative level of complexity or uniqueness required to satisfy this criterion.

That *Prevailing Wage Determination Policy Guidance* instructs that LCA wage levels should be determined only after selecting the most relevant O*NET occupational code classification. Then, a prevailing-wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation. Prevailing wage determinations start with an entry level wage (i.e. Level I) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent worker) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received as indicated by the job description.

The *Prevailing Wage Determination Policy Guidance* issued by DOL provides a description of the wage levels. A Level I wage rate is described by DOL 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 id.

As the evidence in this record of proceeding does not show that the position possesses the requisite level of relative complexity or uniqueness, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Next, the AAO evaluates the record of proceeding to see whether the petitioner has established that it normally requires a degree or its equivalent for the proffered position, pursuant to the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO's review of the record of proceeding under this criterion necessarily includes whatever evidence the petitioner has submitted with regard to its past recruiting, hiring, and employment

practices and employees who previously held the position in question.

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior employment for the position. 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 the performance requirements of the proffered position.⁸ In the instant case, the record does not establish a prior history of recruiting and hiring for the proposed position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty.

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 assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position 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").

As the record contains no material evidence on point, the petitioner has not satisfied the criterion at 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's duties. In other words, the proposed duties have not been described with sufficient specificity to show that their nature is more specialized and complex than marketing manager positions whose duties are not of a nature so specialized and complex that their performance requires knowledge usually associated with a bachelor's or higher degree in a specific specialty or its equivalent.

In regard to this and all of the criteria, it is worth noting that 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. 1972)). Also, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of

⁸ Any such assertion would be undermined in this particular case by the fact that the petitioner indicated in the LCA that its proffered position is a comparatively low, entry-level position relative to others within this occupational category.

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, the AAO incorporates its earlier discussion regarding the Level I wage-level designation on the LCA, which is appropriate for duties whose nature is less complex and specialized than required to satisfy this criterion.

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 establish that it is a specialty occupation. Therefore, the AAO need not and will not address the beneficiary's qualifications further, except to note that, in any event, the petitioner did not submit an evaluation of the beneficiary's foreign academic credentials and prior work experience sufficient to establish the qualifications are equivalent to a U.S. bachelor's or higher degree in a specific specialty.

As mentioned previously, the petitioner submitted an education evaluation finding that the beneficiary's foreign education and prior work experience is equivalent to a master's degree in business administration, but does not designate a specific business specialty. The AAO notes that a degree in business administration alone is insufficient to qualify the beneficiary to perform the services of a specialty occupation, unless the academic courses pursued and knowledge gained is a realistic prerequisite to a particular occupation in the field. The petitioner must demonstrate that the beneficiary obtained knowledge of the particular occupation in which he or she will be employed. *Matter of Ling*, 13 I&N Dec. 35 (Reg. Comm'r 1968). Here, the petitioner has not established that the beneficiary is qualified to perform services in a specialty occupation, and the petition must be denied for this additional reason.

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.