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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: **MAR 04 2013** OFFICE: VERMONT SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

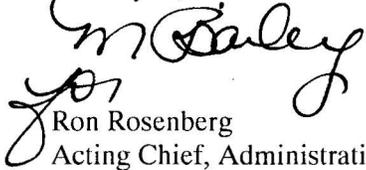
ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the Vermont Service Center on January 3, 2011. In the Form I-129 visa petition, the petitioner describes itself as an enterprise engaged in various businesses ("Grocery Store/Gift Shop/Supermarket/Rental Property Shopping Center/Motel Travel Inn") established in 1998. In order to employ the beneficiary in what it designates as a marketing director 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 on February 8, 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. In support of this assertion, counsel submitted a brief.

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 response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.¹

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, and the petition will be denied.

In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services as a marketing director to work on a full-time basis at a rate of pay of \$1,260 per week. In a support letter dated December 10, 2010, the petitioner stated that the beneficiary would be performing the following duties in the proffered position:

1. Determine the demand for products and services offered by [the petitioner's] business and [the petitioner's] competitors and identify potential customers. 7%
2. Develop pricing strategies with the goal of maximizing [the petitioner's] profit or share of the market while ensuring that [the petitioner's] customers are satisfied with the services and quality of products provided to them. 7%
3. Oversee product development and/or monitor trends that indicate the need for new products and services. 7%

¹ The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

4. Creation of and implementation of marketing strategy. 10%
5. Prepare for and run monthly strategy and events database meetings. 4%
6. Develop e-marketing strategy for conferences and develop business plans for online communities. 5%
7. Ensure business growth through preparation and execution of marketing policies. 10%
8. Conduct market research to identify market opportunities for new and existing product [sic] and services. 10%
9. Managing marketing information and measuring market demand. 30%
10. Prepare sales report & keeping [sic] daily delivery records of sales. 10%

In its letter of support accompanying the initial I-129 petition, the petitioner described the minimum educational requirements for the proffered position as "a Bachelor's Degree in Economics and/or related field and/or its Equivalent in Work Experience." The petitioner provided a copy of the beneficiary's academic credentials and letters confirming his prior work experience. In addition, the petitioner submitted an evaluation from [REDACTED]. The evaluation states that the beneficiary's degree and professional experience equate to the academic equivalent of a "Bachelor's degree in Business Administration."²

In addition, the petitioner submitted a Labor Condition Application (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 "Marketing Managers" - SOC (ONET/OES Code) 11-2021.00, at a Level I (entry level) wage.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on November 25, 2011. The AAO notes that the director specifically requested that the petitioner submit probative evidence to establish that the proffered position is a specialty occupation. In the request, the petitioner was asked to provide documentation highlighting the nature, scope, and activity of its business enterprise. Furthermore, the director notified the petitioner that the evidence provided was not persuasive in establishing that the proffered position qualifies as a specialty occupation. The petitioner was asked to provide a sampling of the work the beneficiary performed for the petitioner in connection with the prior H-1B approval.³ The director

² The AAO notes that the evaluation of the beneficiary's credentials is based on his foreign degree and work experience.

³ The petitioner submitted an H-1B petition on behalf of the beneficiary in 2008, which was approved with validity dates of October 1, 2008 to March 30, 2011. The instant petition was submitted as an extension petition. The AAO notes that the petitioner indicated on the Form I-129 and supporting documentation that the basis for H-1B classification is "[c]ontinuation of previously approved employment without change with

outlined the specific evidence to be submitted.

On January 25, 2012, the petitioner responded to the director's RFE by providing a letter of support and additional evidence. Notably, the petitioner submitted the same description of the job duties as it submitted with the initial petition. Additionally, the petitioner submitted the following evidence: (1) copies of handwritten paychecks addressed to the beneficiary; (2) financial documents for the petitioner, including copies of unsigned tax forms for 2009 and 2010; (3) the petitioner's quarterly wage reports; (4) several job announcements; (5) organizational charts; (6) Form W-2, Wage and Tax Statements, issued to the beneficiary; and (7) an Occupational Information Network (O*NET) OnLine printout for the occupational category "Marketing Managers." The petitioner elected not to submit a sampling of the work the beneficiary had performed for the petitioner in connection with the prior approval. No explanation was provided.

The director reviewed the information provided by the petitioner. 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 February 8, 2012. Counsel for the petitioner 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.

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.

The petitioner stated that the beneficiary would be employed in a marketing director position. However, to determine whether a particular job qualifies as a specialty occupation, U.S. Citizenship and Immigration Services (USCIS) does not simply rely on a position's title. As previously mentioned, 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, 387 (5th Cir. 2000). 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.

the same employer."

Thus, a crucial aspect of this matter is whether the petitioner has adequately described the duties of the proffered position, such that USCIS may discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through attainment of at least a baccalaureate degree in a specific discipline. The AAO finds that the petitioner has not done so.

In the instant case, the AAO observes that the duties of the proffered position, as described by the petitioner in support of the Form I-129 and in response to the director's RFE, have been stated in generic terms that fail to convey the actual tasks the beneficiary will perform on a day-to-day basis. The AAO notes that the several of the duties of the proffered position are virtually verbatim from the O*NET OnLine Summary Report for the occupation "Marketing Managers." For example, the description of the duties in the Summary Report states, in part, that marketing managers:

Plan, direct, or coordinate marketing policies and programs, such as determining the demand for products and services offered by a firm and its competitors, and identify potential customers. Develop pricing strategies with the goal of maximizing the firm's profits or share of the market while ensuring the firm's customers are satisfied. Oversee product development or monitor trends that indicate the need for new products and services.

(Emphasis added). O*NET OnLine, 11-2021.00 – Marketing Managers, on the Internet at <http://www.onetonline.org/link/summary/11-2021.00> (last visited February 27, 2013).

The AAO notes that providing job duties for a proffered position from O*NET is generally not sufficient for establishing H-1B eligibility. That is, while this type of generalized description may be appropriate when defining the range of duties that may be performed within an occupational category, it cannot be relied upon by a petitioner when discussing the duties attached to specific employment for H-1B approval as this type of generic description fails to adequately convey the substantive work that the beneficiary will perform within the petitioner's business operation. Accordingly, it cannot be relied upon when discussing the duties attached to specific employment. In establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in the context of the petitioner's business operations, demonstrate a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition.

Such generalized information does not in itself establish a correlation between any dimension of the proffered position and a need for a particular level of education, or educational equivalency, in a body of highly specialized knowledge in a specific specialty. The AAO also observes, therefore, that it is not evident that the proposed duties as described in this record of proceeding, and the position that they comprise, merit recognition of the proffered position as a specialty occupation. To the extent that they are described, the AAO finds the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire period requested, so as to persuasively support the claim that the position's actual work would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific specialty directly related to

the duties and responsibilities of the proffered position. Moreover, the job description fails to communicate (1) the actual work that the beneficiary would perform on a day-to-day basis; (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 assertion with regard to the educational requirement for the position is conclusory and unpersuasive, as it is not supported by the job description or probative evidence.

That is, the job duties of the proffered position, as provided by the petitioner, do not convey the substantive nature of the actual work that the beneficiary would perform. Rather, the job description conveys, at best, only generalized functions of the occupational category at a generic level. Moreover, even if the AAO were to accept the described duties of the proffered position as sufficiently specific, the AAO notes that the duties of the proffered position must be analyzed within the context of the petitioner's business operations. That is, in analyzing whether the proffered position is properly characterized as pertaining to the occupational category "Marketing Managers," the size and scope of the petitioner's business operations are aspects for review.⁴ However, in the instant case, the petitioner has provided inconsistent information regarding the nature and scope of its business operations.

More specifically, in the Form I-129, the petitioner described its business as a "Grocery Store/Gift Shop/Supermarket/Rental Property Shopping Center/Motel Travel Inn," with a gross annual income of \$200,000 and a net annual income of \$70,000. In the Form I-129, the petitioner designated its business operations under the North American Industry Classification System (NAICS) code 445110 – "Supermarkets and Other Grocery (except Convenience) Stores."¹ The U.S. Department of Commerce, Census Bureau website describes this NAICS code as follows:

This industry comprises establishments generally known as supermarkets and grocery stores primarily engaged in retailing a general line of food, such as canned and frozen foods; fresh fruits and vegetables; and fresh and prepared meats, fish, and poultry. Included in this industry are delicatessen-type establishments primarily engaged in retailing a general line of food.

See U.S. Dep't of Commerce, U.S Census Bureau, 2007 NAICS Definition, 445110 – Supermarkets and Other Grocery (except Convenience) Stores, on the Internet at <http://www.census.gov/cgi->

⁴ It is reasonable to assume that the size of an employer's organization has or could have an impact on the duties of a particular position. See *EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the duties of a particular position. In matters where a petitioner's organization is relatively small, the AAO reviews the record for evidence that its operations, are, nevertheless, of sufficient complexity to indicate that it would employ the beneficiary in position requiring the theoretical and practical application of a body of highly specialized knowledge that may be obtained only through a baccalaureate degree or higher in a specific specialty, or its equivalent. Additionally, when a petitioner employs relatively few people, it may be necessary for the petitioner to establish how the beneficiary will be relieved from performing non-qualifying duties. Notably, the director raised this issue in the RFE. However, the petitioner failed to acknowledge the concern or address how the beneficiary will be relieved from performing non-qualifying duties.

bin/sssd/naics/naicsrch (last visited February 27, 2013).

However, on the IRS Forms 1120S for 2009 and 2010, submitted in response to the director's RFE, the petitioner classified its operations under the code 445120 – "Convenience Stores." The U.S. Department of Commerce, Census Bureau website describes this NAICS code as follows:

This industry comprises establishments known as convenience stores or food marts (except those with fuel pumps) primarily engaged in retailing a limited line of goods that generally includes milk, bread, soda, and snacks.

See U.S. Dep't of Commerce, U.S Census Bureau, 2007 NAICS Definition, 445120 – Convenience Stores, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited February 27, 2013).

Notably, in letters submitted by the petitioner in support of the petition (dated December 10, 2010, and January 2, 2012), the petitioner described itself as an enterprise engaged in the purchase and sale of perishable and nonperishable goods. Thus, upon review of the record of proceeding, the petitioner has failed to provide consistent information regarding the nature of its business operations such that the AAO can ascertain the conditions under which the beneficiary will be performing the described duties.

Moreover, the record of proceeding reflects that the petitioner has provided inconsistent representations in regard to the number of individuals it employs. On the Form I-129, the petitioner stated that it had "10 + average" employees.⁵ In its letter of support dated December 10, 2010, the petitioner indicated that it had "2+ full time" employees. In response to the director's RFE, in a letter dated January 2, 2012, the petitioner indicated that it had "2+ full time" employees. Furthermore, the AAO reviewed the tax documents submitted in response to the RFE, and notes several inconsistencies with regard to the number of employees. The (unsigned) IRS Form 941 for 2011 states that there are four employees. Similarly, the printout from the State of Florida Department of Revenue regarding out of state taxable wages for the quarter ending December 31, 2011, indicates that there are four employees. In the instant case, there are discrepancies in the record of proceeding as to the number of people employed by the petitioner. Nevertheless, the evidence indicates that the petitioning company employs relatively few people.

The AAO notes that the petitioner submitted a block-and-line organizational chart in response to the RFE. The AAO reviewed the organizational chart and observes that it indicates that the owner serves as the manager/director of the petitioning company. The organizational chart further states: "Schedule: varies 1:00pm thru 6:00pm some days and others from 10:00am thru 4:00pm." Notably, the owner repeatedly claims in the record of proceeding that he is also operating five other businesses. Presumably, the owner's time is also allocated to operating these businesses. The organizational chart indicates that the beneficiary works from 9:00 a.m. to 5:00 p.m. In addition,

⁵ The owner of the petitioning company claims that he owns several other businesses. In letters (dated December 10, 2010, and January 2, 2012), the owner indicated that he employs a total of 16 employees.

one "sales" employee works from 8:00 a.m. to 1:00 p.m., and another "sales" employee works from 4:00 p.m. to 11:00 p.m.⁶ Thus, from 1:00 p.m. to 4:00 p.m., the manager/director and the beneficiary are the only individuals working at the petitioner's business location. There is no explanation as to who performs the "sales" functions and/or assists customers during this three hour period.

The petitioner claims that the beneficiary serves as the marketing director and that his duties include overseeing and managing various functions. In addition, according to the petitioner, the beneficiary will be "an asset to [the] company in this managerial position." Thus, the petitioner claims that the beneficiary will serve in a directorial/managerial role; however, the petitioner does not claim to have anyone else on its staff to actually perform the marketing function. Although the petitioner claims the proffered position is a managerial position, it failed to establish how the beneficiary's immediate duties will primarily involve managerial duties. Based upon the information provided, there will not be any subordinate employees to relieve the beneficiary from performing non-management duties. Rather, the petitioner indicated that the beneficiary would be the only individual to perform any marketing-related functions. Thus, it can only be assumed, and has not been established otherwise, that the beneficiary will perform all marketing functions, including those that would be normally associated with subordinate workers, and that, in the absence of such subordinates, would preclude the beneficiary from functioning in a primarily managerial role. Generally, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial capacity. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988).

As previously mentioned, the petitioner submitted an H-1B petition on behalf of the beneficiary in 2008, which was approved with validity dates of October 1, 2008 to March 30, 2011. The AAO notes that the petitioner indicated on the Form I-129 and supporting documentation that the basis for H-1B classification is "[c]ontinuation of previously approved employment without change with the same employer." However, in response to the director's request for evidence regarding the petitioner's hiring practices, the owner of the petitioning company provided the following statement:

Petitioner and its staff have been looking for an individual who is experienced, academically educated and **specialized in marketing procedures** with the necessary skills to aim [its] business goals and to assure the continue[d] growth and success of [the] business. The undersign [the owner] has diligently performed this task without success and has been unable to find a qualified candidate to fill the position offered to the Beneficiary. The Petitioner has not had a person in the position offered however, the position and its requirements are a must for continue[d] success and growth of [the] business.

⁶ As described by the petitioner in the chart, the sales employees "receive, store, and issue sales floor merchandise, stock shelves, racks, cases, bins and tables with merchandise and arrange merchandise displays to attract customer[, and] [t]ake physical count of stock, check and mark merchandise[.]"

(Emphasis in original.) Thus, according to the owner of the petitioning company, he (rather than the beneficiary) has been performing the marketing duties. The statement further undermines the credibility of the instant petition.

Moreover, the AAO notes that upon review of the record, there are discrepancies regarding the wages paid to the petitioner's employees, which further undermine the credibility of the petitioner's claims. The AAO notes that the printout from the State of Florida Department of Revenue regarding taxable wages for the quarter ending December 31, 2011, indicates that the petitioner's two "sales" employees, as described on the organizational charts, each earned \$2040 for the quarter. This amount equates to approximately \$170 per week per employee. Thus, taking into account the federal minimum wage, it is not clear that there is always a second employee on the premises during the beneficiary's working hours. Thus, for this reason also, the AAO must question whether the beneficiary is performing the duties as claimed in the petition, and how the beneficiary is relieved from performing non-qualifying duties. In addition, the AAO notes that the unsigned IRS Form 1120S for 2010 submitted by the petitioner in response to the RFE states that the petitioner paid \$61,500 in salaries and wages. The petitioner submitted photocopies of the beneficiary's paychecks for 2010, which indicate that the beneficiary earned gross wages of \$4,800 a month (\$57,600 for the year). Thus, the AAO calculates that the remainder of the petitioner's employees earned a total of approximately \$3,900 during the entirety of 2010. These calculations conflict with both the tax liability reported to the State of Florida, and the employees' work schedules as stated by the petitioner on the organizational charts submitted in response to the RFE.⁷ In light of the conflicting information in the record concerning the petitioner's staffing of its business operations, the AAO must find that the petitioner has not met its burden of proof in this regard.⁸

Further, in light of the size and scope of the petitioner's business operations, the petitioner has not credibly established that its business requires the services of a full-time marketing director. For

⁷ The AAO takes administrative notice that the Federal Minimum Wage in 2010 was \$7.25 per hour. U.S. Department of Labor, "History of Federal Minimum Wage Rates Under the Fair Labor Standards Act, 1938 – 2009," available on the Internet at <http://www.dol.gov/whd/minwage/chart.htm> (last visited on February 27, 2013). Thus, it would be impossible for the employees to comply with the work schedules provided by the petitioner on the organizational chart while earning the minimum wage to which they are entitled by law. No explanation was provided by the petitioner.

⁸ The AAO also notes that in its letters dated December 10, 2010 and January 2, 2012, the petitioner provided a chart of businesses that are owned by the same individual as the petitioner that lists the number of employees at each business. The petitioner submitted tax returns for several of these businesses in response to the RFE. The AAO notes that although the stated number of employees at the various businesses are similar to the number of individuals employed by the petitioner (i.e., two to four employees), the amount reported on the tax returns for salaries and wages is substantially lower than that reported on the petitioner's tax returns. For example, the Form 1120S for [REDACTED] for 2010 reports \$5,100 in salaries and wages. The petitioner indicated that this business employs two individuals. The Form 1120 for [REDACTED] reports \$2,700 salaries and wages for 2010. The petitioner indicated that this business employs two individuals. The petitioner also submitted tax returns for [REDACTED]

[REDACTED] These businesses do not appear in the petitioner's list of businesses with shared ownership. No further information or explanation was provided by the petitioner.

example, in the context of a grocery store with an annual gross income of \$200,000 per year, it is not clear what the petitioner means when it states that the beneficiary will be "develop[ing] e-marketing strateg[ies] for conferences" and "develop[ing] business plans for online communities." Moreover, although the beneficiary has served in the position for three years, the petitioner failed to provide any evidence to substantiate the beneficiary's work, including the existence of any online marketing activities associated with its business operations. Further, the petitioner stated that the beneficiary will engage in "product development." As previously noted, the petitioner stated that it is "engaged in the purchase and sale of perishable and non-perishable goods." Accordingly, the record is unclear as to what products it "develops" for its business. The petitioner has failed to provide any evidence of products that have been developed by the beneficiary. The AAO notes that in the RFE, the director specifically requested the petitioner "[s]ubmit a sampling of the work the beneficiary performed for [its] office in connection with his previous approval." The record is devoid of any such evidence. 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, the petitioner has not provided sufficient evidence to establish that the beneficiary has been performing, and will continue to perform, the duties as described.

Moreover, the AAO observes that 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.

That is, the petitioner submitted an LCA in support of the instant petition that designated the proffered position under the occupational category of "Marketing Managers" - SOC (ONET/OES) code 11-2021. The petitioner stated in the LCA that the wage level for the proffered position was a Level I (entry) position, with a prevailing wage of \$31.10 per hour (\$64,688 per year). The LCA was certified on December 3, 2010. The petitioner signed the LCA, attesting that the information provided was true and accurate.

Wage levels should be determined only after selecting the most relevant O*NET 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.⁹ 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

⁹ 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.

and level of supervision, and the level of understanding required to perform the job duties.¹⁰ 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.

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 its December 10, 2010 letter, the petitioner states that the position requires an individual with "vast experience in the field." In response to the RFE, the petitioner states that its "success in the industry is mostly owed to the well management, and the specific marketing strategies applied throughout the years." The petitioner continued by claiming that it requires "a person who is well qualified and who possess (sic) vast experience in the field and is also academically educated in marketing procedures." According to the petitioner, the beneficiary "would be an asset to [the] company in this managerial position." Moreover, the petitioner claims that it seeks "an individual who is experienced, academically educated and specialized in marketing procedures with the necessary skills to aim [its] business goals and assure the continued growth and success of [its] business." The petitioner references the "demanding duties" of the proffered position and claims that it "urgently requires the Beneficiary's services."

¹⁰ 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.

Furthermore, the petitioner's counsel represents the proffered position as "specialized," requiring a person who is "highly trained and knowledgeable of the industry and the products offered by the petitioner." Counsel asserts that the proffered position "is unique and complex and not only requires a person knowledgeable of the industry and services provided by the [p]etitioner, but also who is highly prepared and educated to be able to develop strategies to increase business profitability." On appeal, counsel states that the position is "unique and complex," and requires "advanced skills." According to counsel, the marketing director position is "vital for the successful functioning of the company." Counsel asserts that the "position is complex and unique and requires application of research techniques" and that "advanced skills acquired in Economics and Marketing courses are necessary." Counsel also references the "level of expertise" required for the proffered position. Further, counsel states that the "highly specialized nature of the position" requires an individual with "expertise in the areas [sic] of [m]arketing and who is familiar with the market and products prices," and that the beneficiary will "apply his knowledge of the industry to recommend [to] managers the most profitable way to attract and retain clientele."

The AAO observes that the petitioner indicated that it will be relying heavily on the beneficiary to make critical decisions regarding the marketing of the petitioner's business and products. Such reliance on the beneficiary's work appears to surpass the expectations of a Level I position, as described above, in which the employee works under close supervision, performing routine tasks that require only a basic understanding of the occupation and has limited exercise of judgment. Here, rather than the beneficiary's work being "monitored and reviewed for accuracy," the petitioner and counsel suggest that the petitioner is relying on the beneficiary services to ensure the growth and success of the petitioner's business.

Thus, upon review of the assertions made by the petitioner and counsel, the AAO must question the level of complexity, independent judgment and understanding actually required for the proffered position as the LCA is certified for a Level I entry-level position. This 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 he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and her work closely monitored and reviewed for accuracy; and that he 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. 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 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 [DOL] 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 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) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit a valid LCA that corresponds to the claimed duties and requirements of the proffered position, that is, specifically, that corresponds to the level of work, responsibilities and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work, responsibilities and requirements in accordance with the pertinent LCA regulations.

The statements regarding the claimed level of complexity, independent judgment and understanding required for the proffered position are materially inconsistent with the certification of the LCA for a Level I entry-level position. This conflict undermines the overall credibility of the petition. 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. As a result, even if it were determined that the petitioner overcame the other independent reason for the director's denial (which it has not), the petition could not be approved for this 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, and for the specific reasons described below, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation.

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 387. 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), 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 147 (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.

The AAO now turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). In the interest of efficiency, the AAO hereby incorporates the above discussion and analysis regarding the duties and requirements of the proffered position into the analysis of each criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which follows below.

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 the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹¹ As previously mentioned, the petitioner asserts in the LCA that the proffered position falls under the occupational category "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.¹² The AAO reiterates that the petitioner has provided inconsistent

¹¹ 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/>.

¹² For additional information regarding marketing manager positions, see U.S. Dep't of Labor, Bureau of

information regarding the proffered position. However, even assuming *arguendo* that the proffered position falls under this occupational category, the AAO notes that the *Handbook* does not indicate that these positions comprise an occupational group for which normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or the equivalent.

The "Advertising, Promotions, and Marketing Managers" chapter of the 2012-2013 edition of the *Handbook* describes the educational requirements for a marketing manager as follows:

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.

Occupational Outlook Handbook, 2012-13 ed., Advertising, Promotions, and Marketing Managers, available on the Internet at <http://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm#tab-4> (last visited February 27, 2013).

When reviewing the *Handbook*, the AAO must note again that the petitioner designated the proffered position as a Level I (entry level) position on the LCA. 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 indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that he would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results.

The *Handbook* does not support the assertion that a baccalaureate or higher degree *in a specific specialty*, or its equivalent, is normally the minimum requirement for entry into the occupation. The passage of the *Handbook* states that most marketing managers have a bachelor's degree, but it does not indicate that any specific specialty is normally required for these positions.¹³ The *Handbook*

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-1> (last visited February 27, 2013).

¹³ Moreover, 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 these positions have a bachelor's degree, it could be said that "most" advertising, promotions, and marketing managers possess such a degree. It cannot be found, therefore, that the statement in the *Handbook* that a "[m]ost marketing managers have a bachelor's degree [with no specification as to the field of study]" would equate to establishing that a baccalaureate or higher degree *in a specific specialty*, or its equivalent, is the normal minimum entry requirement for this occupation, much less for the particular position proffered by the petitioner. (which as has been designated by the petitioner in the LCA as 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

indicates that courses in business law, management, economics, accounting, finance, mathematics, and statistics are advantageous for marketing managers. The AAO notes that the courses that the *Handbook* indicates are advantages for marketing managers are in a wide-variety of disparate fields. The *Handbook* does not conclude that normally the minimum requirement for entry into these positions is at least a bachelor's degree in a specific specialty, or its equivalent.

The AAO reiterates that the *Handbook* does not denote that at least a bachelor's degree is a standard entry requirement for this occupation. However, assuming *arguendo* that the *Handbook* stated a requirement for at least a bachelor's degree for entry into this occupational category (which it does not), 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 disparate fields 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.¹⁴ Section 214(i)(1)(B) of the Act (emphasis added).

Here, although the *Handbook* states that a bachelor's degree is required for most marketing management positions, it also indicates that "[c]ourses in business law, management, economics, accounting, finance, mathematics, and statistics are advantageous" for marketing managers. Thus, courses of study in a wide-range of disparate fields are considered relevant and/or advantageous for entry into the occupation. Notably, these dissimilar courses of study fail to delineate a specific specialty. Thus, the *Handbook's* narrative does not support the assertion that positions in this occupation normally require at least a bachelor's degree in a specific specialty, or its equivalent, for entry into the occupation.

It is incumbent upon the petitioner to provide persuasive evidence that the proffered position qualifies as a specialty occupation under this criterion, notwithstanding the absence of *Handbook* support on the issue. 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." Going on record without supporting documentary evidence is not sufficient for

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.

¹⁴ 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.

purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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 into the occupation. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding 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 of proceeding 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 of 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. Also, there are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement. Furthermore, the petitioner did not submit any letters or affidavits from similar firms or individuals in the petitioner's industry attesting that such firms "routinely employ and recruit only degreed individuals."

In the instant case, in response to the RFE, the petitioner submitted five job postings in support of this criterion of the regulations. The AAO reviewed the job announcements submitted by the petitioner; however, the petitioner's reliance on the job postings is misplaced.

The AAO notes that under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), the petitioner must establish that "the degree requirement is common to *the industry in parallel positions among similar organizations.*" (Emphasis added.) That is, this prong requires the petitioner to establish that a requirement of a bachelor's 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 petitioner to establish that organizations are similar, it must demonstrate that the petitioner and the organization share the same general characteristics.¹⁵ Without such information, evidence submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and an organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner and counsel to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

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, or its equivalent, is common to the petitioner's industry in similar organizations for parallel positions to the proffered position. Contrary to the purpose for which they were submitted, none of the announcements indicate that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the positions.¹⁶

Specifically, the AAO notes that none of the job announcements appear to be for organizations that are similar to the petitioner. The advertising companies include [REDACTED] described as an "e-Commerce" company; [REDACTED] a cosmetics company; [REDACTED] described as "a geo-social classifieds application made exclusively for college students"; [REDACTED] described as "the world's largest electronic security and alarm monitoring provider to residential, commercial, industrial and governmental customers"; and [REDACTED] which lacks a description of the business operations. None of the descriptions of the advertising companies indicate that they are supermarkets, convenience stores or similar businesses. Thus, without further information, the advertisements appear to be for organizations that are not similar to the petitioner and the petitioner has not provided any probative evidence to suggest otherwise. That is, the petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organizations.

As noted earlier, the petitioner designated the proffered position as a low, entry level position in the LCA. Notably, several of the job announcements submitted by the petitioner advertise positions

¹⁵ As previously mentioned, in the Form I-129, the petitioner described its type of business as "Grocery Store/Gift Shop/Supermarket/Rental Property Shopping Center/Motel Travel Inn." The petitioner further stated that it was established in 1998. According to the petitioner, it has a gross annual income of approximately \$200,000 and a net annual income of approximately \$70,000. In response to the RFE, the petitioner provided a block and line organizational chart indicating that, aside from the owner/president, it has three employees. As noted above, on the Form I-129 petition, the petitioner designated its business operations under the NAICS code 445110 – "Supermarkets and Other Grocery (except Convenience) Stores."¹⁵ Notably, on the petitioner's 2009 and 2010 tax returns, the petitioner classified its operations under the code 445120 – "Convenience Stores."

¹⁶ Moreover, the petitioner did not provide any independent evidence of how representative these job postings 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.

that do not appear to be parallel to the proffered position. For example, some of the postings appear to be for more senior jobs than the proffered position. The petitioner submitted a posting for a VP of Ecommerce and Marketing with [REDACTED] which has a base pay of \$100,000 per year. The position requires a degree and five years of experience. The petitioner also provided a posting for a Marketing Director with [REDACTED] which requires a degree and 10 years of experience. Furthermore, the Director, Marketing and Communications position with [REDACTED] requires a degree and 5 to 8 years of experience. In addition, the petitioner submitted a posting for a Trade Marketing Director position with [REDACTED] which requires a degree and at least five years of experience. Moreover, the advertisement states that the employee will "[w]ork as part of a team to serve as liaison between sales and marketing." In addition, the territory for the position includes North and South America, including "24 accounts with a clear focus on Brazil, Mexico" and the employee is responsible for brand strategies. Upon review of the job postings (including the requirements and duties), it does not appear that the advertised positions are parallel positions involving primarily and essentially the same duties and responsibilities as the proffered position.

Moreover, contrary to the purpose for which they were submitted, some of the job postings do not indicate that at least a bachelor's degree in a specific specialty, or its equivalent, is required. For instance, the posting for a VP of Ecommerce and Marketing at [REDACTED] and the posting for the director of marketing and communications at [REDACTED] both list "Bachelor's degree" as an acceptable educational requirement. The announcement for a Trade Marketing Director of Cosmetics at [REDACTED] requires a "bachelor's degree" or equivalent marketing experience. The Marketing Coordinator position at [REDACTED] simply requires a "4 year degree," and the Marketing Director position at [REDACTED] states the education requirement as "BA/BS."

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 position. Although a general-purpose bachelor's degree 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).¹⁷ In

¹⁷ 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.

the instant case, the petitioner submitted job postings in which a bachelor's degree (no specific specialty) is sufficient for the advertised positions. Thus, the job postings do not establish that the advertising employers require at least a bachelor's degree *in a specific specialty*, or its equivalent.

The AAO reviewed all of the advertisements submitted by the petitioner. However, 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 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.¹⁸

Thus, based upon a complete review of the record of proceeding, the AAO finds that the petitioner has not established that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. Thus, 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.

¹⁸According to the *Handbook's* detailed statistics on this occupation, there were approximately 178,200 persons employed as marketing managers in 2010. *Handbook*, 2012-13 ed., available at <http://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm#tab-6> (last accessed February 27, 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.

On appeal, counsel asserts that the proffered position "is unique and complex and not only requires a person knowledgeable of the industry and services provided by the [p]etitioner, but also who is highly prepared and educated to be able to develop strategies to increase business profitability." The AAO acknowledges that the petitioner and counsel may believe that the proffered position is so complex and/or unique that it can be performed only by an individual with at least a bachelor's degree. In support of the assertion, the petitioner submitted evidence regarding its business operations, including various financial documents; organizational charts; and documentation issued to the beneficiary (checks, Form W-2s).¹⁹ Upon review of the evidence submitted, the AAO finds that the petitioner has not established complexity or uniqueness as attributes of the proffered position that would require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent.

More specifically, the evidence in the record of proceeding fails to demonstrate how the duties of the proffered position require the theoretical and practical application of a body of highly specialized knowledge such that a baccalaureate 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 that it claims are so complex or unique. While related courses may be beneficial, or even required, in performing certain duties of the proffered position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here.

The AAO reviewed the record in its entirety and 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. 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 AAO again notes that the petitioner has classified the proffered position as a Level I (entry level) position on the LCA. 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 indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that he would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results.

Further, the AAO must assess the complexity and uniqueness of the duties within the context of the petitioner's business operations, in this case a 2+ employee supermarket or convenience store. In

¹⁹ The petitioner further submitted a list of other business entities, along with financial documents, that share common ownership with the petitioner. However, as explained by the director in the RFE, the petitioner is the only relevant employer to the instant I-129 petition. If the beneficiary were scheduled to perform work for any other employer, that employer would need to submit a separate I-129 petition for the portion of the beneficiary's time to be spent performing duties for that employer.

the instant case, the record lacks sufficient probative evidence 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 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 a bachelor's degree in a specific specialty, or its equivalent, is not required for these positions. In other words, the record lacks sufficiently detailed information to discern the proffered position as unique from or more complex than similar positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

The AAO observes that the petitioner and counsel have indicated that the beneficiary's background will assist him in carrying out the duties of the proffered position, and takes particular note of his academic degree and prior experience. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner does not explain or clarify at any time in the record which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner has thus failed to establish the proffered position as satisfying the second prong of the criterion at 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. To this end, the AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

To merit approval of the petition under 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. Upon review of the record of proceeding, the petitioner has not established 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.

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").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. See *generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of 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. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. See *id.* at 388.

The petitioner stated in the Form I-129 petition that it was established in 1998 (approximately thirteen years prior to the filing of the H-1B petition). In response to the RFE, the petitioner indicated that it has two employees, aside from the owner/president and the beneficiary. Further, in response to the RFE, the petitioner indicated that the proffered position is a new position, held only by the beneficiary through a prior approved H-1B petition. The record of proceeding does not contain any documentation regarding employees who have previously held the position and/or probative evidence regarding the petitioner's recruiting and hiring practices. The record is devoid of information to satisfy this criterion of the regulations.

Upon review of the record, the petitioner has not provided probative 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.

On appeal, counsel refers to "the highly specialized nature of the position being offered, which requires the individual to have expertise in the areas of Marketing and who is familiar with the market and product prices." In support of the petition, the petitioner submitted various documents, including evidence regarding its business operations such as unsigned tax forms, quarterly wage reports, and organizational charts. The AAO acknowledges that the petitioner and counsel may believe 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. However, the AAO reviewed the documentation submitted by the petitioner and finds that it fails to support the petitioner's assertion that the proffered position qualifies as a specialty occupation under this criterion of the regulations. More specifically, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position.

Moreover, the petitioner has designated the proffered position as a Level I position on the submitted LCA, indicating that it is an entry-level position for an employee who has only basic understanding of the occupation. Therefore, it is simply not credible that the 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.

In this regard, the AAO here refers back to, and hereby incorporates by reference, its earlier analysis, comments, and findings with regard to the petitioner's generalized and generic descriptions of the duties and the position they comprise, the discrepancies in the record, and the lack of evidence substantiating the duties and responsibilities of the position. As described, the AAO finds, the evidence in the record of proceeding does not provide a sufficient factual basis to convey a persuasive basis to discern the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire three-year period requested, such that they persuasively support any claim in the record of proceeding that the work that they would generate would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific performance specialty directly related to the demands of the proffered position.

The petitioner has submitted inadequate probative evidence to satisfy this criterion of the regulations. Thus, the petitioner has not established that the duties of the position are 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. 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.

Beyond the decision of the director, the petitioner has failed to establish that the beneficiary is qualified to perform the duties of a specialty occupation. Even if the petitioner established that the proffered position qualified as a specialty occupation (which it has not), the beneficiary would not qualify to perform the duties of that specialty occupation based on his education credentials, because it has not been demonstrated that the beneficiary possesses a degree in a specialized field of study.

Specifically, while an evaluation of the beneficiary's academic credentials prepared by [REDACTED] states that, based on the beneficiary's education and work experience, he "has attained the equivalent of a Bachelor's Degree in Business Administration from an accredited institution of higher education in the United States," it fails to designate any specific business

specialty.²⁰ The AAO notes that a general degree in business administration alone is insufficient to qualify the beneficiary to perform the services of a specialty occupation, unless the academic courses pursued and knowledge gained is a realistic prerequisite to a particular occupation in the field. *Matter of Ling*, 13 I&N Dec. 35 (Reg. Comm'r 1968). The petitioner must demonstrate that the beneficiary obtained knowledge of the particular occupation in which he or she will be employed. *Id.* Thus, even if the petitioner had demonstrated that the proffered position requires at least a bachelor's degree in a specific specialty, or its equivalent, the petition could not be approved, because the petitioner failed to demonstrate that the beneficiary has taken courses or gained knowledge considered to be a realistic prerequisite to any specific specialty within the field of business. For this additional reason, the petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 145 (noting that the AAO conducts appellate review on a *de novo* basis).²¹

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 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. Here, that burden has not been met.

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

²⁰ Furthermore, there is no independent evidence in the record from appropriate officials, such as deans or provosts, to establish that, at the time of the evaluation, the evaluator was, in the language of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(I), "an official [with] authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience." Thus, the evaluator has not established that he is competent under 8 C.F.R. § 214.2(h)(4)(iii)(D)(I) to evaluate the educational equivalency of the beneficiary's work experience. Accordingly, this evaluation, does not meet the standard of 8 C.F.R. § 214.2(h)(4)(iii)(D)(I) for competency to render an opinion on the educational equivalency of work experience.

²¹ As noted, the AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 145. However, as the appeal is dismissed for the reasons discussed above, the AAO will not further discuss the additional issues and deficiencies that it observes in the record of proceedings.