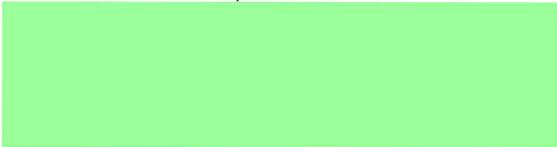


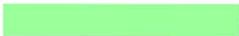
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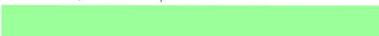


U.S. Citizenship  
and Immigration  
Services



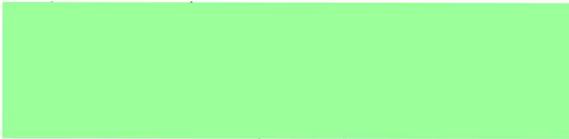
Date: **MAR 05 2013**

Office: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

  
Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa filed on February 1, 2012. 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 an online automotive rental club with 3 employees and an estimated gross annual income of \$1,000,000. It seeks to employ the beneficiary in what it designates as an advertising and promotions manager position, and 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 the grounds that the petitioner failed to establish that the proffered position qualifies for classification as a specialty occupation.

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

The LCA submitted by the petitioner support the petition was certified for the Standard Occupational Classification (SOC) code 11-2011, the associated occupational classification for Advertising, Promotions, and Marketing Managers, and a Level I prevailing wage rate.

At the outset, the AAO will address counsel's statement regarding the "preponderance of the evidence" standard. On appeal, counsel for the petitioner argues, correctly, that the "preponderance of the evidence" standard is relevant to this matter, and also argues that under that standard, the petitioner clearly established through credible and uncontested evidence that the proffered position is a specialty occupation. Counsel also argues that the proffered duties come under the section in the *Handbook* on accountants and auditors. Additionally, counsel states that the director erroneously classified the proffered position as an accounting clerk position.

With respect to the preponderance of the evidence standard, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), states in pertinent part the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

\* \* \*

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case.

\* \* \*

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Applying the preponderance of the evidence standard, the AAO finds that the proffered position is not a specialty occupation, for the reasons stated below.

Next, the AAO will address salient evidence and statements within the record of proceeding presented by counsel that demonstrates inconsistency as it pertains to the petitioner's business organization that has a decisive negative impact on the outcome of this case. The AAO observes that on the Form I-129 Petition for a Nonimmigrant Worker that the business listed three employees. This statement is directly contradicted by the petitioner's organizational chart presented within the RFE response, showing 10 individuals within its hierarchy and staffing. Also of note, the organizational chart does not show the proffered position as one that entails supervision of other employees, whereas the initial support letter stated that the beneficiary would oversee a creative staff that develops the advertising. The AAO finds it improbable that the beneficiary would be engaged in overseeing a creative staff developing the advertising, a statement that is not congruent with the submitted line and block chart of the petitioner's staffing, showing that the beneficiary does not have staff beneath him. 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). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The primary issue that the AAO will consider 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.

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

occupation that requires:

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

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

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise

interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category. Next, the AAO will examine the specific duties of the proffered position and will consider whether executing the duties necessarily involves the application of a body of highly specialized knowledge.

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.

Next, the AAO will examine the specific duties of the proffered position, and will determine whether executing these duties necessarily involves the application of a body of highly specialized knowledge.

In its support letter, the petitioner stated that it needed an advertising and promotions manager to realize desired levels of performance and profitability, and the petitioner identified the following as duties of the proffered position:

- Inspect layouts and other promotional material for adherence to specifications;
- Plan and prepare advertising and promotional material to increase [rentals], services, and interaction with clients;

- Gather and organize information to plan advertising campaigns;
- Confer with department heads to discuss topics such as selection of advertising media;
- Prepare budgets and submit estimates for program costs as part of campaign plan development; and
- Plan and execute advertising policies and strategies for [the petitioner].

Additionally, counsel presented a narrative description of the duties, which is presented below in a bullet format below for ease of review:

- Direct [the petitioner's] programs that combine advertising with purchasing incentives to increase our rentals;
- Responsible for incentives that may include discounts, samples, gifts and rebates;
- Work with sales staff and others to generate ideas for the campaign, oversee a creative staff that develops the advertising;
- Work with the finance department to prepare a budget and cost estimates for the campaign; and
- Serve as a liaison between the web designers and the advertising personnel that actually creates and places the ads.

The petitioner submits that the above-described duties constitute sophisticated responsibilities, and as such, they require the application of specialized knowledge ordinarily attained through the completion of a bachelor's degree in business administration or its equivalent.

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.

Counsel for the petitioner submitted a response to the director's RFE, including a letter dated December 23, 2011, together with additional evidence, including a document entitled, "Advertising & Promotions Manager Detailed Job Description," with the anticipated percentages of time allocated to three sets of tasks. This job description restates the initially presented tasks, but also fleshes out the responsibilities and sets forth the specific allocation of time by function as detailed below:

**Search Engine Marketing-Managing \$400,000 in search marketing (50% of time)**

This involves managing the company's annual \$400,000 search engine marketing budget with [REDACTED]. We currently spend this budget running pay-per-click (PPC) ads on [REDACTED] search engine and their related search properties. As part of this responsibility, [the beneficiary] will be required to optimize search-related ads, keywords, and campaign targeting and settings to optimize the Return On Investment (ROI) metrics associated with this marketing spend.

**Search Engine Optimization-SEO Management for Google, Bing and Yahoo (25% of time)**

This involves monitoring and improving the business listings as they show up in search results. This is relevant because many of our customers search for luxury cars online, and click on the links they see in search engines. Showing up higher in search results increases exposure, traffic and sales. This requires analytical and marketing skills in measuring hundreds of variables that Google and other search engines look for such as keyword density, HTML meta-tags, page-rank, and incoming links. Building a network of websites linking back to us is also part of this responsibility.

**Email Marketing Campaigns & Other Assignments (25% of time)**

This involves conducting weekly email marketing campaign targeting potential customers in key cities where we operate. Email addresses for these customers have to be generated via lead-generation or purchasing from vendors, and involves data quality analysis and lead testing. We conduct one or more of these campaigns every week.

Other assignments include banner advertising on various websites, analytics tracking in [REDACTED] and daily reports on how our key performance metrics are doing.

Based on the duties bulleted above, counsel reasoned that the position is clearly a specialty occupation, and stated that the minimum education level for entry into the position is a bachelor's degree. More specifically, counsel maintains that the position and its complex constituent duties are so critical to the petitioner's mission that it realistically requires a bachelor's degree.<sup>1</sup> In further support of the contention that a bachelor's degree is normally required for entry into the occupation, counsel submitted five job listings and an organizational chart depicting the petitioner's hierarchy and staffing levels.

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<sup>1</sup> The AAO notes that counsel argued in the RFE response letter that it is unrealistic for a candidate not to have a bachelor's degree in engineering, due to the complex software and web structures and processes required to revolutionize the car rental industry. Presumably, the shift in argument to a degree in engineering as applicable to complex software and web structures was not intended for this RFE response letter, as both the degree, and the focus on web structures and software seems incongruent with the thrust of the instant petition.

The director denied the petition on February 1, 2012, finding that the proffered position is not a specialty occupation in accordance with the applicable statutory and regulatory provisions. 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."<sup>2</sup>

On appeal, counsel for the petitioner contends that the decision was erroneous and that the petitioner meets all evidentiary criteria. In particular, counsel asserts that the director erred in finding that: the position does not qualify as a specialty occupation; the particular position is not so complex or unique that it can be performed only by an individual with a degree; and that the nature of the specific duties are not so specialized and complex that knowledge required to perform the duties is usually associated with a baccalaureate or higher degree. No new evidence was submitted on appeal.

As a preliminary matter, even if the petitioner had substantiated its claim that a bachelor's 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. 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, 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).<sup>3</sup>

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<sup>2</sup> 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/>.

<sup>3</sup> 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

For the purpose of performing a comprehensive analysis of whether the proffered position qualifies as a specialty occupation, the AAO turns next 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 *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 a "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:

- 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.

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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.

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 Edition*, "Advertising, Promotions, and Marketing Managers," on the Internet at <http://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm> (last visited January 17, 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 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.<sup>4</sup>

### **Education**

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

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

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, "Advertising, Promotions, and Marketing Managers," on the Internet at <http://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm> (last visited January 17, 2013).

Here, although the *Handbook* indicates that a bachelor's or higher degree is required for most positions within the occupational category, it also indicates that baccalaureate degrees in various courses of study with a distinctly different focus and academic concentration from each other are acceptable for entry into the occupation. This particular range of acceptable relevant courses of study is so broad, the AAO finds, that is not indicative of a specialty occupation position. Accordingly, as the *Handbook* indicates that working as an advertising and promotions manager

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<sup>4</sup> 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.

does not normally require at least a bachelor's degree in a specific specialty or its equivalent for entry into the occupation, the *Handbook* does not support the proffered position as being a specialty occupation.

Counsel also asserts that the Occupation Information Network (O\*NET) unambiguously states that the Advertising, Promotions, and Marketing Managers occupational category is designated a job zone 4 rating, and as such, a bachelor's degree is the normal requirement for entry into the profession. The AAO notes that the O\*NET Summary Reports, referenced by counsel, 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 January 17, 2013, the AAO accessed the pertinent section of the O\*NET OnLine Internet site relevant to 11-2011.00 – Advertising, Promotions, and Marketing Managers. Contrary to the assertions of counsel, O\*NET OnLine does not state a requirement for a bachelor's degree. Rather, it assigns this occupation a Job Zone "Four" rating, which groups it among occupations of which "most," but not all, "require a four-year bachelor's degree." Further, O\*NET OnLine does not indicate that four-year bachelor's degrees required by Job Zone Four 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.

As a final matter, counsel maintains that USCIS has historically and routinely determined that the occupational category of Advertising, Promotions, and Marketing Managers is one that requires at least a bachelor's degree in business administration, and as such, that a position within the occupational classification is one that is a specialty occupation. In support of this claim, counsel sites to two unpublished AAO decisions. The AAO notes that counsel fails to document his claim by providing any precedent decision or even any study to support his claim—and the AAO knows of none. Further, if a petitioner wishes to have unpublished decisions considered by USCIS in its adjudication of a petition, the petitioner is permitted to submit copies of such evidence that it either obtained itself through its own legal research and/or received in response to a Freedom of Information Act request filed in accordance with 6 C.F.R. Part 5. Otherwise, "[t]he non-existence or other unavailability of required evidence creates a presumption of ineligibility." 8 C.F.R. § 103.2(b)(2)(i). In the instant case, the petitioner failed to submit copies of the unpublished decisions. As the record of proceeding does not contain any evidence of the unpublished decisions, there were no underlying facts to be analyzed and, therefore, no prior, substantive determinations could have been made to determine what facts, if any, were analogous to those in this proceeding. Further, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly-binding.

Also, It must be emphasized that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). As the director properly reviewed the record before him, it was impracticable for the director to provide the petitioner with an explanation as to why the prior approvals were erroneous, as counsel suggests.

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)(1).

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 at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

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

The petitioner did submit five job 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.<sup>5</sup> Preliminarily, the AAO observes that the director correctly determined

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<sup>5</sup> According to the *Handbook's* detailed statistics on advertising, promotion, and marketing managers, there were approximately 38,700 persons employed as advertising and promotions managers, and 178,000 employed as marketing managers in 2010. *Handbook, 2012-13 Edition*, Advertising, Promotions, and Marketing Managers, on the Internet at <http://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm> (last accessed January 17, 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 just five job postings with regard to the common educational requirements for entry into parallel positions in similar organizations in the online automotive rental club 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 the job of advertising and promotions manager for a three-person online automotive rental club required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

that the petitioner submitted job advertisements that do not limit the field of study to a particular field that is appropriate to the proffered position, and as such, they are insufficient to show that the degree requirement is common to the industry in parallel positions among similar organizations. Also, the petitioner has the burden of demonstrating that its organization is similar to the organizations advertising parallel positions. In this case, the petitioner did not advance any similarities when attempting to establish that a degree requirement is common to the industry in parallel positions among similar organizations. Moreover, the five advertising entities represent an array of industries, including semiconductor manufacturing, home improvement, newspaper media, artisan and gourmet food, and what appears to be a search engine optimization business within the marketing industry.

Further, the AAO additionally finds that, in the absence of authoritative evidence documenting that the advertisements are representative of the recruiting and hiring requirements common to the industry, the advertisements are not probative evidence towards satisfying this particular criterion. The job postings, then, are not persuasive evidence that at least a bachelor's degree, in a specific specialty, is commonly required, for positions parallel to the one proffered here, by organizations similar to the petitioner in its industry. Accordingly, the job advertisements submitted into the record have no probative value.

The AAO agrees with the director's assessment that not one of the job postings showed, nor did counsel assert, that the job ads were from similar organizations, i.e. organizations engaged in online automotive rentals, as specified in the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

In sum, 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 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."

Counsel submits that the petitioner meets the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) because the petitioner's industry is unique, and also 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. This lack of probative evidence related to this criterion is itself decisive and 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 advertising and promotion at some generic level, but that would involve advertising and promotion 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.

The petitioner failed to show how the described position is so complex or unique that it would require the theoretical and practical application of a body of highly specialized knowledge in a specific specialty such that only a person with at least a bachelor's or higher degree in a specific specialty or its equivalent can perform that position. 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 fill the position it claims is so complex and unique. While one or two courses in business administration may be beneficial for this advertising and promotions manager position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate degree in a specific specialty, or its equivalent are required for the particular position here proffered.

In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than advertising and promotions manager positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

Of particular significance to this decision, 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 Employment and Training Administration (ETA), *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009). The LCA's 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 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/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf)

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 position, pursuant to the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

In the instant matter, the proffered position is a newly created position, and as such, there is no prior history of past employment practices. Therefore, the petitioner has not submitted any evidence for consideration under this criterion. Consequently, this criterion cannot be satisfied within the context of the present petition.<sup>6</sup>

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<sup>6</sup> It is worth noting, nonetheless, that to satisfy this criterion, the record must establish 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 or its equivalent as the minimum for entry into the occupation as required by section 214(i)(1) of the Act. To interpret the regulation 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 specific specialty

As the record contains no material evidence on point, the petitioner has not met the burden 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.

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 advertising and promotions positions whose duties are not of a nature so specialized and complex that their performance requires knowledge usually associated with a degree in a specific specialty.

Counsel asserts that the petitioner satisfied this criterion, and that it provided a detailed description of the petitioner's business nature and its desire to be competitive in the marketplace, its staffing structure, and a detailed description of the duties of the proffered position. While the AAO acknowledges that the record of proceeding contains information as to the related business, the duties, and the position in question, the evidence in the record of proceeding does not develop the proposed duties with sufficient substantive details to establish that their nature is so specialized and complex that their performance would require knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty.

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 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.

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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 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.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed, and the petition will be denied.

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