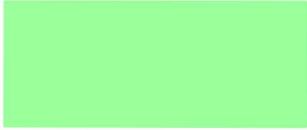


(b)(6)

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

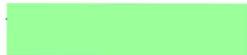


U.S. Citizenship  
and Immigration  
Services



Date: **MAY 24 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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as a transportation/logistics firm. To employ the beneficiary in what it designates as a Marketing and Business Development Manager position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. On appeal, counsel asserted that the director's basis for denial was erroneous and contended that the petitioner satisfied all evidentiary requirements.

As will be discussed below, the AAO has determined that the director did not err in her decision to deny the petition on the specialty occupation issue. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's submissions on appeal.

The issue on appeal is whether the petitioner has demonstrated that 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 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation. Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

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

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

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term

"degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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

The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is a marketing and business development manager position, and that it falls under the occupational category "marketing managers." The LCA further states that the proffered position is a Level I, entry level, position.

The record contains evidence that the beneficiary was awarded a master of economics degree with a specialization in accounting by [REDACTED] University of Economics in Poland. An evaluation provided states that the beneficiary's degree is equivalent to a U.S. bachelor's degree and a U.S. master's degree in management and marketing with a minor in accounting.

With the visa petition, counsel provided a letter, dated September 6, 2011, from the petitioner's CEO, who provided the following description of the duties of the proffered position:

- Determine the demand for products and services provided by [the petitioner]
- Identify its competitors and how they differ in doing business
- Identify potential customers and increase business opportunities
- Develop pricing strategies to maximize the firm's profit and market share

- Balance company's objectives with customer satisfaction
- Create advertisements describing services and products offered
- Initiate market research to advance sales of services and products

In that letter, the petitioner's CEO also stated, "A bachelor's degree is the absolute minimal requirement for this position." He did not state that the proffered position requires a minimum of a bachelor's degree or its equivalent *in any specific specialty*.

On January 19, 2012, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence that the petitioner would employ the beneficiary in a specialty occupation. The service center outlined the specific evidence to be submitted.

In response, counsel submitted, *inter alia*, (1) a letter, dated March 30, 2012, from the president of [REDACTED] (2) counsel's own letter, dated March 15, 2012; and (3) four vacancy announcements.

In his March 30, 2012 letter, the president of [REDACTED] stated:

I would like to confirm, that due to the complexity of services and operations of our company, it is our normal business practice to employ individuals with baccalaureate or higher degrees in our key - management positions. Our Business Manager, [REDACTED] holds a Master's Degree in Management (diploma and W-2 enclosed) and our Financial Controller, [REDACTED], holds a Master's Degree in International Business and Political Relations, a Master's of Science in Accounting[,] as well as a CPA Certificate.

Evidence pertinent to the degrees of those other people and their employment, was provided. However, that letter did not state which of those positions, if either, is similar to the position proffered in the instant case.

In his own letter, counsel stated that the proffered position, "requires the attainment of a baccalaureate or higher degree or its equivalent, in a specific specialty, as a minimum, for entry into the occupation in the United States." Counsel did not identify the specific specialty required by the proffered position.

Counsel also provided a list of duties which he characterized as a "more detailed description of the work to be performed by the beneficiary." The new description includes the percentage of time and hours to be spent on each duty.

The director denied the petition on May 1, 2012, finding, as was noted above, that the petitioner had not demonstrated that the proffered position qualifies as a position in a specialty occupation by

virtue of requiring a minimum of a bachelor's degree in a specific specialty or its equivalent. More specifically, the director found that the petitioner had satisfied none of the supplemental criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel submitted (1) a letter, dated February 8, 2010, from a radio producer; (2) a letter, dated July 11, 2008, from the petitioner's CEO; and (3) a brief.

The body of the February 8, 2010 letter from a radio producer, on [REDACTED] letterhead, states in its entirety the following:

The following job opening was presented on the radio, on February 5, 2010.

Business Manager: Plan, direct, coordinate operations of the company; compensation & benefits activities & staff of an organization. Administer, direct, and review employee benefit programs. Plan, direct, supervise, and coordinate work activities relating to employment, compensation, labor relations & employee relations. Prepare budgets for personnel operations. 1 yr exp. Masters in HR. Resume: [REDACTED]

In his July 11, 2008 letter, which is dated more than three years before the instant petition was filed, and written in support of an H-1B petition filed on behalf of [REDACTED] the petitioner's CEO asserted that a bachelor's degree is essential for a "Marketing and Business Development Director" position. In that letter, he did not indicate that the requisite degree must be in any specific specialty. He asserted that, among its 19 employees, the petitioner employs two other degreed individuals, but not that they are in positions similar to the proffered position in this case, other than that they deal with sophisticated information.

In the appeal brief, counsel cites to the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*, and states that it and the evidence presented demonstrate that the proffered position qualifies as a specialty occupation position. Counsel also contends that the petitioner previously filed an H-1B petition for a marketing and business development manager which was approved by USCIS. Counsel states that "[d]ue to the expiration of the previous worker's H-1B status, [the petitioner] is in need of services performed by a qualified worker."

As a preliminary matter, the petitioner's claim that a bachelor's degree is a sufficient minimum requirement for entry into the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position

requires a precise and specific course of study that relates directly and closely to the position in question. There must be a close correlation between the required specialized studies and the position, thus the mere requirement of a degree, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988) ("The mere requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility."). The petitioner's assertion that its minimum requirement for the proffered position is a bachelor's degree is tantamount to an admission that the proffered position is not in fact a specialty occupation. The director's decision must therefore be affirmed and the petition denied on this basis alone.

Nevertheless, for the purpose of performing a comprehensive analysis of whether the proffered position qualifies as a specialty occupation, the AAO turns next to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO will first address the requirement under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1): A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>1</sup> As noted above, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Marketing Managers." In the "Advertising, Promotions, and Marketing Managers" chapter, the *Handbook* provides the following description of the duties of those positions:

#### **What Advertising, Promotions, and Marketing Managers Do**

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

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<sup>1</sup> The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2012 – 2013 edition available online.

## 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.

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

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

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

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

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

**Marketing managers** estimate the demand for products and services that an organization and its competitors offer. They identify potential markets for the organization's products.

Marketing managers also develop pricing strategies to help organizations maximize profits and market share while ensuring that the organizations' customers are satisfied. They work with sales, public relations, and product development staff.

For example, a marketing manager may monitor trends that indicate the need for new products and services. Then they oversee the development of that new product. For more information on sales or public relations, see the profiles on sales managers, public relations managers and specialists, and market research analysts.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Advertising, Promotions, and Marketing Managers," <http://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm#tab-2> (last visited May 21, 2013).

The duties the petitioner attributes to the proffered position are consistent with the duties of marketing managers as described in the *Handbook*. On the balance, the AAO finds that the proffered position is a marketing manager position as described in the *Handbook*. However, the *Handbook* does not indicate that advertising, promotions, and marketing managers constitute an occupational group for which normally the minimum requirement for entry is a specialty occupation level of education, that is, at least a U.S. bachelor's degree *in a specific specialty*, or its equivalent. This is also evident from the discussion in the "How to Become an Advertising, Promotions, and Marketing Manager" section of its chapter "Advertising, Promotions, and Marketing Manager." This section of the *Handbook* states the following regarding the requirements for this occupation:

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

## Education

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

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

*Id.* at <http://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm#tab-4> (last visited May 21, 2013).

While the *Handbook* reports that a baccalaureate degree is the minimum educational requirement for *most* advertising, promotions, and marketing management jobs, it does not indicate that such a degree is a minimum entry requirement or, more importantly, that the degrees or equivalencies held by such workers must be in a specific specialty that is directly related to advertising, promotions, and marketing management, as would be required for the occupational category to qualify as a specialty occupation, as that term is defined in section 214(i) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).<sup>2</sup> *See id.* With no indication that such knowledge must be equivalent to a U.S. bachelor's or higher degree in a specific specialty, the *Handbook* is not sufficient evidence in and of itself that the particular position proffered here qualifies as a specialty occupation.

Further, 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. *See* U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf). The classification of the proffered position as a Level I position does not support the assertion that it is a position that cannot be performed without a minimum of a bachelor's degree in a specific specialty or its equivalent, especially since the *Handbook* suggests that some marketing manager positions do not require such a degree, or any bachelor's degree at all.

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<sup>2</sup> For instance, the first definition of "most" in *Webster's New Collegiate College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of marketing manager positions require at least a bachelor's degree, it could be said that "most" accountant 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 offered 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.

Further still, the AAO finds that, to the extent that they are described in the record of proceeding, the numerous duties that the petitioner ascribes to the proffered position indicate a need for a range of knowledge of marketing, but do not establish any particular level of formal, post-secondary education leading to a bachelor's or higher degree in a specific specialty as minimally necessary to attain such knowledge.

As the evidence of record does not establish that the particular position here proffered is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

As stated earlier, in determining whether there is 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).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or any other authoritative, objective, and reliable resource, reports a standard industry-wide requirement of at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no letters from professional associations 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 record does contain, however, information from and about [REDACTED], another employer claimed to be in the petitioner's industry. That information indicates that [REDACTED] employs a business manager with a master's degree in management and a financial controller with a master's degree in international business and political relations, and that it once advertised for a business manager who was required to have a bachelor's degree in human resources. As none of those positions have been shown to be similar to the proffered position in the instant case, however, that [REDACTED] employs people with degrees in those positions has not been shown to have any relevance to the requirements of the proffered position.

Finally, counsel submitted four vacancy announcements, as was noted above.

For the petitioner to establish that an advertising organization is similar to the petitioner, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, vacancy announcements submitted by a petitioner are generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the advertising organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered).

None of those announcements contain duty descriptions sufficient to show that the advertised positions are parallel to the proffered position. In fact, the job titles of some positions suggest that they are in sales, rather than in marketing. Moreover, the petitioner fails to establish that the submitted advertisements are relevant in that the posted job announcements are not for parallel positions in similar organizations in the same industry. The petitioner did not submit any independent evidence demonstrating that the advertising entities are similar to the petitioner in terms of the type and level of services provided such that they could be found to be similar organizations.

The AAO notes that one of the vacancy announcements provided indicates that a bachelor's degree in any of a wide array of subjects is a sufficient qualification for the position announced. One indicates that the position requires a bachelor's degree, but not that the requisite degree must be in any specific specialty. One indicates that equivalent experience may be substituted for education, but does not reveal what amount and type of experience the hiring authority would consider equivalent to a bachelor's degree.

Finally, as was noted above, the petitioner has designated the proffered position as a Level I position on the LCA, indicating that it is an entry-level position for an employee who has only basic understanding of the occupation. In order to attempt to show that parallel positions require a minimum of a bachelor's degree in a specific specialty or its equivalent, the petitioner would be obliged to demonstrate that other Level I marketing manager positions, entry-level positions requiring only a basic understanding of marketing management, require a minimum of a bachelor's degree in a specific specialty or its equivalent, the proposition of which is not supported by the *Handbook*.

As a result, the petitioner has not established that similar companies in the same industry routinely require at least a bachelor's degree in a specific specialty or its equivalent for parallel positions. Thus, based upon a complete review of the record, the petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner. For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner also has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that

it can be performed only by an individual with a degree." A review of the record indicates that the petitioner has failed to credibly demonstrate that the duties the beneficiary will be responsible for or perform on a day-to-day basis entail such complexity or uniqueness as to constitute a position so complex or unique that it can be performed only by a person with at least a bachelor's degree in a specific specialty.

Specifically, the petitioner failed to demonstrate how the duties described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. 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 of the proffered position. While a few related courses may be beneficial, or even required, in performing certain duties of the proffered position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here.

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

Finally, as was also noted above, the LCA submitted in support of the visa petition is approved for a Level I marketing manager, an indication that the proffered position is an entry-level position for an employee who has only a basic understanding of marketing management. This does not support the proposition that the proffered position is so complex or unique that it can only be performed by a person with a specific bachelor's degree, notwithstanding that the *Handbook* suggests that some marketing manager positions do not require such a degree.

Thus, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will next address the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which may be satisfied if the petitioner demonstrates that it normally requires a degree or its equivalent for the position.<sup>3</sup>

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<sup>3</sup> While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS

On appeal, counsel stated:

The petitioner meets [the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3)] as he [sic] has in the past required the services of individuals with baccalaureate or higher degrees in a specific specialty. As a matter of fact, the petitioner has required the services of a Marketing and Business Development Manager, and therefore applied for and obtained the approval of the H1B visa. The Service, in the previous case, has determined that the position of a Marketing and Business Development Manager meets the requirements established for H1B status and approved the petition[.] Enclosed please find the approval notice issued for the previously filed [F]orm I-129 as well as the evidence of the individual's educational background. This proves that the petitioner did not create a position with an obligatory bachelor's degree requirement. Instead, the petitioner requires the services of a Marketing and Business Development Manager. Due to the expiration of the previous worker's H-1B status, [the petitioner] is in need of services performed by a qualified worker.

Counsel did provide an approval notice showing that the petitioner previously filed an H-1B visa petition for the instant beneficiary's husband, [REDACTED] and that it was approved for employment from October 1, 2008 to September 28, 2011, while the instant petition requests a validity period of October 1, 2011 to September 30, 2014. Counsel did not, however, provide any evidence pertinent to [REDACTED] education. Further, the approval notice does not show that [REDACTED] worked in the same position as that proffered in the instant case. Further still, although counsel appeared to assert that [REDACTED] has a minimum of a bachelor's degree, the record is devoid of evidence that [REDACTED] has a minimum of a bachelor's degree in a specific specialty closely related to the proffered position, or its equivalent.

Even if counsel had asserted that the beneficiary's husband worked in the proffered position and has a minimum of a bachelor's degree in a specific, appropriate, specialty or its equivalent that would be insufficient, for two reasons, to show that the petitioner normally requires a minimum of a bachelor's degree in a specific specialty or its equivalent for the proffered position.

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limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in a specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

First, the petitioner has not revealed how many people it has employed in the proffered position since it was established in 2005. Even if the petitioner had demonstrated that the beneficiary's husband worked in the proffered position, evidence as to only one of the petitioner's previous marketing and business development managers does not establish a pattern that the petitioner normally requires, as opposed to simply prefers to hire, someone with at least a bachelor's degree in a specific specialty, or the equivalent, for the proffered position.

Second, counsel's assertions 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). Without documentary evidence to support the claim, the assertions of counsel, as to the position that [REDACTED] filled and as to his education, will not satisfy the petitioner's burden of proof.

The record does not demonstrate that the petitioner normally requires a minimum of a bachelor's degree in a specific specialty or its equivalent for the proffered position. Therefore, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).<sup>4</sup>

Finally, the AAO will address the alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which is satisfied if the petitioner establishes that the nature of the specific duties is so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent.

Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. In other words, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than the duties of marketing manager positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent.<sup>5</sup> The AAO finds that the description of the duties of the

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<sup>4</sup> While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in a specific specialty or its equivalent. See *Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. See § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

<sup>5</sup> Moreover, as noted above, 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. See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at

proffered position does not reveal complexity and specialization above those of positions in the occupation that are not usually associated with knowledge that requires at least a bachelor's or higher degree in a specific specialty.

For the reasons discussed above, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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

The AAO is aware of counsel's claim that the petitioner previously had an H-1B visa petition approved for the beneficiary's husband to work in the proffered position. As was pointed out above, counsel submitted no evidence to show that the beneficiary's husband has a minimum of a bachelor's degree in a specific specialty or its equivalent in or closely related to the proffered position. As such, the relevance of that previous approval to the instant visa petition has not been demonstrated.

The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. If any of the previous nonimmigrant petitions were approved based on the same evidence and assertions that are contained in the current record, they would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, the AAO would not be bound to follow the contradictory

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[http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf). Therefore, it is not credible that the position is one with specialized and complex duties, as such a higher-level position would likely be classified at a higher level, such as a Level IV position, requiring a significantly higher prevailing wage. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Also, the AAO is not persuaded by counsel's comments on *Unical Aviation, Inc. v. INS*, 248 F. Supp. 2d 931 (D.C. Cal 2002). The material facts of the present proceeding are distinguishable from those in *Unical*. Specifically, *Unical* involves: (1) a position for which there was a companion position held by a person with a Master's degree; (2) a record of proceedings that included an organizational chart showing that all of its employees in the marketing department held bachelor's degrees; and, in the court's words, (3) "sufficient evidence to demonstrate that there is a requirement of specialized study for [the beneficiary's] position." Also, the proffered position and related duties in the present proceeding are different from those in *Unical Aviation, Inc.*, where the beneficiary was to liaise with airline and Maintenance Repair Organization ("MRO") customers in China for supply of parts and services; analyze and forecast airline and MRO demands to generate plans to capture business; provide after-sales services to customers in China; and develop new products and services for the China market. Moreover, there is no indication in the record of proceeding that the petitioner is in the same industry or is in any way similar in size or type of business as *Unical Aviation, Inc.*

Further, in *Unical Aviation* the Court partly relied upon *Augut, Inc. v. Tabor*, 719 F. Supp. 1158 (D. Mass. 1989), for the proposition that Immigration and Naturalization Service (INS, now USCIS), had not used an absolute degree requirement in applying the "profession" standard at 8 U.S.C. § 1101(a)(32) for determining the merits of an 8 U.S.C. § 1153(a)(3) third-preference visa petition. That proposition is not relevant here, because the H-1B specialty occupation statutes and regulations, not in existence when INS denied the *Augut, Inc.* third-preference petition, mandate not just a baccalaureate or higher degree, or its equivalent, but a degree "in the specific specialty." § 214(i)(1) of the Act; *see also* 8 C.F.R. § 214.2(h)(4)(ii). The AAO also notes that, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising even within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.

As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine whether it will require a baccalaureate or higher degree in a specific specialty or its equivalent. Absent this determination that a baccalaureate or higher degree in a specific specialty or its equivalent is required to perform the duties of the proffered position, it also cannot be determined whether the beneficiary possesses that degree or its equivalent. Therefore, the AAO need not and will not address the beneficiary's qualifications further.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. §1361. Here, that burden has not been met. The appeal will be dismissed and the petition denied.

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