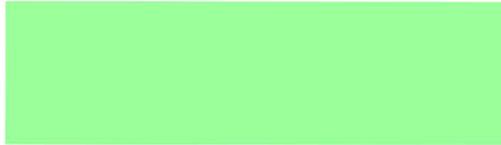




U.S. Citizenship  
and Immigration  
Services

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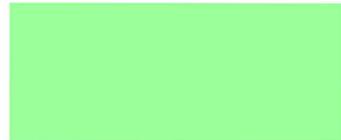
Date: **OCT 02 2013** Office: VERMONT SERVICE CENTER

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

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

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner describes itself as a "Pharmaceutical Company" established in 2003 which employs five personnel in the United States. In order to employ the beneficiary in what it designates as a marketing manager position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition determining: (1) that the petitioner had not established the beneficiary's eligibility for an extension of stay in H-1B nonimmigrant status under the American Competitiveness in the Twenty-First Century Act (AC21), as amended by the Twenty-First Century Department of Justice Appropriations Authorization Act (DOJ21);<sup>1</sup> and (2) that the petitioner had failed to establish that the 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 additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, Notice of Appeal or Motion, counsel's brief, and additional documentation. The AAO reviewed the record in its entirety before issuing its decision.

Upon review of the entire record of proceeding, the AAO concurs with the director's determination that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed. The petition will remain denied.

### **Beneficiary's Eligibility for Extension of Stay in H-1B Status**

The first issue in this matter is whether the petitioner has established the beneficiary's eligibility for an extension of stay in H-1B status under AC21.

### **The Law**

The AAO notes, in general, section 214(g)(4) of the Act provides that: "[T]he period of authorized admission of [an H-1B nonimmigrant] shall not exceed 6 years." However, AC21, as amended by DOJ21, temporarily removes the six-year limitation on the authorized period of stay in H-1B visa status for certain aliens whose labor certifications or immigrant petitions remain undecided due to lengthy adjudication delays and broadens the class of H-1B nonimmigrants who may avail themselves of this provision.

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<sup>1</sup> See Pub. L. No. 106-313, §§ 104(c) and 106(a), 114 Stat. 1251, 1253-54 (2000); Pub. L. No. 107-273, § 11030A(a), 116 Stat. 1836 (2002).

As amended by section 11030A(a) of DOJ21, section 106(a) of AC21 reads:

(a) EXEMPTION FROM LIMITATION. -- The limitation contained in section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. § 1184(g)(4)) with respect to the duration of authorized stay shall not apply to any nonimmigrant alien previously issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(b) of *such Act* (8 U.S.C. § 1101(a)(15)(H)(i)(b)), if 365 days or more have elapsed since the filing of any of the following:

(1) Any application for labor certification under section 212(a)(5)(A) of *such Act* (8 U.S.C. § 1182(a)(5)(A)), in a case in which certification is required or used by the alien to obtain status under section 203(b) of *such Act* (8 U.S.C. § 1153(b)).

(2) A petition described in section 204(b) of *such Act* (8 U.S.C. § 1154(b)) to accord the alien a status under section 203(b) of *such Act*.

Section 11030A(b) of DOJ21 amended § 106(b) of AC21 to read:

(b) EXTENSION OF H-1B WORKER STATUS--The [Secretary of Homeland Security] shall extend the stay of an alien who qualifies for an exemption under subsection (a) in one-year increments until such time as a final decision is made:

(1) to deny the application described in subsection (a)(1), or, in a case in which such application is granted, to deny a petition described in subsection (a)(2) filed on behalf of the alien pursuant to such grant;

(2) to deny the petition described in subsection (a)(2); or

(3) to grant or deny the alien's application for an immigrant visa or for adjustment of status to that of an alien lawfully admitted for permanent residence.

Pub. L. No. 107-273, § 11030A, 116 Stat. 1836, 1836-37 (2002) (emphasis added to identify sections amended by DOJ21).

### **Facts and Procedural History**

The instant petition was signed on November 30, 2011, and filed on April 30, 2012. In the H Classification Supplement to the Form I-129, the petitioner claims that the beneficiary was in H or L classification in the United States from October 2005 to "present." The petitioner filed the instant petition requesting an extension of the beneficiary's stay beyond the six year authorized admission with a requested validity period of December 12, 2011 through December 11, 2012.

With the instant Form I-129, the petitioner submitted evidence that it filed a Form I-140, Immigrant Petition for an Alien Worker (SRC 12 900 84054), with USCIS on December 20, 2011. USCIS records indicate that the I-140 was denied on April 19, 2012, prior to the filing of

the instant petition. USCIS records do not show that the petitioner filed an appeal of the I-140 denial decision.

In a Request for Evidence (RFE) dated June 29, 2012, the director noted that "the beneficiary has reached a total of six years in an 'H' and/or 'L' nonimmigrant status. Nonimmigrants holding H status may not exceed a total of six years stay in H or L status." Therefore, the director requested evidence of the following:

- (1) That 365 days or more have passed since the filing of any application for labor certification that is required or used by the alien to obtain status as an employment based immigrant, OR
- (2) That 365 days or more have passed since the filing of an employment based immigrant petition and the petition is still pending.

In response, the petitioner submitted evidence that the petitioner filed an ETA Form 9089 with the DOL on September 6, 2011. That ETA Form 9089 was certified on November 16, 2011, with a validity period of November 16, 2011 to May 14, 2012. The petitioner also submitted evidence that it filed an I-140 petition (SRC 12 903 59237) with USCIS on August 20, 2012. USCIS records indicate that the I-140 petition was denied on February 13, 2013. USCIS records do not show that the petitioner filed an appeal of the denial decision.

On October 25, 2012, the director denied the petition finding that the petitioner had not established the beneficiary's eligibility for an extension of stay in H-1B nonimmigrant status under AC21, as amended by DOJ21.<sup>2</sup> With respect to an extension beyond the six-year limitation under section 106(a) of AC21, the director found the following:

The record does not establish that prior to the attainment of six years in "L" and/or "H" status, that 365 days or more have passed since the filing of any application for labor certification that is required or used by the alien to obtain status as an employment based immigrant, or that 365 days or more have passed since the filing of an employment based immigrant petition and the petition is still pending.

On appeal, counsel states only the following with respect to the beneficiary's eligibility for an extension of stay pursuant to AC21:

We are herewith attaching the copy of labor certification, which was filed by the beneficiary, before the attainment of 6 years of his H-1B status, which establishes that he is eligible under AC21 rule.

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<sup>2</sup> Section 104(c) of AC21 refers to eligibility beyond the six-year limitation when a beneficiary has an approved immigrant visa petition and is unable to file for permanent residence due to per country limitations. With respect to an extension beyond the six-year limitation under section 104(c) of AC21, the director found that the "[r]ecord of proceeding does not establish that the beneficiary has an approved employment-based immigrant visa petition; therefore, he or she is not eligible for consideration of benefits under Section 104(c) of AC21."

With the appeal, counsel submitted evidence that on December 22, 2006, an Application for Permanent Employment Certification (ETA Form 9089) was filed for a marketing manager position by a different employer ( ) which was certified by the Department of Labor (DOL) on June 15, 2007. The expiration date of the approval is noted on the ETA Form 9089 as March 31, 2008. A Form I-140, Immigrant Petition for Alien Worker, ( ) was filed by ( ) on behalf of the beneficiary on September 24, 2007. The Form I-140 was denied on April 14, 2009, and the AAO dismissed a subsequently filed appeal on August 20, 2010.<sup>3</sup> The petitioner did not file a motion to reopen the AAO's denial decision.

### Analysis

Upon review of the evidence in this matter, the petitioner has not demonstrated that the beneficiary qualifies for an additional year of H-1B status pursuant to AC21, as amended by DOJ21. The petitioner does not claim and the record of proceeding does not establish that the beneficiary has an approved employment-based immigrant visa petition; therefore, he is not eligible for consideration of benefits under section 104(c) of AC21.

Neither has the petitioner demonstrated that the beneficiary qualifies for an additional year of stay in H-1B status pursuant to section 106(a) and (b) of AC21, as amended by DOJ21. That is the petitioner has not established that 365 days or more have elapsed from either (1) the filing of a labor certification application or (2) the filing of an employment-based immigrant petition (Form I-140).<sup>4</sup> Specifically, the date of the filing of the petitioner's application for alien labor certification, September 6, 2011, is less than 365 days prior to the date of filing of the instant Form I-129. Similarly, the Form I-140 filed by the petitioner on December 20, 2011, is less than 365 days prior to the date of filing of the instant petition.

Counsel's submission on appeal of an expired ETA Form 9089 to establish that 365 days or more had elapsed since its filing is not persuasive. Although the December 22, 2006 ETA Form 9089

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<sup>3</sup> USCIS records also reveal that ( ) filed a Form I-140 ( ) on February 1, 2010, which was denied on October 28, 2011. USCIS records further reveal that ( ) business as ( ) filed a Form I-140 ( ) on January 18, 2013, which is currently pending.

<sup>4</sup> In this matter the beneficiary completed his six years of authorized stay in H-1B status on September 30, 2011 (October 1, 2005 to September 30, 2011). The record in the current matter does not include comprehensive evidence demonstrating what time, if any, the beneficiary spent outside the United States during his six years of authorized stay in H-1B status. Thus, there is insufficient evidence to determine whether the beneficiary is entitled to recapture any days spent outside the United States and extend the maximum period of H-1B classification. Accordingly, the petition for an extension of the beneficiary's stay in H-1B status pursuant to AC21 as amended by DOJ21 would not begin until the beneficiary's H-1B status actually expired; either October 1, 2011 or October 1, 2011 plus any days recaptured from the time the beneficiary spent outside the United States while in H-1B classification. In that regard, it appears the petition filed on behalf of the beneficiary on February 14, 2011 ( ) approved for validity from April 30, 2011 to April 29, 2012), was approved, in part, in error. The AAO observes USCIS records show that the director issued a Notice of Intent to Revoke (NOIR) approval of the petition on April 10, 2013. To date, USCIS records do not show the director's decision regarding the NOIR.

was certified on June 15, 2007, and a Form I-140 was filed within the validity of the certification period of 180 days, the Form I-140 using that permanent labor certification was denied on April 14, 2009, and an appeal was dismissed on August 20, 2010. USCIS records do not show that a motion to reopen the denial of the Form I-140 was filed. Thus, the denial of the Form I-140 was final on August 20, 2010. Accordingly, although the ETA Form 9089 was initially granted, the denial of the Form I-140 filed on behalf of the beneficiary terminated the validity of the ETA Form 9089 approval.

Therefore, the beneficiary is ineligible for a one-year period of stay beyond the maximum period permitted in H-1B status under AC21. Thus, while AC21 is relevant to matters in which a beneficiary has spent the maximum period permitted in the United States in H-1B status, the beneficiary in this matter is ineligible for an extension of stay as a result of the provisions of AC21.<sup>5</sup>

### **Specialty Occupation**

The next issue before the AAO is whether the position qualifies as a specialty occupation.

### **The Law**

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

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<sup>5</sup> Until or unless regulations to the contrary are promulgated, the plain language of section 106 of AC21, as amended by DOJ21, does not require an alien to be in H-1B status when seeking an extension of stay under this provision. Instead, all that is required by the statute is that the alien be a nonimmigrant alien and that his or her petitioner be seeking a stay in H-1B status on their behalf.

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 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.

### **Facts and Procedural History**

In a November 30, 2011 letter submitted in support of the petition, the petitioner stated that the beneficiary's job duties will include:

- Perform market analysis and analyze trends in the pharmaceutical field;
- Direct sales staff and training of personnel;
- Analyze sales statistics and implement sales plans;
- Prepare durational reports on sales figures;
- Attract new customers and maintain existing business relationships;
- Formulate and implement marketing strategies;
- Promote company products through the use of marketing techniques and strategies; and,
- Analyze and coordinate customer needs and requirements.

[Bullet points added.]

The petitioner also stated that the "[m]inimum requirements for this position are at least a Bachelor's degree in Business Accounting & Auditing, Marketing with relevant experience in the field." The petitioner noted that the beneficiary had obtained a bachelor's of arts degree from a United States university. The petitioner provided the required temporary certified Labor Condition Application (LCA) which indicates that the occupational classification for the position is "Marketing Managers," SOC (ONET/OES) Code 11-2021, at a Level II (qualified) wage.<sup>6</sup>

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<sup>6</sup> 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).

In an RFE, the director requested further detail regarding the proposed position, sufficient to establish it as a specialty occupation.

The petitioner, in a response dated September 7, 2012, revised the proposed duties and allocated the time the beneficiary would spend performing the duties as follows:

- Business Development & Sales by New Consumer Goods & Market them with better Display – 15 percent;
- Negotiated Price with Wholesalers – 10 percent;
- Field Knowledge & Update the Knowledge with new rules and regulations – 10 percent;
- Analyze Sales statistics and Implement Sales Plan – 10 percent;
- Attract New Customers and maintain existing business relationship & providing best Customer Experience – (15 percent);
- Promote Partner Company Products Through the use of Marketing Techniques and Strategies – (10 percent);
- Direct Sales Staff and Training of Personnel – (10 percent);
- IT Related Duties – 20 percent.

The petitioner added that these duties include instructing sales staff and determining work schedules of sales and marketing employees and to do this the beneficiary needs a marketing background. The petitioner also indicated that the beneficiary will train employees to deal with marketing and sales of goods and that he will calculate the cost of inventory, market trends, the amount of particular goods to be bought, and the profit margin in those goods. The petitioner stated that this will involve extensive analysis of data, testing and experimenting methods, extensive statistical reporting and mathematical modeling. The petitioner noted that the duties of this position require an individual to possess a bachelor's degree with a marketing background or equivalent and that the candidate should also have a management background. The petitioner further indicated that the marketing manager will use computer graphics and statistical methods to solve mathematical equations, to get the final result as to the profit ratio, production costs, and future market swing. The petitioner added further that the marketing manager will evaluate the prevailing system used for analyzing the market situation and evaluate the overall effectiveness, cost, reliability, and safety. The petitioner concluded that the proffered position is a specialty occupation.

The petitioner also provided a printout from the Department of Labor's (DOL) *Occupational Outlook Handbook's (Handbook)* chapter on Advertising, Promotions, and Marketing Managers. Based upon the evidence submitted, the director determined that the proffered position did not qualify for classification as a specialty occupation as defined in section 214(i)(1) of the Act.

On appeal, counsel for the petitioner provides the same general position description as provided in response to the director's RFE. Counsel asserts that the beneficiary is not doing the work of a computer professional but of a marketing manager. Counsel also asserts that the beneficiary's duties relate to sales and that he is not performing the duties of a business consultant. Counsel contends that the beneficiary's work "in similar/same organization in the position of Marketing Manager, itself is a proof that the petitioner and other organization also hire people with

similar/same qualification." Counsel references the *Handbook* and asserts that as the *Handbook* reports that the minimum requirement for the position of marketing manager is a bachelor's degree, the petitioner has established that such a degree is normally the minimum requirement for entry into the position.

### Analysis

In this matter, the petitioner seeks to employ the beneficiary as a "marketing manager" SOC (ONET/OES) Code 11-2021.00, at a Level II (qualified) wage. Preliminarily, we find that the petitioner has provided a broadly cast description of the duties of the proffered position. The petitioner's initial general description provided an overview of the duties of a marketing manager but failed to include specific information regarding the beneficiary's actual daily duties. In response to the director's RFE, the petitioner focused on the beneficiary's duties relating to its sales staff and again provided a description of the beneficiary's claimed marketing duties which failed to establish the beneficiary's specific duties relating to the beneficiary's business. The petitioner noted that the individual in the proffered position would need a marketing and management background. The petitioner did not specifically state that the proffered position required a bachelor's degree in marketing to perform the duties of the position. Moreover, the petitioner did not explain its initial statement that the "[m]inimum requirements for this position are at least a Bachelor's degree in Business Accounting & Auditing, Marketing with relevant experience in the field." 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).

Upon review of the vague description of the beneficiary's actual duties for the petitioner, we find that the petitioner has failed to establish the substantive nature of the work to be performed by the beneficiary. Failure to describe the substantive nature of the work precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), 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. However, for the sake of thoroughness, and assuming *arguendo* that the actual proffered position is a marketing manager position, the AAO will also review the record of proceeding in relation to 8 C.F.R. § 214.2(h)(4)(iii)(A).

To satisfy the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), the evidence must establish that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position that is the subject of the petition.

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.<sup>7</sup>

The *Handbook* reports:

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.

The *Handbook* reports further that their duties typically comprise 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

U.S. Dept. 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 Sept. 30, 2013).

The *Handbook* states the following regarding the education required for a marketing manager:

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.

*Handbook*, "Advertising, Promotions, and Marketing Managers," <http://www.bls.gov/ooh/>

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<sup>7</sup> The *Handbook*, which is available in printed form, may also be accessed online at <http://www.stats.bls.gov/oco/>. Our references to the *Handbook* are from the 2012-13 edition available online.

management/advertising-promotions-and-marketing-managers.htm/#tab-4 (last visited Sept. 30, 2013).

The statements made by the DOL in the *Handbook* do not support a finding that a bachelor's degree in a specific field of study is required for entry into this occupation. To the contrary, although the *Handbook* states that "most" marketing managers have a bachelor's degree, it does not state that bachelor's degree from any particular field of study is normally required. Furthermore, the *Handbook* does not even indicate that a bachelor's degree in *any* field of study is normally required. The first definition of "most" in *Webster's New 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" 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 proposed 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." Section 214(i)(1) of the Act.

Accordingly, the *Handbook's* report on marketing managers, does not establish the requirements of the first criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

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

As discussed *supra*, the petitioner has not established that its proposed position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. The petitioner has not submitted evidence from the industry's professional associations or letters or affidavits from other firms or individuals in the industry. Counsel's assertion on appeal that the beneficiary's past employment as a "marketing manager" for another pharmacy satisfies this requirement is not persuasive. Although the beneficiary was previously approved for H-1B classification for work for another petitioner, USCIS 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). Moreover, if any of the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, they would constitute material and gross error on the part of the director.

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 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).

In this matter, the petitioner has not established that bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proposed position; and (2) located in organizations that are similar to the petitioner. The petitioner has failed to satisfy the first alternative prong described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Next, the AAO finds that the petitioner has not satisfied the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner shows that the proposed position is "so complex or unique" that it can be performed only by an individual with at least a bachelor's degree in a specific discipline.

In this particular matter the petitioner has failed to credibly demonstrate that the duties the beneficiary would perform on a day-to-day basis collectively constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty. The AAO finds that, as reflected in the list of duties quoted earlier in this decision from the record of proceeding, the duties are described in generalized terms and generic functions that, as such, do not develop relative complexity or uniqueness as attributes of either themselves or of the position that they comprise.

Thus, based upon the record of proceeding, the petitioner has not established that the proposed position is so complex or unique that it can only be performed by a person who has completed a baccalaureate program in a specific discipline that directly relates to the proposed position. Consequently, it cannot be concluded that the petitioner has satisfied the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO next turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires that the petitioner demonstrate that, for the proffered position, it normally requires at least a bachelor's degree, in a specific specialty, or the equivalent.

In considering this criterion, the AAO normally reviews the petitioner's past recruiting and hiring practices, as well as the histories, including the names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. The petitioner in this matter does not provide documentary evidence of individuals previously employed in the proffered position. Thus, the petitioner has not established its past recruiting and hiring practices. 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'r 1972)).

Moreover, while a petitioner may believe or otherwise assert that a proffered position requires a degree in a specific specialty, 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 the 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"). Here, the petitioner has failed to establish that the duties of its proffered position require the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States. Upon review of the evidence of record, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

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

The AAO finds that the petitioner has provided a broad overview of the occupation of a marketing manager position and has provided little detail establishing the specific tasks the beneficiary in this matter would be required to perform, especially as those tasks relate to the petitioner's business. Consequently, the record of proceeding lacks evidence fundamentally required for establishing the knowledge and degree-attainment association required to satisfy this criterion.

As the evidence in the record of proceeding has not established that the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated

with the attainment of a baccalaureate or higher degree in a specific specialty, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As the petitioner has not satisfied at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation. Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.