



U.S. Citizenship  
and Immigration  
Services

(b)(6)

[REDACTED]

DATE: **AUG 01 2014** OFFICE: VERMONT SERVICE CENTER FILE: [REDACTED]

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

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

ON BEHALF OF PETITIONER:  
[REDACTED]

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,

*for Michael T. Keely*  
Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office 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 retail business. In order to extend the employment of the beneficiary in what it designates as a marketing manager position, the petitioner seeks to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the basis of her determination that the petitioner had failed to demonstrate that the proffered position qualifies for classification as a specialty occupation.

The record of proceeding before us contains the following: (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 letter denying the petition; and (5) the Form I-290B and supporting documentation.

For the reasons that will be discussed below, we agree with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

## I. THE LAW

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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

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

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

*Specialty occupation* means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law,

theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

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

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

## II. FACTUAL AND PROCEDURAL HISTORY

In this matter, the petitioner stated on the Form I-129 petition that it is a retail business, and that it seeks the beneficiary's services in a position that it designates as a "Marketing Manager" to work on a full-time basis at an annual salary of \$41,413. The petitioner was established in 2007 and has 7 employees and a gross annual income of \$9.6 million.

The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for the SOC (O\*NET/OES) Code 11-2021, the associated Occupational Classification of "Marketing Managers," and a Level I (entry-level) prevailing wage rate.

In a letter dated October 8, 2012, the petitioner claimed to be a Louisiana corporation organized as an acquisition, management and development firm that was primarily engaged in the business of retail distribution of food, automotive and household products. It claimed to require the services of a marketing manager in order to enable the petitioner to become "a major participant in the industry."

The petitioner described the duties of the proffered position as follows:

In this position, [the beneficiary's] specific duties will include: (i) leading and managing the people in the field organization and building a culture that promotes a positive, open environment for our employees and customers; (ii) spending quality time in each store observing managers/associates and analyzing and identifying opportunities in the operations and service selling process; (iii) conducting regular manager and market meetings to communicate company information; (iv) planning, organizing, and managing advertising and brand promotions; (v) initiating market research studies and analyzing their findings; (vi) developing pricing strategies for

products to be marketed and balancing the goals of a firm with customer satisfaction; (vii) ensuring the execution of operational processes in each location including inventory, merchandising, facility maintenance, safety and security; (viii) leading and directing all aspects of recruitment, retention, training, and onboarding; (ix) working with the upper management on all market marketing needs; (x) ensuring all new products are effectively rolled out to the stores; (xi) ensuring that all promotions are executed and current; (xii) creating an environment of open communication and trust-based relationships with management teams; (xiii) working with management team to build sales in each store, in order to ensure sales growth and customer satisfaction; (xiv) developing marketing campaigns and tactics to ensure sales results are achieved; (xv) managing development of company website; and (xvi) approving new retail sites.

The petitioner concluded by stating that the minimum prerequisite for the offered position was a bachelor's degree in business administration or a related field.

In further support of eligibility, the petitioner submitted copies of the beneficiary's academic credentials and transcripts, as well as an evaluation of her academic credentials and work experience by [REDACTED] Ph.D.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on January 29, 2013. The director requested *inter alia*, additional evidence demonstrating that the proffered position was a specialty occupation, as well as details regarding the nature and location of the petitioner's business operations.

In a letter dated April 25, 2013, counsel for the petitioner responded to the director's request. Counsel provided a more detailed explanation of the duties associated with the proffered position, and also provided the following chart which provided the amount of time the beneficiary would devote to each of his duties:

<u>DESCRIPTION</u>	<u>TIME%</u>
Leading and managing the people in the field organization and building a culture that promotes a positive, open environment for our employees and customers. Spending quality time in each store observing managers/associates. Analyzing and identifying opportunities in the operations and service-selling process.	25%
Conducting regular manager and market meetings to communicate company information. Planning, organizing, and managing advertising and brand promotions. Developing pricing strategies for products to be marketed, Balancing the goals of a firm with customer satisfaction.	25%
Ensuring the execution of operational processes in each location including inventory, merchandising, facility maintenance, safety and security. Leading and directing all aspects of recruitment, retention, training, and onboarding. Working with the upper	20%

management on all market marketing needs.	
Ensuring all new products are effectively rolled out. Ensuring that all promotions are executed and current. Creating an environment of open communication and trust-based relationships with management teams. Working with management team to build sales in each store, in order to ensure sales growth and customer satisfaction.	20%
Developing marketing campaigns and tactics to ensure sales results are achieved and managing development of company website.	10%

Counsel also submitted the following documentary evidence: (1) an excerpt from the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* pertaining to marketing managers; (2) an excerpt from O\*NET Online pertaining to the occupational category of marketing managers; (3) copies of 24 job postings for positions counsel claimed were parallel to the proffered position within similar organizations; (4) various corporate documents, including a copy of the petitioner's 2011 tax return, and copies of its recent quarterly tax returns and W-2 forms; and (5) a copy of a USCIS policy memorandum by [REDACTED]

The director denied the petition on June 11, 2013, concluding that the petitioner did not establish that the proffered position qualifies as a specialty occupation.

On appeal, counsel for the petitioner asserts that the director's denial was erroneous, and submits a brief and additional evidence. In addition to the appeal brief, counsel submits (1) copies of the petitioner's recent bank statements; (2) a copy of the petitioner's organizational chart along with a description of the job duties of each of its employees; and (3) copies of educational credentials for the petitioner's other employees. Counsel also resubmits the previously-submitted tax documents and educational credentials, including the evaluation by [REDACTED]

### III. PRELIMINARY FINDINGS

We shall now enter some preliminary findings which are an integral part of our determination to dismiss this appeal. As such, we hereby incorporate them into the decision's analysis that follows.

In the Form I-129, the petitioner stated that it is a "retail" business established in 2007. Although the petitioner claimed in its letter of support that it was primarily engaged in the business of retail distribution of food, automotive and household products, the exact nature of the petitioner's true business operations remains unclear. Specifically, no definitive statement describing the true nature of the petitioner's operations has been provided. Although counsel emphasized in response to the RFE that the focus of the petitioner's business is retail and distribution, counsel provided no additional information regarding the actual nature of the petitioner's operations. This is a major deficiency, as without substantive information about the particular business-operations context in which the beneficiary would work and about the substantive marketing and marketing-manager

work associated with those particular operations we cannot reasonably conclude that the proffered position satisfies any criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

This lack of information is significant when considering numerous discrepancies contained in the petition. For instance, the petitioner designated its business operations under the North American Industry Classification System (NAICS) code 541511 on both the H-1B Data Collection Supplement filed with the petition<sup>1</sup> and on the certified LCA. We note that this NAICS code is designated for "Custom Computer Programming Services." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating that "this U.S. industry comprises establishments primarily engaged in writing, modifying, testing, and supporting software to meet the needs of a particular customer." See U.S. Dep't of Commerce, U.S. Census Bureau, 2012 NAICS Definition, 541511 – Custom Computer Programming Services, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last viewed July 22, 2014). However, we note that on its 2011 Form 1120S, U.S. Income Tax Return for an S Corporation, the petitioner designated its business code as 447100, which, according to the IRS's website, denotes "gasoline stations."

This discrepancy is particularly significant, since neither the petitioner nor counsel at any time definitively state the true nature of the petitioner's business operations. It appears, however, upon review of the petitioner's various invoices, purchase orders, and corporate documents submitted in response to the RFE, that the petitioner is more likely than not operating as a gas station and convenience store. Specifically, an Internet search reveals that a [REDACTED] station, also known as [REDACTED] is operating from the petitioner's address of record, thereby enabling us to find that, absent additional evidence to the contrary, the petitioner is not engaged in Custom Computer Programming Services as claimed on the H-1B Data Collection Supplement and LCA.<sup>2</sup>

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). Furthermore, an inaccurate statement anywhere on the Form I-129 or in the evidence submitted in connection with the petition mandates its denial. See 8 C.F.R. § 214.2(h)(10)(ii); see also 8 C.F.R. § 103.2(b)(1).

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<sup>1</sup> According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity and each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last viewed July 14, 2014).

<sup>2</sup> See <http://www.manta.com/c/mmlr1hx/usa-food-express> (last visited July 22, 2014). This conclusion is further supported by documents contained in the record, such as a Certificate of Underground Storage Tank Registration, issued to the petitioner by the State of Louisiana Department of Environmental Quality, as well as a "Permit to Operate" a "Grocery class 6 <500k ANNUAL," issued to the petitioner by the State of Louisiana Department of Health and Hospitals, Department of Public Health.

#### IV. ANALYSIS

We will now turn our discussion directly to the specialty occupation issue that is the subject of this appeal.

As a preliminary matter, we will first focus on the implications of the petitioner's claim that a bachelor's degree in "business administration" is a sufficient minimum requirement for entry into the proffered position.

Such a claim 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. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

To prove that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).<sup>3</sup>

In addition, the claim that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree, i.e., a bachelor's degree in business administration, is

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<sup>3</sup> Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

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

tantamount to an admission that the proffered position is not in fact a specialty occupation. The director's decision must therefore be affirmed and the petition denied on this basis alone.

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

The *Handbook* describes the occupational category of Marketing Managers as follows:

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

**Duties**

Advertising, promotions, and marketing managers typically do the following:

- Work with department heads or staff to discuss topics such as budgets and contracts, marketing plans, and the selection of advertising media
- Plan advertising and promotional campaigns
- Plan advertising, including which media to advertise in, such as radio, television, print, online media, and billboards
- Negotiate advertising contracts
- Evaluate the look and feel of websites used in campaigns or layouts, which are sketches or plans for an advertisement
- Initiate market research studies and analyze their findings to understand customer and market opportunities for businesses
- Develop pricing strategies for products or services marketed to the target customers of a firm
- Meet with clients to provide marketing or technical advice
- Direct the hiring of advertising, promotions, and marketing staff and oversee their daily activities

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*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 their 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 a new product or service. Then they oversee the development of that product or service. For more information on sales or public relations, see the profiles on sales managers, public relations and fundraising managers, public relations specialists, and market research analysts.

Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Advertising, Promotions, and Marketing Managers," <http://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm#tab-2> (accessed July 22, 2014).

The duties of the proffered position as defined in the job description submitted in response to the RFE are akin to those general duties that the *Handbook* ascribes to the Marketing Managers occupational group. The *Handbook* states as follows with regard to the educational requirements for entry into this occupational group:

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, finance, computer science, mathematics, and statistics are advantageous. For example, courses in computer science are helpful in developing an approach to maximize traffic through online search results, which is critical for digital advertisements and promotions. In addition, completing an internship while in school is highly recommended.

Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Advertising, Promotions, and Marketing Managers," <http://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm#tab-4> (accessed July 22, 2014).

Although the *Handbook* indicates that a bachelor's degree is required for "most" positions, the *Handbook* specifies no specific academic major in any specific specialty as normally required. Rather, the *Handbook* only notes a wide range of courses from disparate fields as "advantageous" –

but not required. These are "business law, management, economics, finance, computer science, mathematics, and statistics." Further, the disparate fields of business law, management, economics, finance, computer science, mathematics, and statistics do not constitute a specific specialty; such a wide range of acceptable majors or academic concentrations is not indicative of a position requiring the theoretical and practical application of a distinct body of highly specialized knowledge in a specific specialty, as required by section 214(i)(1) of the Act and its implementing regulation at 8 C.F.R. § 214.2(h).

In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties.<sup>4</sup> Section 214(i)(1)(B) of the Act (emphasis added).

In addition, we note the director's finding that the proffered position, when viewed in light of the nature and scope of the petitioner's operations, is not truly that of a marketing manager. In this regard, it is reasonable to assume that the size of an employer's business has or could have an impact on the duties of a particular position. *See EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728. Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the duties of a particular position. Here, the petitioner has also failed to establish that the transactions of what appears to be a 7-person gas station/convenience store with a claimed gross annual income of \$9.6 million requires the services of a marketing manager.

Specifically, as discussed above, the petitioner provided minimal documentation related to its marketing operations and organization that would shed light on the claimed complexity of the marketing work to be performed by the beneficiary. In this regard, we note that the petitioner did not provide substantive evidence about the actual day-to-day scope of its operations that would require marketing (and we note, that the petitioner appears to be operating as a gas station/convenience store). Of course, as we noted earlier, the NAICS industry code submitted by the petitioner on the LCA and the H-1B Data Collection Supplement relates to a completely

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<sup>4</sup> Whether read with the statutory "the" or the regulatory "a," both readings denote a singular "specialty." Section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Still, we do not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. As just stated, this also includes even seemingly disparate specialties provided the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

different type of business (computer consulting), and this inconsistency about the petitioner's business is not resolved anywhere in the record of proceeding. 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. at 591-92.

The petitioner's repeated contentions that it requires the services of a full-time marketing manager are not supported by the evidence in the record. The record contains no evidence to support the contention that the petitioner's business will be expanding or that it is pursuing new markets. Although the record contains an organizational chart that demonstrates that the beneficiary will oversee a purchase agent, there is no evidence that this position is actually filled by an employee (we note that the organizational chart only identifies the president/CEO, retail manager, and accountant by name – no other individuals are identified as filling the positions of cashier, purchase manager, or assistant manager). There is no evidence that the petitioner yet employs persons in all of the staff positions indicated in the chart, and this fact undermines the chart's evidentiary value. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248.

Consequently, the documentation submitted is minimal and the record contains no meaningful evidence to establish that the unsubstantiated marketing duties to be performed by the beneficiary in relation to the petitioner's claimed operations would require either a marketing manager in the first place, let alone a marketing manager with at least a bachelor's degree or higher in a specific specialty.

Finally, we note that the petitioner designated the proffered position as a Level I position on the LCA. That wage-level designation is appropriate for a comparatively low, entry-level position relative to others within its occupation, and it signifies that the petitioner is attesting that the beneficiary is only expected to possess a basic understanding of the occupation.<sup>5</sup>

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<sup>5</sup> The *Prevailing Wage Determination Policy Guidance* issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

**Level 1** (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered [emphasis in original].

Nor does the record of proceeding contain any persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion in the Marketing Manager occupational category would be sufficient in and of itself to establish the proffered position as, in the words of this criterion, a "particular position" for which "[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry."

Finally, we note that counsel relies on numerous decisions in support of the petitioner's eligibility in this matter. First, throughout the record, counsel refers to various unpublished decisions in which we determined that the proffered position in those matters were specialty occupations. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions. Also, while 8 C.F.R. § 103.3(c) provides that our precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

In addition, on page 2 of the response to the RFE counsel cites to six cases, including *Arctic Catering, Inc. v. Thornburgh*, 769 F.Supp. 1167 (D. Colo. 1991), claiming that these cases represent some of the business managerial occupations that have been recognized as specialty occupations. Counsel's assertions are misplaced, as the matters cited pertain to immigrant visa petitions and whether the beneficiaries are members of the professions as defined in section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), and as interpreted at those times. The issue before us is whether the petitioner's proffered position qualifies as a nonimmigrant H-1B specialty occupation and not whether it is a profession. Thus, the matters cited by counsel on page two of the RFE response are irrelevant to the instant petition.<sup>6</sup>

We are also 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

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The proposed duties' level of complexity, uniqueness, and specialization, as well as the level of independent judgment and occupational understanding required to perform them, are questionable, as the petitioner submitted an LCA certified for a Level I, entry-level position. By submitting an LCA in support of the petition that has been certified only for use with a Level I wage-level job opportunity, the petitioner conveys that it evaluates the position as actually a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate is to be used when the beneficiary would only be required to possess a basic understanding of the occupation; would be expected to perform routine tasks requiring limited, if any, exercise of judgment; would be closely supervised and would have her work closely monitored and reviewed for accuracy; and would receive specific instructions on required tasks and expected results.

<sup>6</sup> We note that the current, primary, and fundamental difference between qualifying as a profession and qualifying as a specialty occupation is that specialty occupations require the U.S. bachelor's or higher degree, or its equivalent, to be in a specific specialty. Thus, while "teachers in elementary or secondary schools" are specifically identified as qualifying as a profession as that term is defined in section 101(a)(32) of the Act, that occupation would not necessarily qualify as a specialty occupation unless it met the definition of that term at section 214(i)(1) of the Act.

*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 proceeding 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), one of the cases cited to by counsel in response to the RFE, 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. As explained above, 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).

On appeal, counsel cites to *Tapis Int'l v. INS*, 94 F. Supp. 2d 172 (D. Mass. 2000). In that case, the U.S. district court found that while the former Immigration and Naturalization Service (INS) was reasonable in requiring a bachelor's degree in a specific field, it abused its discretion by ignoring the portion of the regulations that allows for the equivalent of a specialized baccalaureate degree. According to the U.S. district court, the INS's interpretation was not reasonable because then H-1B visas would only be available in fields where a specific degree was offered, ignoring the statutory definition allowing for "various combinations of academic and experience based training." *Tapis Int'l v. INS*, 94 F. Supp. 2d at 176. The court elaborated that "[i]n fields where no specifically tailored baccalaureate program exists, the only possible way to achieve something equivalent is by studying a related field (or fields) and then obtaining specialized experience." *Id.* at 177.

We agree with the district court judge in *Tapis Int'l v. INS*, that in satisfying the specialty occupation requirements, both the Act and the regulations require a bachelor's degree in a specific specialty or its equivalent, and that this language indicates that the degree does not have to be a degree in a single specific specialty. As previously noted in this decision, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the

particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) (emphasis added).

Moreover, we also agree that, if the requirements to perform the duties and job responsibilities of a proffered position are a combination of a general bachelor's degree and experience such that the standards at both section 214(i)(1)(A) and (B) of the Act have been satisfied, then the proffered position may qualify as a specialty occupation. We do not find, however, that the U.S. district court is stating that any position can qualify as a specialty occupation based solely on the claimed requirements of a petitioner.

Instead, USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in a specific specialty as the minimum for entry into the occupation as required by the Act.

In addition, the district court judge does not state in *Tapis Int'l v. INS* that, simply because there is no specialty degree requirement for entry into a particular position in a given occupational category, USCIS must recognize such a position as a specialty occupation if the beneficiary has the equivalent of a bachelor's degree in that field. In other words, we do not find that *Tapis Int'l v. INS* stands for either (1) that a specialty occupation is determined by the qualifications of the beneficiary being petitioned to perform it; or (2) that a position may qualify as a specialty occupation even when there is no specialty degree requirement, or its equivalent, for entry into a particular position in a given occupational category.

First, USCIS cannot determine if a particular job is a specialty occupation based on the qualifications of the beneficiary. A beneficiary's credentials to perform a particular job are relevant only when the job is first found to qualify as a specialty occupation. USCIS is required instead to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether an alien beneficiary is qualified for the position at the time the nonimmigrant visa petition is filed. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. at 560 ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].").

Second, in promulgating the H-1B regulations, the former INS made clear that the definition of the term "specialty occupation" could not be expanded "to include those occupations which did not require a bachelor's degree in the specific specialty." 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991). More specifically, in responding to comments that "the definition of specialty occupation was too severe and would exclude certain occupations from classification as specialty occupations," the former INS stated that "[t]he definition of specialty occupation contained in the statute contains this requirement [for a bachelor's degree in the specific specialty or its equivalent]" and, therefore, "may not be amended in the final rule." *Id.*

Finally, counsel cites to *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985 (S.D. Ohio 2012), for the proposition that a "degree in a specific academic discipline was not necessary to be a Marketing Manager." While we agree with the court's finding that the knowledge, and not the title of the degree, is what is important, we again note that, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act.<sup>7</sup> In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added). For the aforementioned reasons, however, the petitioner has failed to meet its burden and establish that the particular position offered in this matter requires a bachelor's or higher degree in a specific specialty, or its equivalent, directly related to its duties in order to perform those duties.

In any event, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to any of those cases cited above. We also note that, in contrast to the broad precedential authority of the case law of a United States circuit court, we are 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 us, the analysis does not have to be followed as a matter of law. *Id.* at 719.

As the evidence in the record of proceeding does not establish that a baccalaureate degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of this petition, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, we find 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.

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<sup>7</sup> It is noted that the district judge's decision in that case appears to have been based largely on the many factual errors made by the service center in its decision denying the petition. We further note that the service center director's decision was not appealed to our office. Based on the district court's findings and description of the record, if that matter had first been appealed through the available administrative process, we may very well have remanded the matter to the service center for a new decision for many of the same reasons articulated by the district court if these errors could not have been remedied by us in our *de novo* review of the matter.

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

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent, nor does the record established a degree as a minimum entry requirement within the petitioner's industry.

In response to the RFE, the petitioner submitted 24 vacancy postings for positions it claims are similar to that of the proffered position in support of the contention that a degree requirement is common in parallel positions within the petitioner's industry. These postings, however, are not persuasive.

As previously noted, the petitioner stated on the Form I-129 that it is a "retail" business established in 2007 with seven employees and a gross annual income of \$9.6 million. It appears for the reasons previously stated that the petitioner's business is that of a gas station/convenience store, as indicated by its selection of business code 447100 on its 2011 Form 1120S.

For the petitioner to establish that an advertising organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, postings 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). As related earlier in this decision, due to the record's lack of comprehensive and substantive information regarding (1) the business organization in which the beneficiary would work and (2) the substantive marketing management matters in which the beneficiary would employ his services, the record lacks an adequate factual basis upon which to reliably determine (1) that the petitioner is similar to any of the organizations whose job advertisements were submitted or (2) that the proffered position and any of the advertised positions are parallel.

Next, we note that the petitioner did not provide any independent evidence of how representative the job advertisements are of the particular advertising employer's recruiting history for the type of job advertised. As the advertisements are only solicitations for hire, they are not evidence of the employer's actual hiring practices. Upon review of the documents, we find that they do not establish that a requirement for a bachelor's degree, in a specific specialty, is common to the petitioner's industry in similar organizations for parallel positions to the proffered position.

Again, in support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner and counsel submitted copies of 24 advertisements in response to the RFE. We have reviewed each positing, and note that not one of the submitted vacancy announcements is for a marketing manager position at a retail store with 7 employees. The petitioner thus has failed 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.

For instance, the advertisements include positions with well-known companies such as [REDACTED]. In addition, they represent vacancy announcements by various retail companies, a construction company, a medical center, and a veterinary health company, a food services company, and a mortgage company. The advertisements are for organizations that do not appear to be similar to the petitioner, and the petitioner has not provided any probative evidence to suggest otherwise. Consequently, the record is devoid of sufficient information regarding the advertising organizations to conduct a legitimate comparison of the organizations to the petitioner. The petitioner failed to supplement the record of proceeding to establish that the advertising organizations are similar to it. That is, the petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organizations.

Moreover, even on their face, some of the advertisements do not appear to be for parallel positions. For instance, some of the positions are for "senior" marketing managers, and some require a degree and "5+ to 7 years" of experience. As previously discussed, the petitioner designated the proffered position on the LCA through the wage level as a Level I low, entry-level position. For these postings, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.

Additionally, contrary to the purpose for which the advertisements were submitted, some of the postings do not establish that at least a bachelor's degree in a specific specialty, or the equivalent, is required for the positions. For example, some of the postings state that a bachelor's degree is required, but they do not indicate that a bachelor's degree in a *specific specialty* that is directly related to the occupation is required. Additionally, the petitioner submitted advertisements in which a bachelor's degree in disparate fields is acceptable. We here reiterate that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a *specific specialty* that is directly related to the specialty occupation claimed in the petition. Moreover, we observe that the petitioner submitted an advertisement that indicates that a bachelor's degree in business is acceptable. As previously discussed, since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not support the assertion that a position is a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558. In any event, the contents of the spread of advertisements submitted into the record reinforce the information in the *Handbook* that indicates

that the Marketing Managers occupational group is not notable for a requiring for entry at least a bachelor's degree in a specific specialty.

For the reasons set forth above, the petitioner has not satisfied the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not establish a requirement for at least a bachelor's degree in a specific specialty as 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.

Next, we find that the petitioner did not satisfy 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."

In this particular case, the petitioner has failed to credibly demonstrate that the duties the beneficiary would perform on a day-to-day basis 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 duties proposed for the beneficiary are similar to those outlined in the *Handbook* as normally performed by marketing managers, and the petitioner's descriptions of the duties which collectively constitute the proffered position lack the detail and specificity required to establish that the position surpasses or exceeds the typical marketing manager positions in terms of complexity or uniqueness. As noted above, the *Handbook* indicates that the performance of marketing manager positions do not normally require a bachelor's degree, or the equivalent, in a specific specialty.

We also incorporate by reference this decision's earlier comments and findings regarding the generalized level of the descriptions of the proposed duties and the position that they are said to comprise. We further find that, even outside the context of the *Handbook*, the petitioner has simply not established relative complexity or uniqueness as attributes of the proffered position, let alone as attributes with such an elevated degree as to require the services of a person with at least a bachelor's degree, or the equivalent, in a specific specialty. While we acknowledge that the beneficiary's background in business may assist her in performing the duties of the proffered position, the petitioner failed to establish how the beneficiary's responsibilities and day-to-day duties constitute a position so complex or unique it can be performed only by an individual with at least a bachelor's degree, or the equivalent, in a specific specialty.

Also, we incorporate here by reference and reiterate our earlier discussion regarding the LCA and its indication that the proffered position is a low-level, entry position relative to others within the occupation. Based upon the Level I wage rate specified in the LCA, the beneficiary is only required to have a basic understanding of the occupation. Moreover, that wage rate is indicative of a position where the beneficiary would perform routine tasks that require limited, if any, exercise of independent judgment; would be closely supervised and monitored; would receive specific instructions on required tasks and expected results; and would have her work reviewed for accuracy.

For these reasons, the petitioner has not satisfied either prong under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

We turn next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which entails an employer demonstrating that it normally requires a bachelor's degree, or the equivalent, in a specific specialty for the position.

Our review of the record of proceeding under this criterion necessarily includes whatever evidence the petitioner has submitted with regard to its past recruiting and hiring practices and with regard to employees who previously held the position in question.

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. The record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the proffered position.<sup>8</sup> In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty.

While a petitioner may believe and 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 the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position would not meet the statutory or regulatory definition of a specialty occupation. *See* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the actual performance requirements of the position necessitate a petitioner's history of requiring a particular degree in its recruiting and hiring for the position. *See generally Defensor v. Meissner*, 201 F. 3d at 387. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd

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

results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proposed position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

In any event, there is no evidence in the record to suggest that the petitioner has previously employed a marketing manager. Although counsel states in response to the RFE that "the position of a Marketing Manager has always been filed [sic] by an individual with education and experience equivalent to a U.S. Bachelor's degree in Business Administration," neither the petitioner nor counsel submit any evidence to support this claim. 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)). There is no evidence in the record that the petitioner has ever employed anyone but the beneficiary in the position of marketing manager.

As the evidence of record has not demonstrated a history of recruiting and hiring for the proffered position only persons with a bachelor's 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)(3).

Next, we find that the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires the petitioner to establish that the nature of the proffered position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

We here incorporate by reference into this discussion its earlier comments and findings regarding the generalized and generic level at which the proffered position and its duties are described, which reflect that the evidence of record does not develop the nature of the proposed duties with sufficient detail to establish the level of complexity and specialization required to satisfy this criterion.

Additionally, we observe that both on its own terms and also in comparison with the three higher wage-levels that can be designated in an LCA, the petitioner's designation of an LCA wage-level I is indicative of duties of relatively low complexity.

As earlier noted, the *Prevailing Wage Determination Policy Guidance* issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

**Level I** (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required

tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered [emphasis in original].

The pertinent guidance from the Department of Labor, at page 7 of its *Prevailing Wage Determination Policy Guidance* describes the next higher wage-level as follows:

**Level II** (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O\*NET Job Zones.

The above descriptive summary indicates that even this higher-than-designated wage level is appropriate for only "moderately complex tasks that require limited judgment." The fact that this higher-than-here-assigned, Level II wage rate itself indicates performance of only "moderately complex tasks that require limited judgment," is very telling with regard to the relatively low level of complexity imputed to the proffered position by virtue of its Level I wage-rate designation.

Further, we note the relatively low level of complexity that even this Level II wage-level reflects when compared with the two still-higher LCA wage levels, neither of which was designated on the LCA submitted to support this petition.

The aforementioned *Prevailing Wage Determination Policy Guidance* describes the Level III wage designation as follows:

**Level III** (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O\*NET Job Zones would be indicators that a Level III wage should be considered.

Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. . . .

The *Prevailing Wage Determination Policy Guidance* describes the Level IV wage designation as follows:

**Level IV** (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification,

and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

Here we again incorporate our earlier discussion and analysis regarding the implications of the petitioner's submission of an LCA certified for the lowest assignable wage-level. By virtue of this submission the petitioner effectively attested that the proffered position is a low-level, entry position relative to others within the occupation, and that, as clear by comparison with DOL's instructive comments about the next higher level (Level II), the proffered position did not even involve "moderately complex tasks that require limited judgment" (the level of complexity noted for the next higher wage-level, Level II). We also find that, separate and apart from the petitioner's submission of an LCA with a wage-level I designation, the petitioner has also failed to provide sufficiently detailed documentary evidence to establish that the nature of the specific duties that would be performed if this petition were approved is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

For all of these reasons, the evidence in the record of proceeding fails to establish that the nature of the proposed duties meets the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

## V. PRIOR APPROVAL

We note counsel's assertion that the proffered position is the same position in job title and duties as the previously approved H-1B petitions filed by the petitioner on behalf of the beneficiary. Counsel also references an April 23, 2004 memorandum authored by [REDACTED] (hereinafter [REDACTED] memo) as establishing that USCIS must give deference to those prior approvals or provide detailed explanations why deference is not warranted. Memorandum from [REDACTED] Associate Director for Operations, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity*, HQOPRD 72/11.3, (Apr. 23, 2004).

First, it must be noted that the Yates memo specifically states as follows:

[A]djudicators are not bound to approve subsequent petitions or applications seeking immigration benefits where eligibility has not been demonstrated, merely because of a prior approval which may have been erroneous. *Matter of Church Scientology International*, 19 I&N 593, 597 (Comm. 1988). Each matter must be decided according to the evidence of record on a case-by-case basis. See 8 C.F.R. § 103.8(d). . . . Material error, changed circumstances, or new material information

must be clearly articulated in the resulting request for evidence or decision denying the benefit sought, as appropriate.

Thus, the [REDACTED] memo does not advise adjudicators to approve an extension petition when the facts of the record do not demonstrate eligibility for the benefit sought. On the contrary, the memorandum's language quoted immediately above acknowledges that a petition should not be approved, where, as here, the petitioner has not demonstrated that the petition should be granted.

Again, as indicated in the [REDACTED] memo, we are 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). If the previous nonimmigrant petition was approved based on the same description of duties and assertions that are contained in the current record, it would constitute material and gross error on the part of the director. 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, our 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, we 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).

## VI. BEYOND THE DIRECTOR'S DECISION

Beyond the decision of the director, the petition may also not be approved due to insufficient evidence of the beneficiary's qualifications to perform the duties of a specialty occupation. We do not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient documentation 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. Therefore, we need not and will not address the beneficiary's qualifications further, except to note that, in any event, the evaluation from Dr [REDACTED] together with the supporting documentation submitted, does not meet the standard described in 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). No documentation was submitted from the [REDACTED] to establish that Dr [REDACTED] has the authority to grant credit for training and/or work experience, which is a requirement under the regulation. Therefore, the petitioner failed to submit an evaluation that meets the standard of 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) and the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

## VII. CONCLUSION

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d at 145.

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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