



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **JUL 29 2014** 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,

for Ron Rosenberg
Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as a 10 employee coffee business¹ established in 2004. In order to employ the beneficiary in what it designates as a full-time "marketing manager" at a salary of \$159,500 per year 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, concluding that the evidence of record does not demonstrate that the proffered position qualifies for classification as a specialty occupation.

The record of proceeding contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) counsel's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B, a letter from counsel, and supporting documentation.

We find that, upon review of the entire record of proceeding, the evidence of record does not overcome the director's grounds for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

I. FACTUAL AND PROCEDURAL HISTORY

As indicated above, the petitioner seeks to employ the beneficiary in a position that it describes as a "Marketing Manager" on a full-time basis. The petitioner specified its gross annual income as \$2,763,833 and its net annual income as \$684,302.

The Labor Condition Application (LCA) that the petitioner submitted in support of the petition was certified for use with a job prospect within the "Advertising, Promotions, and Marketing Managers" occupational classification, SOC (O*NET/OES) Code 11-2021, and a Level IV prevailing wage rate. The LCA also reflects that, as mentioned above, the petitioner assigned "Marketing Manager" as the position's job title.

In its March 4, 2013 letter, the petitioner described the duties of the proffered position as follows:

¹ The petitioner provided a North American Industry Classification System (NAICS) Code of 311920, "Coffee and Tea Manufacturing." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "311920 Coffee and Tea Manufacturing," <https://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited July 1, 2014).

- Grade and sort raw coffee products according to factors such as color, species, appearance, feel, smell and quality to ensure correct company product standards.
- Discern inferior or substandard raw coffee products and negotiate acceptable products for further company processing.
- Weigh products or estimate their weight, visually or by feel.
- Select raw coffee products according to grade and mark grades on containers.
- Record grade and/or identification numbers on containers for company processing and shipping.
- Assess raw coffee strength, uniformity and quality of coffee beans.
- Acquisition of the basic concepts of the sale of products for mass consumption.
- Process knowledge in the quotation, purchase of the raw product and marketing management and the total production of the coffee chain.
- Demonstrate high experience and willingness to stay current in the purchase and sale (sic) coffee markets.
- Must be highly qualified to service and maintain coffee and espresso equipment for which mechanical and electrical aptitude is needed.
- Possess good communication skills and an understanding of how to work with commercial coffee manufacturing equipment.
- Possess managerial skills with a solid engineering base.
- Be highly competent in the final sales as well as the industrial segments.
- Ability to communicate deal (sic) with diverse cultures in various languages including English and Spanish required for the US and Latin-American markets.

- Provide information to supervisors, co-workers, and subordinates by telephone, in written form, email or in person.
- Acquire and maintain accounts in the Latin, American and Italian Market.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 19, 2013. The petitioner was asked to submit probative evidence to establish that the position required a bachelor's degree in a specific field of study in order to perform the duties of the position. Further, the petitioner was asked to submit evidence of the beneficiary's valid nonimmigrant status until the beginning of the proposed H-1B status. Finally, the petitioner was asked to submit a statement explaining why checks had been previously issued to the beneficiary. The director outlined some of the types of specific evidence that could be submitted.

In a July 11, 2013 letter from counsel in response to the director's RFE, counsel provided the following information:

[The petitioner] is becoming a huge company. The company has signed contracts with [REDACTED] and during the last month with [REDACTED]. The beneficiary, since he is a system engineer will be the person responsible for managing seven sales persons and four mechanics who service four hundred coffee machines in the company. In addition, the new contract with [REDACTED] the beneficiary will be interacting with two hundred sales persons. [REDACTED] too has a sales force of up to two hundred sales persons.² A person like the Beneficiary is needed who is competent in systems and numbers. The Beneficiary has experience in the past from working in the Petitioner's sister company in Venezuela. The Beneficiary is a systems engineer. He has extensive experience in putting together budget systems, systems for tracking money, systems for obtaining sales in order to expand the company. In addition, the position requires knowledge of purchasing raw coffee for the proper processing of the coffee for sale and consumption.

The Beneficiary must have extensive experience and specialized knowledge of not only the product of coffee knowing how to market the finished product to large companies. [The beneficiary] has twenty four years of experience in the coffee business. In total the Beneficiary in this position be (sic) will be supervising eleven persons in the company and interact and will supervise over

² Although counsel has submitted documentation, including contracts and invoices, between the petitioner and various companies, including [REDACTED]

[REDACTED] no documentation has been provided to establish what specific involvement, duties and obligations the beneficiary will have with these companies. Nor has it been established that the work the beneficiary will perform on behalf of the petitioner in relation to these companies will require a bachelor's degree or its equivalent in a specialty occupation.

four hundred sales persons from [REDACTED] The Beneficiary must know how to deal with such a large sales force organizing and tracking sales and profitability.

[The petitioner] has other affluent customers as well in the Miami area. For example the company sells coffee to thirty seven branches of [REDACTED] Please see Exhibit K showing invoices with [REDACTED] Chain. The beneficiary will interact with seventy managers as each supermarket has two manager. The beneficiary will be the person to interact with the managers, to approve purchases and do budgeting.

[The petitioner] sells coffee also to twenty branches of the [REDACTED] There are forty managers again two managers per supermarket. Please see Exhibit O, a letter from the Distribution company which distributes coffee from [the Petitioner] to [REDACTED] Not only will the beneficiary need to interact with the Distribution company but also the sales managers of the [REDACTED] company.

* * *

The position being offered to the beneficiary is one with duties that are highly specialized and complex. The position requires specialized knowledge in the area of raw coffee, the processing of the coffee, knowledge of the complicated multimillion dollar machines, the sale of coffee to large companies and knowing how to make presentations to companies like [REDACTED] in order for the business to grow. In addition the position requires that the beneficiary have knowledge of how to manage and supervise at least one hundred and ten sales force from these companies.

The employee in this position must also know how to plan and budge for the company in order for the company to grow. This position will require systems to be put in place for the incoming funds and the allocation of funds. The Beneficiary must know how to obtain new contracts, work with their labor force and then organize the financials of the company.

* * *

Please note that the Beneficiary did work for the company for four years in a E-2 status. During that time he was paid a salary. The Beneficiary ceased working with the company on April 2012. Payments which were included in the previous package were checks issued to the Beneficiary when he worked with the company.

The director reviewed the documentation and found it insufficient to establish eligibility for the

benefit sought. The director denied the petition on July 19, 2013. Counsel submitted an appeal of the denial of the H-1B petition. With the appeal, counsel submitted a letter. In the July 31, 2013 letter, counsel stated the following:

You [the USCIS] have not had the opportunity to enter the factory. You have not seen the complex myriad of computers, and complex equipment that without a lengthy in-depth training could be used for anything from processing toothpaste to what it is truly used for- the processing of coffee. The machines are tightly arranged, yet perfectly balanced to work at optimum performance. The machines, specialty machines purchased from a manufacturer in Italy known for its high level of precision and quality components, have very specific purposes, tolerances, and must be carefully understood to avoid damaging or destroying the machinery. Any disruption in the flow of the coffee production would cost this growing company thousands of dollars. The Beneficiary is one person who understands how to manage the complex machines and oversee its operations.

If one were left alone and asked to simply begin the conveyer belt process leading to the manufacturing of the coffee, one would have to first meet all required mechanical tolerances, ascertain proper operational temperatures, and other product settings, before one could begin the processing of the coffee. One would not be able to successfully initiate this process because of the extreme complexity. Counsel has seen first-hand the manufacturing operation. Not one cup of coffee would be created from the efforts of a non-trained professional, even if one were to work at this all week.

The amount of training, experience, supervision, understanding of the market, engineering, and many other variables, requires an extremely high level of proficiency and training. No one at the beneficiary's level can operate these machines, or work for this company, if they did not understand the entire coffee-making process. Manufacturing is based on marketing and demand. Demand, sets manufacturing schedules and roasting processes. It would takes (sic) volumes to explain this process, the details, the workings of the machines, and that would require various experts in different area of engineering, production, and marketing, with many years experience to make the entire process possible and profitable.

* * *

Yes, this is a specialty occupation. No ordinary person could ever help run these operations with an average non-specific background. The company could not benefit from someone with just a marketing degree, or just an engineering degree. [The petitioner] cannot benefit from someone with expertise in another industry, as these are not transferable skills.

The beneficiary was key to all marketing efforts by the company because he understood all the processes behind making a profitable sale; from production, to marketing, and distribution. The beneficiary was responsible for increasing the revenues of the company through acquiring wholesale accounts. As a direct result of the beneficiary's efforts, [the petitioner] has been able to secure business from large wholesalers such as [redacted] and [redacted]. These are large organizations in the South Florida area. These are significant 'milestone' contributions to the company and requires specialized knowledge and superior work ethic to achieve.

II. ANALYSIS

A. Preliminary Findings that Preclude Approval

When determining whether a position is a specialty occupation, USCIS looks at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. To ascertain the intent of a petitioner, USCIS looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

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

As a preliminary matter, we note that the expanded description of the duties of the proffered position is not probative evidence as the descriptions were provided by counsel, not the petitioner. The letters provided by counsel, in response to the director's RFE and on appeal, were not endorsed by the petitioner and the record of proceeding does not indicate the source of the duties and responsibilities that counsel attributes to the proffered position. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Upon consideration of the totality of all of the petitioner's duty descriptions, position descriptions, explanations, and assertions, as well as the complete complement of documents submitted in support of the petitioner's specialty occupation claim, we find that the evidence in the record of proceeding does

not establish relative complexity, specialization and/or uniqueness as distinguishing aspects of either the proposed duties or the position that they are said to comprise.

While the petitioner and counsel may claim otherwise, the record's descriptions of the proffered position and its duties do not elevate them above positions within the Advertising, Promotions and Marketing Managers occupational group that are not so specialized, complex, and/or unique as to require either a person with at least bachelor's degree in a specific specialty, or the equivalent, or application of knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The record's description of the proffered position and its duties do comport with general duties of the Advertising, Promotions and Marketing Managers occupational group. However, as evident in the list of duties quoted above, the record of proceeding presents the proposed duties in terms of relatively abstract and generalized functions. They lack sufficient detail and concrete explanation to establish the substantive nature of the work and associated applications of specialized knowledge that their actual performance would involve within the context of the petitioner's particular business operations. Take for example the following duty description:

Process knowledge in the quotation, purchase of the raw product and marketing management and the total production of the coffee chain.

The evidence of record contains neither substantive explanation nor documentation showing the range and volume of such "quotation, purchase. . . and marketing management and the total production of the coffee chain" that the beneficiary would have to process. Likewise, the record does not illuminate the substantive work and associated applications of specialized knowledge that would be involved so as to establish a necessary connection between that work and attainment of a bachelor's degree, or the equivalent, in a specific specialty.

Additionally, although counsel asserts that the beneficiary will be "responsible for managing seven sales persons and four mechanics" in the proffered position, we note that the Form I-129 indicates that the company has only 10 employees, and further, the organizational chart submitted in response to the director's RFE does not indicate the referenced "four mechanics." 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).

Moreover, in response to the director's RFE counsel submits a document entitled [REDACTED]. The petitioner does not provide any detail on how this packaging machine relates to the proffered position and by extension, that only individuals with at least bachelor's degree in a specific specialty, or the equivalent, or application

of knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty, are able to "service and maintain coffee and espresso equipment."

With respect to such duties as "grade and sort raw coffee products," "discern inferior or substandard raw coffee products," "weigh products or estimate their weight, visually or by feel," "record grade and/or identification numbers on containers for company processing and shipping," "access raw coffee strength, uniformity and quality of coffee beans" and "service and maintain coffee and espresso equipment, we reiterate that to qualify as a specialty occupation, the petitioner must establish, *inter alia*, that the duties of the proffered position require a bachelor's or higher degree in a specific specialty or its equivalent. See section 214(i)(1)(B) of the Act and 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation"). Furthermore and as previously stated by the Service, "The H-1B classification is not intended . . . for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts." 63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998); *but cf.* 8 C.F.R. § 214.2(l)(3)(v)(C) (permitting L-1A managers or executives that are coming to the United States to open a "new office" in the United States to perform some non-qualifying duties during the one year period it takes the new office to meet the "doing business" standard).³ In other words and in contrast to the L-1A new office regulations, no provision in the law relevant to H-1B nonimmigrants provides an initial grace period during which non-qualifying duties may be performed.

Nevertheless, while there is no provision in the law for specialty occupations to include non-qualifying duties, we view the performance of duties that are incidental⁴ to the primary duties of the proffered position as acceptable when they are unpredictable, intermittent, and of a minor nature. Anything beyond such incidental duties, however, e.g., predictable, recurring, and substantive job responsibilities, must be specialty occupation duties or the proffered position as a whole cannot be approved as a specialty occupation.

Thus, we conclude that, as generally described as all of the elements of the constituent duties are, they do not - even in the aggregate - establish the nature of the proffered position or the nature of the position's duties as more complex, specialized, and/or unique than positions or their associated duties within the claimed advertising, promotions, and marketing managers occupational group that can be performed by a person without a least a bachelor's degree in a specific specialty, or the

³ This regulation recognizes that when a new office is first established and commences operations in the United States, the L-1A manager or executive responsible for setting up operations will be engaged in a variety of non-qualifying, day-to-day duties not normally performed by employees at the executive or managerial level and that often the full range of executive or managerial responsibility cannot be performed in that first year. See 52 Fed. Reg. 5738, 5740 (Feb. 26, 1987).

⁴ The two definitions of "incidental" in *Webster's New College Dictionary* 573 (Third Edition, Hough Mifflin Harcourt 2008) are "1. Occurring or apt to occur as an unpredictable or minor concomitant . . . [and] 2. Of a minor, casual, or subordinate nature. . . ."

equivalent, and that do not require the application of knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty.

Finally, as a corollary to our finding about the generalized and relatively abstract descriptions of the proffered position and its constituent duties, we also find that the record of proceeding fails to establish the relative amounts of time and effect that the beneficiary would have to devote to the various duties listed in the record. Given the record's relative emphasis upon the marketing management aspects of the proffered position and the designation of Marketing Manager as the proffered position in the Form I-129 and the LCA, we will evaluate the position as falling within the Marketing Managers occupational category.

B. Specialty Occupation

We will now address the director's determination that the evidence of record has not established that the proffered position is a specialty occupation. Based upon our complete review of the record of proceeding, we find that the evidence fails to establish that the position as described constitutes a specialty occupation. Accordingly, the appeal will be dismissed, and the petition will be denied.

To meet its burden of proof in establishing the proffered position as a specialty occupation, 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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires [(1)] 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 requires [(2)] the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

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

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

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

To determine whether a particular job qualifies as a specialty occupation, USCIS does not rely simply upon a proffered position's title. The specific duties of the position, combined with the nature of the petitioning entity's business operations, are factors to be considered to determine whether the position qualifies as a specialty occupation. USCIS must examine the extent and substance of whatever documentary evidence is provided with regard to the substantive nature of the specific work that the end-client (in this case, Cisco) may require as the ultimate employment of the beneficiary. *See generally Defensor v. Meissner*, 201 F. 3d at 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.

We will first discuss 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.

We recognize the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.⁵ As noted above, the petitioner submitted an LCA in support of this position certified for a job offer falling within the "Advertising, Promotions and Marketing Managers" occupational category.

The *Handbook's* discussion of the duties of the Advertising, Promotions and Marketing Managers occupational group states, in pertinent part, the following:

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.

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

⁵ The *Handbook*, which is available in printed form, may also be accessed online at <http://www.bls.gov/ooh>. The references to the *Handbook* are from the 2014-15 edition available online.

- 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

Advertising managers create interest among potential buyers of a product or service for a department, for an entire organization, or on a project basis (account). They work in advertising agencies that put together advertising campaigns for clients, in media firms that sell advertising space or time, and in organizations that advertise heavily.

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

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

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

Advertising managers known as *account executives* manage clients' accounts, but they are not responsible for developing or supervising the creation or presentation of the advertising. That task becomes the work of the creative services department.

Promotions managers direct programs that combine advertising with purchasing incentives to increase sales. Often, the programs use direct mail, inserts in newspapers, Internet advertisements, in-store displays, product endorsements, or

special events to target customers. Purchasing incentives may include discounts, samples, gifts, rebates, coupons, sweepstakes, or contests.

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

Marketing managers also develop pricing strategies to help organizations maximize 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.

U.S. Dep't 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 1, 2014).

The *Handbook* states the following with regard to the educational requirements necessary for entrance into the Advertising, Promotions and Marketing Managers 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.

Id. at <http://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm#tab-4> (accessed July 1, 2014).

The statements from the *Handbook* do not indicate that a bachelor's degree or the equivalent, in a specific specialty, is normally required for entry into this occupation. To the contrary, although the *Handbook* states that courses in business law, management, economics, accounting, finance, mathematics, and statistics are "advantageous," it does not state that a bachelor's degree from a

specific specialty is necessary. The statement that certain degrees are advantageous is not sufficient to establish that a bachelor's degree in a specific field of study is a normal minimum entry requirement.⁶

Moreover, with regard to the *Handbook's* statement that "most" advertising, promotions, and marketing managers possess a bachelor's degree, it is noted that 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 systems analyst positions require at least a bachelor's degree or a closely related field, it could be said that "most" system analyst positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." § 214(i)(1) of the Act.

Nor does the record of proceeding contain any persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion within the Advertising, Promotions, and Marketing Managers occupational group is 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."

As the evidence in the record of proceeding does not establish that at least a baccalaureate degree in a specific specialty, or its equivalent, 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 described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, 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 (1) to the petitioner's industry; and (2) for positions within that industry that are both: (a) parallel to the proffered position, and (b) 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

⁶ If merely stating that a degree confers advantage upon its holder were sufficient to satisfy this criterion, then virtually any position would qualify for classification as a specialty occupation, and the adjudicatory process would be rendered meaningless, as virtually every degree could be found to confer some type of advantage upon its holder.

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)).

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 are there any submissions from a professional association in the petitioner's industry stating that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions. Nor has the petitioner submitted any letters or affidavits from firms or individuals in the industry attesting that such firms "routinely employ and recruit only degreed individuals.

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

Next, the evidence of record does 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 will 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 record of proceeding does not contain sufficient evidence to establish relative complexity or uniqueness as aspects of the proffered position, let alone that the position is so complex or unique as to require the theoretical and practical application of a body of highly specialized knowledge such that a person with a bachelor's in a specific specialty or its equivalent is required to perform that position. Rather, the petitioner has not distinguished either the proposed duties, or the position that they comprise, from generic marketing managers work, which, the *Handbook* indicates, does not necessarily require a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

We further observe that counsel has indicated that the beneficiary's experience will assist the petitioner in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. Although the petitioner did submit documentation describing the coffee industry, its growth, and characterizes the nature of production and marketing as complex, it does not establish relative unique specialization and complexity as distinguishing dimensions of this particular position, let

alone as dimensions elevating the position above marketing manager positions that can be performed by persons without at least a bachelor's degree, or the equivalent, in a specific specialty.

The petitioner therefore failed to establish how the beneficiary's responsibilities and day-to-day duties comprise a position so complex or unique that the position can be performed only by an individual with a bachelor's degree, or the equivalent, in a specific specialty.

As the evidence of record therefore fails to establish that the beneficiary's responsibilities and day-to-day duties comprise a position so complex or unique that the position can be performed only by an individual with at least a bachelor's degree in a specific specialty or its equivalent, the petitioner has not satisfied the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) either.

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 in a specific specialty or its equivalent for the position.

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. Additionally, 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.

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* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

As the record of proceeding contains no evidence regarding the petitioner's recruiting and hiring of any other marketing managers, there is no evidence for consideration under this criterion. As the record of proceeding does not demonstrate that the petitioner normally requires at least a bachelor's degree in a specific specialty or its equivalent for the proffered position, it does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Next, the evidence of record does not satisfy 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 the specific specialty or its equivalent.

In reviewing the record of proceeding under this criterion, we reiterate our earlier discussion regarding the *Handbook's* entries for positions falling within the "Advertising, Promotions and Marketing Managers" occupational category. Again, the *Handbook* does not indicate that a bachelor's degree in a specific specialty, or the equivalent, is a standard, minimum requirement to perform the duties of such positions. As reflected in this decision's earlier discussion of the duty descriptions of the proffered position, the proposed duties as described in the record of proceeding contain no indication of specialization and complexity such that the knowledge they would require is usually associated with any particular level of education in a specific specialty. As generically and generally as they were described, the duties of the proposed position are not presented with sufficient detail and explanation to establish the substantive nature of the duties as they would be performed in the specific context of the petitioner's particular business operations. Also as a result of the generalized and relatively abstract level at which the duties are described, the record of proceeding does not establish their nature as so specialized and complex as to require knowledge usually associated with at least a bachelor's degree in a specific specialty, or the equivalent. We incorporate into the analysis of this criterion this decision's earlier comments and findings with regard to the generalized level at which the duties are described in the record. The evidence of record does not develop the duties in sufficient detail to establish their nature as so specialized and complex that their performance would require knowledge usually associated with the attainment of at least a bachelor's degree in a specific specialty. For all of these reasons, the evidence in the record of proceeding fails to establish that the proposed duties meet the specialization and complexity threshold 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. Consequently, the appeal will be dismissed and the petition will be denied on this basis also.

III. BENEFICIARY'S QUALIFICATIONS

The petitioner did not submit sufficient evidence regarding the proffered position to determine whether it will require a baccalaureate or higher degree in a specific specialty or its equivalent. 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 petitioner did not submit an evaluation of his foreign degree or sufficient evidence to establish that his degree is the equivalent of a U.S. bachelor's degree in a specific specialty. This would be an issue that the petitioner would have to resolve if the evidence of record had established the proffered position as a specialty occupation.

IV. CONCLUSION AND ORDER

For the reasons discussed above, we conclude that the evidence of record does not establish that the proffered position qualifies for classification as a specialty occupation.

An application or petition that fails to comply with the technical requirements of the law may be denied by this office 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 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when we deny 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 our 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, 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. The petition is denied.