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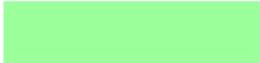


U.S. Citizenship
and Immigration
Services



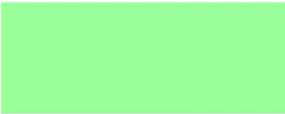
DATE: **MAY 29 2014**

OFFICE: CALIFORNIA SERVICE CENTER

FILE: 

IN RE:

Petitioner:

Beneficiary: 

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

ON BEHALF OF PETITIONER:

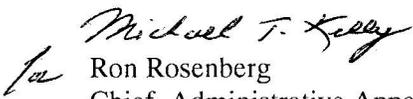
SELF-REPRESENTED

INSTRUCTIONS:

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

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

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as a wholesaler/retailer of fashion products. In order to employ the beneficiary in what it designates as a "Trilingual Business Development Writer,"¹ 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 the AAO 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, the AAO agrees 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. Factual and Procedural Background

In the petition signed on March 28, 2013, the petitioner indicates that it is seeking the beneficiary's services as a Trilingual Business Development Writer on a full-time basis at the rate of pay of \$14.12 per hour. In its March 12, 2013 letter of support, the petitioner states that it is engaged in the import and distribution of scarves, fashion jewelry, hats and belts. The petitioner further claimed that it seeks to expand its business interests into Latin America and China, and thus requires the services of a professional with a multicultural background to serve in the proffered position.

Regarding the duties of the proposed position, the petitioner stated:

The job duties to be handled by the position include the following:

1. **Marketing and promotional collateral:** Produce trilingual marketing and promotional collateral. Consult with marketing management and executive as appropriate. (30%)

¹ The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for the SOC (O*NET/OES) Code 27-3043, the associated Occupational Classification of "Writers and Authors," and a Level I (entry-level) prevailing wage rate.

- Consult and collaborate with CEO in setting long term goals and mapping out short and medium marketing and promotional strategies.
 - Compile data and write or revise text for informative, instructional and promotional articles, newsletters, electronic database publications, media guides as well as similar materials of a business nature.
 - Prepare and review press releases, and compose and/or proofread corporate announcements to America, Hispanic and Chinese business representations and customers.
 - Rewrite company's advertising and promotional materials in Spanish, Chinese and English by refer more Chinese or more Spanish culture.
 - Prepare and present detailed business plans and proposals, likely requiring both English and Chinese, for review and approval (because the CEO is native Chinese speaker). Proposals should include itemized requests for any initial expenditures and outlays required for the execution of said plans.
2. Provide trilingual business communication to facilitate effective coordination between the company and the foreign (including local) county fashion accessory supplier and our Chinese speaking and Spanish speaking customers. Rewrite and translate all the catalogue from Chinese to English or from Spanish to English or from English to Chinese or Spanish (20%)
- Assist CEO in drafting correspondence (including Chinese and Spanish) with vendors and suppliers in China, Mexico and USA in order to collect their latest business information such as product availability, returned item handling, new accessory etc.
 - Communicate with foreign country's business representative through phone and fax by using Chinese language software and Spanish software.
 - Develop and provide updated trilingual product's manuals.
3. Rewrite and translate company's business contracts, business plan and agreement from English to Chinese or from English to Spanish for the purpose to deal with more Chinese speaking suppliers in China or Spanish speaking suppliers in Mexico (10%)
4. Focus on potential Latin America and Chinese community markets. Assist the CEO and Manager in collecting and organize our company's updated financial report into Chinese or Spanish. These financial reports may include company's tax return, income and expense statement etc. (15%)
- Contact potential business partners and collect their information, including but not limited to product brochure, pricing, company's registration record, financial credibility background, product specialty and so forth.
5. Responsible for the day-to-day communication with the fashion product suppliers

in Asia and South America regarding purchase order, trend discovery, quality control, returned items and other daily operations. (10%)

6. Identify new product suppliers and retailers that may be interested in establishing joint ventures or branch offices with our company and determine the potential ability of these suppliers and retailers to benefit our company's development in the near future. (10%)
7. Provide editorial direction and/or writing services for the in-house projects of other departments. (5%)

The petitioner concluded by stating that the knowledge required to perform the duties of this position was often obtained through a four-year degree in communication, linguistics, or business administration. The petitioner further stated that the proffered position is akin to the classification of "Writers and Editors" as described by the U.S Department of Labor's *Occupational Outlook Handbook (Handbook)*, which indicates that "a bachelor's degree is typically needed for a salaried job as a writer." The petitioner concluded by stating that the proffered position required the incumbent to possess "at least a bachelor's degree in business administration related field."

In addition, the petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the job prospect corresponds to the occupational classification of "Writers and Editors" - SOC (ONET/OES Code) 27-3043, at a Level I (entry level) wage. The petitioner also submitted: (1) a copy of the petitioner's job posting for the proffered position; (2) a copy of a business proposal to enter into Hispanic markets; (3) copies of job postings that the petitioner claims are for parallel positions within the petitioner's organization; (4) copies of the beneficiary's academic credentials; and (5) various corporate documents pertaining to the petitioner's business, including an organizational chart and federal tax documents.

The director found the evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on May 22, 2013. The petitioner was asked to submit probative evidence to establish that the proffered position was a specialty occupation in accordance with the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). Additionally, the petitioner was asked to submit additional evidence pertaining to its business operations.

On July 18, 2013, counsel for the petitioner responded to the RFE. Counsel provided the following updated description of the duties of the proffered position:

The candidate for the proffered position will research, analyze, and conceptualize business strategies for profitable penetration into new and/or existing market segments and prepare marketing and analysis reports in English, Chinese, and Spanish as follows:

Analyze company's business systems to develop and devise methods and procedures to collect data, perform international costing analysis, pricing analysis, variance

analysis, formulate competition and market trending analysis according to the business environment and economic development of consumer markets in Latin America (20%)

Collect data and conduct qualitative analysis in order to forecast and monitor business, marketing and sales trends. Then provide trilingual business communications to facilitate effective coordination between the company and the foreign (including local) county fashion accessory suppliers, vendors, distributors, and customers in Latin America and Asia (who only speak Spanish or Chinese); and monitor and analyze company's business consumer information file to ensure efficient maintenance of company's sales channels and distribution channels meeting customer needs. (20%)

Research and analyze industry publications, press releases, events, and announcements in the Latin America & Asia regions to profile existing & potential customers in order to enhance database marketing initiatives; and perform marketing campaign activities and ensure data integrity and consistence are achieved across all Sales and Marketing systems (20%)

Perform statistical analysis (including analysis of overseas custom data from Latin America and Asia) and conduct database simulations to analyze company's operation information; and prepare reports, business plans, and related contract terms in three languages (with specifications tailored to the Spanish and Chinese culture) to management defining elements of problems and the interrelationship of the elements using simulated mathematical and statistical models (20%)

Participate in company's strategic meetings regarding business association and development with current & prospective business partners from the Latin America and Asia regions; and develop negotiating strategies and reports by studying the integration of new venture with company strategies, operations, examination of risks and potentials, and estimate partners' needs and goals (20%)

Counsel further stated that the proffered position was akin to a Marketing Manager, SOC (O#NET/OES Code 11-2021), as discussed in the *Handbook's* section entitled "Advertising, Promotions, and Marketing Managers.

Counsel also submitted additional documentary evidence in response to the RFE, including: (1) additional job postings for marketing manager positions; (2) a letter from [REDACTED] Ph.D., submitted for consideration as an expert opinion; (3) a letter from [REDACTED] Ph.D., also submitted for consideration as an expert opinion; (4) copies of the educational credentials for two of the petitioner's employees; (4) copies of the petitioner's quarterly tax returns; and (5) copies of various corporate documentation pertaining to the petitioner.

The director reviewed the information provided by the petitioner and counsel to determine whether

the petitioner had established eligibility for the benefit sought. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The director denied the petition on September 18, 2013. On appeal, the petitioner submitted a brief and contends that the director's findings were erroneous.

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, the AAO will make some preliminary findings that are material to the determination of the merits of this appeal.

II. Material Change in Response to the RFE

To ascertain the intent of a petitioner, U.S. Citizenship and Immigration Services (USCIS) must look 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."

In the instant case, the petitioner materially altered the duties of the proffered position in response to the RFE. Specifically, at the time of filing, the petitioner claimed that the proffered position was akin to that of a writer as described in the *Handbook's* section discussing the occupational classification of "Writers and Authors." Although the petitioner's description of the proffered position included numerous marketing tasks, it also indicated that the beneficiary's primary responsibility would be writing. For instance, the petitioner attributed the following duties to the proffered position:

- Compile data and write or revise text for informative, instructional and promotional articles, newsletters, electronic database publications, media guides as well as similar materials of a business nature.
- Prepare and review press releases, and compose and/or proofread corporate announcements to America, Hispanic and Chinese business representations and customers.
- Rewrite company's advertising and promotional materials in Spanish, Chinese and English by refer more Chinese or more Spanish culture.

- Rewrite and translate all the catalogue from Chinese to English or from Spanish to English or from English to Chinese or Spanish.
- Rewrite and translate company's business contracts, business plan and agreement from English to Chinese or from English to Spanish for the purpose to deal with more Chinese speaking suppliers in China or Spanish speaking suppliers in Mexico
- Provide editorial direction and/or writing services for the in-house projects of other departments.

In addition, the petitioner submitted a certified LCA for a job prospect designated as a "Business Writer" and classified under SOC (O*NET/OES) Code 27-3043.

In response to the RFE, however, counsel for the petitioner provided an entirely new description of duties for the proffered position. All of the duties enumerated above were eliminated from the descriptions of the proffered position that were provided in response to the RFE, which focused specifically on marketing duties, such as performing statistical analysis, researching, analyzing, and conceptualizing business strategies, collecting data, and forecasting business, marketing, and sales trends. Furthermore, counsel for the petitioner claimed that, contrary to the initial assertions submitted with the petition, the proffered position was actually that of a Marketing Manager under SOC (O*NET/OES) Code 11-2021.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary or materially change its associated job responsibilities. Here, the information provided in response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather provided a new list of generic duties that appears to materially change the "primary responsibilities" of the proffered position.

A petitioner may not make material changes to an H-1B submission in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If significant changes are made to the initial request for approval, the petitioner must file an amended or new petition, with appropriate fees and a new LCA, in accordance with the regulation at 8 C.F.R. § 214.2(h)(2)(i)(E).

The director denied the petition based on an analysis of the new statement of duties submitted in response to the RFE, and concluded that the position of marketing manager was not a specialty occupation. While the AAO concurs with the director's ultimate conclusion, the AAO notes that the director did not perform a complete analysis of eligibility in this matter. First, the AAO notes that the response to the RFE and the updated description of duties is printed on counsel's letterhead.

It is noted that this revised description of the duties and the requirements of the proffered position is not probative evidence as the information was provided by counsel, not the petitioner. Counsel's submission was not endorsed by the petitioner and the record of proceeding does not indicate the source of the revised 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).

Additionally, the information provided by counsel in response to the RFE did not clarify or provide more specificity to the original duties of the position, but rather introduced entirely new duties and altered the job title, and corresponding SOC (*ONET/OES) Code of the position. Rather than accepting this new, unendorsed statement of duties and analyzing those duties for compliance with the specialty occupation provisions in this section, the director should have analyzed the job description submitted with the initial petition to determine whether the proffered position was a specialty occupation.

Finally, counsel's attempt to amend the position to that of a marketing manager in response to the RFE, and the director's adjudication of the proffered position as that of a marketing manager, was improper, as the certified LCA contained herein would no longer correspond to the petition. Specifically, the LCA submitted with the petition reads "Business Writer" and was certified for SOC (O*NET/OES) Code 27-3043 ("Writers and Authors") at a Level I wage which, at the time of certification, was \$14.12 per hour, or \$29,370 per year, in San Bernardino County, California. The prevailing Level I wage for a Marketing Manager during that same time period in San Bernardino County was \$30.39 per hour/\$63,211 per year.

As noted above, the change of the proffered position's title and associated duties to that of a marketing manager constitutes not only a material change in the duties of the position, but also a material change to the prevailing wage associated with the newly-claimed occupational classification. Again, if significant changes are made to the initial request for approval, the petitioner must file an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E). To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A), by allowing that petitioner to simply submit an LCA for a different occupation and at a lower prevailing wage than the one being petitioned for.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the U.S. Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. See 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition, whether the*

occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the AAO cannot accept the new statement of duties and analyze the proffered position as that of a marketing manager, because doing so would result in adjudication of a petition that was not accompanied by an LCA certified for the proper occupational classification. The director's adjudication of the proffered position as a marketing manager, therefore, was improper.

The director's error is harmless, however, because the AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Because the information provided by counsel in response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather entirely revised the duties to the job description, the analysis of this criterion will be based on the job description submitted with the initial petition.

The AAO will therefore analyze the proffered position and its duties exclusively as presented in the Form I-129 and the allied documents that accompanied it when it was filed.

III. Law

To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the 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 stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and

other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

IV. Analysis

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. USCIS must examine the ultimate employment of the beneficiary, and determine whether the position qualifies as a specialty occupation. *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.

At Part 5 of the Form I-129, the petitioner stated that it was wholesaler/retailer of fashion products established in 2005 that currently employed 11 persons.

As a preliminary matter, the petitioner's claim that a bachelor's degree in "business" or a business-related field is a sufficient minimum requirement for entry into the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. 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).²

² 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

Again, the petitioner in this matter claims 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. This assertion is tantamount to an admission that the proffered position is not in fact a specialty occupation. We find, then, that appeal must be dismissed and that the petition must be denied on this basis alone.

The AAO will now discuss the application of each supplemental, alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

The AAO 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.

The AAO recognizes 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.³ The AAO reviewed the *Handbooks'* section pertaining to "Writers and Authors," and notes that this occupational category is described as follows:

Writers and authors develop written content for advertisements, books, magazines, movie and television scripts, songs, and online publications.

Duties

Writers and authors typically do the following:

- Choose subject matter that interests readers
- Write fiction or nonfiction through scripts, novels, and biographies
- Conduct research to obtain factual information and authentic detail
- Write advertising copy for use by newspapers, magazines, broadcasts, and the Internet

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.

Id.

³ The *Handbook*, which is available in printed form, may also be accessed online at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are from the 2014-15 edition available online.

- Present drafts to editors and clients for feedback
- Work with editors and clients to shape the material so it can be published

Writers and authors develop written material, namely, stories and advertisements, for books, magazines, and online publications.

Writers must establish their credibility with editors and readers through strong research and the use of appropriate sources and citations. Writers and authors select the material they want to use and then convey the information to readers. With help from editors, they may revise or rewrite sections, searching for the best organization and the most appropriate phrasing.

An increasing number of writers are *freelance writers*—that is, they are self-employed and earn their living by selling their written content to book and magazine publishers; news organizations; advertising agencies; and movie, theater, and television producers. Many freelance writers are hired to complete specific short-term or recurring assignments, such as writing a newspaper column, contributing to a series of articles in a magazine, or producing an organization's newsletter.

An increasing number of writers are producing material that is published directly online in videos and on blogs.

The following are examples of types of writers and authors:

Copywriters prepare advertisements to promote the sale of a good or service. They often work with a client to produce advertising themes, jingles, and slogans.

Biographers write a thorough account of a person's life. They gather information from interviews and research about the person to accurately portray important events in that person's life.

Generalists write about any topic of interest, unlike writers who usually specialize in a given field.

Novelists write books of fiction, creating characters and plots that may be imaginary or based on real events.

Songwriters compose music and lyrics for songs. They may write and perform their own songs or sell their work to a music publisher. They sometimes work with a client to produce advertising themes, jingles, and slogans, and they may be involved in marketing the product or service.

Playwrights write scripts for theatrical productions. They produce lines for actors to say, stage direction for actors to follow, and ideas for theatrical set design.

Screenwriters create scripts for movies and television. They may produce original stories, characters, and dialogue, or turn a book into a movie or television script. Some may produce content for radio broadcasts and other types of performance.

Journalists write reports on current events. For more information, see the profile on reporters, correspondents, and broadcast news analysts.

U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Writers and Authors," <http://www.bls.gov/ooh/media-and-communication/writers-and-authors.htm#tab-2> (accessed May 14, 2014).

While this occupational classification does not seem to completely encompass the nature of the beneficiary's proposed duties, a careful review of the nature of the petitioner's business and the proposed duties of the position, as outlined in the letter dated March 12, 2013, reveal that the proffered position generally comports with the Writers occupational group as described in the *Handbook*.

The *Handbook* states the following with regard to the educational requirements necessary for entrance into the field:

A college degree is generally required for a salaried position as a writer or author. Proficiency with computers is necessary for staying in touch with sources, editors, and other writers while working on assignments. Excellent writing skills are essential.

Education

A bachelor's degree is typically needed for a full-time job as a writer. Because writing skills are essential in this occupation, many employers prefer candidates with a degree in English, journalism, or communications.

Other Work Experience

Writers can obtain job experience by working for high school and college newspapers, magazines, radio and television stations, advertising and publishing companies, or not-for-profit organizations. College theater and music programs offer playwrights and songwriters an opportunity to have their work performed. Many magazines and newspapers also have internships for students. Interns may write stories, conduct research and interviews, and gain general publishing experience.

In addition, Internet blogs can provide writing experience to anyone with online access. Some of this writing may lead to paid assignments regardless of education, because the quality of writing, the unique perspective, and the size of the potential audience are the greatest determinants of success for a piece of writing. Online publications require knowledge of computer software and editing tools that are used to combine text with graphics, audio, video, and animation.

Those with other backgrounds who demonstrate strong writing skills also may find jobs as writers.

Id. at <http://www.bls.gov/ooh/media-and-communication/writers-and-authors.htm#tab-4>.

The statements made by DOL in the *Handbook* regarding entrance into this occupational category do not support a finding that a bachelor's degree, or the equivalent, in a specific specialty is normally required. Although the *Handbook* indicates that writers *typically* need a bachelor's degree, it does not indicate that the degree must be in a particular specialty. Although it states that many employers *prefer* a degree in English, journalism, or communications, such a degree preference does not equate the position to that 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). Therefore, the proffered position's inclusion in the Writers and Authors occupational group is not sufficient to establish that the position is one which normally requires for entry at least a bachelor's degree or the equivalent in a specific specialty.

The AAO notes the submission of two letters, by [REDACTED] and [REDACTED] for consideration as expert opinions regarding the educational requirements of the proffered position. However, these letters state that the proffered position is a marketing manager, and they further state that the conclusions are based on the description of duties provided by counsel, not the petitioner. As previously noted, the description of duties provided by counsel, in addition to altering the duties of the position as claimed in the initial support letter, were not endorsed by the petitioner. Moreover, for the reasons previously discussed, the proffered position will not be analyzed as that of a marketing manager, thereby affording no weight to the conclusions contained in these letter. Therefore, the AAO will not consider these documents further, except to note that the evaluators' conclusions that the proffered position requires the attainment of a bachelor's degree or its equivalent in business administration or a related field is inadequate to establish that a 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).

Finally, the AAO notes 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.⁴

⁴ 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:

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 Writers and Authors 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."

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, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common (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

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].

http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf (accessed May 12, 2014).

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 his or her work closely monitored and reviewed for accuracy; and would receive specific instructions on required tasks and expected results.

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.

The petitioner provided four job vacancy announcements in support of the contention that a common degree requirement exists in parallel positions within organizations that are similar to the petitioner.⁵

The petitioner designated its business operations under the corresponding North American Industry Classification System (NAICS) code 315212 designated for "Women's, Girls', and Infants' Cut and Sew Apparel Contractors" on the H-1B Data Collection and Filing Fee Exemption Supplement.⁶ The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

This U.S. industry comprises establishments commonly referred to as contractors primarily engaged in (1) cutting materials owned by others for women's, girls', and infants' apparel and accessories and/or (2) sewing materials owned by others for women's, girls', and infants' apparel and accessories.

U.S. Dep't of Commerce, U.S Census Bureau, 2007 NAICS Definition, 315212 – Women's, Girls', and Infants' Cut and Sew Apparel Contractors on the Internet at <http://www.census.gov/econ/industry/def/d423130.htm> (last visited May 14, 2014).

For the petitioner to establish that an 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.

The AAO notes 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, the AAO finds that they do not

⁵ Although the petitioner, through counsel, provided additional job postings in response to the RFE, those postings correspond to the occupation of marketing manager which, for the reasons set forth above, will not be considered, as the proffered position will not be analyzed under that occupational classification.

⁶ 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 visited May 14, 2013).

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.

Upon review of the documentation, the petitioner fails 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.

The petitioner submitted the following advertisements:

1. Business Writer/Process Documentation for an unidentified company;
2. Business Development, Capture Manager, and Proposal Writer (3 available positions included in one advertisement) for 22nd Century Technologies, Inc.;
3. Business Analyst for Robert Half Technology, described as "a leading provider of technology professionals";
4. Healthcare Communications Writer for unidentified company, described as a "community-developed health plan."

Without further information, the advertisements appear to be for organizations that are not similar to the petitioner and the petitioner has not provided any probative evidence to suggest otherwise. The first two postings listed above provide no information regarding the nature of the advertising company's business. The last two postings indicate that they are for positions in a technology staffing company and a community-developed health plan, neither of which is similar to the business operations of the petitioner. 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, most of the advertisements do not appear to be for parallel positions. For instance, all of the titles vary, from Healthcare Communications Writer to Business Analyst to Capture Manager, etc. Only the first posting listed above is for the position of "Business Writer," but the duties of this position, which include documentation of business processes and development of high level process flows, are not akin to the duties of the proffered position as described herein. Moreover, this position requires 3-5 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.⁷

⁷ USCIS "must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." *Matter of Chawathe*, 25 I&N Dec. at 376. As just discussed, the petitioner has failed to establish the relevance of the job advertisements submitted to the position proffered in this case. Even if their relevance had been established, the petitioner still fails to demonstrate what inferences, if any, can be drawn from these few job postings with regard to determining the common educational requirements for

Therefore, 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, the AAO finds 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 writers and authors, and the petitioner's description of the duties which collectively constitute the proffered position lacks the detail and specificity required to establish that the proffered position surpasses or exceeds the typical writer or author positions in terms of complexity or uniqueness. As noted above, the *Handbook* indicates that the performance of duties attributed to writers and authors 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 petitioner's statement that a generalized degree in business or a related field would qualify as an acceptable prerequisite for entry into the proffered position. The AAO finds further 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.

Also, the AAO incorporates here by reference and reiterates its 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 his work reviewed for accuracy.

entry into parallel positions in similar organizations in the same industry. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995).

The petitioner therefore 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.

Consequently, as it did not show that the particular position for which it filed this petition is 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 petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO turns 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 at least a bachelor's degree, or the equivalent, in a specific specialty for the position.

The AAO's 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.⁸ 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

⁸ 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.

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 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.

The petitioner confirms that the proffered position is a newly-created position and thus there is no hiring history to examine under this criterion. Although the petitioner submits some educational credentials pertaining to its other employees, the question here is whether the petitioner routinely requires a degree in a specific specialty for the proffered position, which it does not since this is a new position.

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, the AAO finds 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.

The AAO observes 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, the AAO notes 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 the AAO again incorporates its 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).

The AAO also finds 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. Although the petitioner asserts on appeal that the multicultural background of the beneficiary, and his trilingual abilities, are essential for the petitioner's ultimate expansion into new markets, this alone not establish complexity and specialization as contemplated herein.

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).

Additionally, we note that in the initial letter of support, the petitioner refers to several unpublished decision in which the AAO determined that the proffered position in those matters qualified as a specialty occupation. The petitioner has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. Moreover, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Finally, the assertions that the proffered position is not actually as described upon the filing of the petition and in the accompanying LCA of course undermine the credibility of the petition.

V. Conclusion

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

(b)(6)



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NON-PRECEDENT 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.