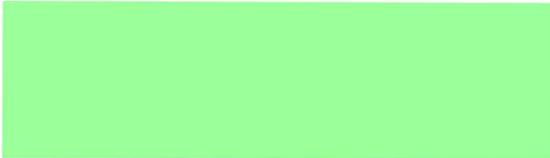
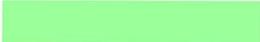




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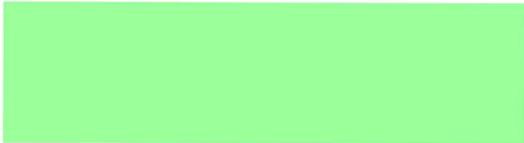


DATE: **OCT 09 2014** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

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:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

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

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as a "[t]ablet and mobile gaming company" established in 2012, with one to five employees and \$2.9 million in venture capital funding. In order to employ the beneficiary in what it designates as a "Director of User Acquisition" position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that the beneficiary is qualified to perform the duties of a specialty occupation. The petitioner subsequently filed a motion to reopen and reconsider. The director granted the motion, and denied the petition on the same ground, and the additional ground that the proffered position is not a specialty occupation. The petitioner now files this appeal, asserting that the director's decision was erroneous and failed to fully consider the submitted evidence.

As will be discussed below, we find that the evidence fails to establish that the proffered position is a specialty occupation. We will not reach the additional issue of whether the beneficiary is qualified to perform the duties of the proffered position. The appeal will be dismissed, and the petition will be denied.

We base our decision upon our review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; (5) the petitioner's motion to reopen/reconsider and the supporting documentation filed with it; (6) the director's second letter denying the petition; and (7) the petitioner's appeal and submissions on appeal.

I. FACTUAL AND PROCEDURAL HISTORY

As noted above, the petitioner describes itself as a "[t]ablet and mobile gaming company" established in 2012. In a letter dated March 26, 2013 submitted in support of the petition, the petitioner describes its company's operations, and states that it has locations in Helsinki, Finland, and Singapore. The petitioner explains that in March 2013, the petitioner raised \$2.9 million seed round venture funds to produce "core releases." From these funds, the petitioner opened its San Francisco office for the purpose of expanding its development capacity and launching the first of its core gaming titles. The petitioner explained the primary function of the proffered Director of User Acquisition position as to "be in charge of user acquisition for [the petitioner] in the U.S. market, with the responsibility of spanning across web, mobile and offline activities," and to "create partnerships with agencies and distribution partners to find the channels with the best possible

Customer Lifetime Value and lowest Cost per Acquisition." As to the educational requirement of the proffered position, the petitioner stated:

The position of Director of User Acquisition at [the petitioner] is a specialty occupation, requiring an individual who has achieved the minimum educational level of a Bachelor's degree (or foreign equivalent) in Business Administration, Finance, Economics, or a related quantitative field. The position also requires experience in relation development with third-party ad networks and mobile games publishers.

The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position corresponds to Standard Occupational Classification (SOC) code and occupation title "11-2021, Marketing Managers" from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a Level I, entry-level, position.

The petitioner submitted evidence that the beneficiary received the equivalent of a Master of Business Administration Degree from an accredited college or university in the United States. In support, the petitioner submitted, *inter alia*, the beneficiary's transcript from [redacted] where he received his Bachelor's in Business Studies. The petitioner also submitted course descriptions for several courses the beneficiary completed at Tilburg University and the [redacted] of Science and Technology, where he received a Master of Business Administration degree.

The petitioner printed out a page from its website describing jobs within the petitioning company. No educational requirements were mentioned on this page. The petitioner also submitted its job postings for a Product Manager and Marketing Manager Internship positions, none of which mentioned any educational requirements.

The petitioner submitted an opinion letter from Dr. [redacted], Professor of Marketing, [redacted] concluding that the job duties of the proffered position "describe a 'specialty' occupation, requiring the ability to apply the knowledge associated with the attainment of a bachelor's-level degree (or its equivalent) in Business Administration, Marketing Management, or a related field."

On August 27, 2013, the director issued a request for evidence (RFE) in this matter. The director requested, *inter alia*, evidence that the proffered position qualifies as a specialty occupation, and evidence to establish that the beneficiary is qualified to perform the proffered position. The RFE provided a non-exhaustive list of items that might be used to satisfy the requirements.

In response, the petitioner submitted, *inter alia*, a letter listing the duties of proffered position, as well as the specific coursework that relates to job duties. Specifically, the petitioner stated the following:

- Develop new network relationships with agencies and advertising agencies (10%)

- Reach out to third parties that can further aid [the petitioner] in distribution of its games. The scope of potential partners can vary widely from mobile ad networks, gaming companies, websites or traditional media.
- Respond to requests from third parties and actively select potential new partners. A thorough analysis (operationally and financially) of partners is required to assess the potential impact on [the petitioner].
- Enter in negotiations with new partners to obtain the best possible pricing for [the petitioner's] advertising channels.

Relevant Coursework:

Bachelor[']s of Science: Business Research: General assessment of the market and how to find new potential channels. Assists in collecting and analyzing data from various organizations.

Master[']s of Business Administration: Effective Negotiations: Apply specific negotiating techniques to maximize value for [the petitioner] and understand cross cultural negotiation differences.

Marketing Strategy and Policy: Assess new markets and territories in relation to the new partnerships.

- Work with the newly established partners to drive, execute and optimize user acquisition campaign strategies (15%)
 - Maintain relationships with partners from both the sales and account management side.
 - Analyze active user acquisition campaigns through modeling of performance data and optimizing accordingly.
 - Manage both external account managers and internal UA analysts to maximize performance of the UA campaigns.
 - Develop Lifetime value models for acquired players.

Relevant Coursework:

Bachelor[']s of Science: Computer & Internet Skills: Apply Excel skills for modeling.

Consumer Behavior: Understanding how different consumer cohorts behave and how overall market dynamics change. This will aid in effectively targeting user segments for [the petitioner].

Master[']s of Business Administration: Information and technology management. Apply the right IT tools and solutions for the business of [the petitioner].

Data Analysis: Advanced modeling techniques need to be applied to identify profitable user cohorts.

Equity valuation: Highly sophisticated models will need to be developed for LTV calculations, these models bear much resemblance to models used in finance for equity valuation purposes.

- Plan and execute all user acquisition campaigns on iOS and Android, using the partner relationships (20%)
 - Translate business expansion plans into actionable UA campaigns with partners and select specific partners based on their area of expertise.
 - Manage foreign parties and partners for international expansion.

Relevant Coursework:

Bachelor[']s of Science: Marketing, Introduction: Formulate strategy to achieve business objectives through marketing planning.

Master[']s of Business Administration: Marketing strategy and policy: Place marketing concepts in an international context and understand how foreign consumers react differently to various marketing messages. This is critical as [the petitioner] will operate an international business with customers all over the world.

- Manage the allocation of total marketing budgets (10%)
 - Allocate the total marketing budget across partners according to identified business needs.

Relevant Coursework:

Bachelor[']s of Science: Accounting Introduction: Understand the overall accounting framework and process.

Master[']s of Business Administration: Financial accounting foundations: How the marketing budgets will impact the overall financial statements of [the petitioner].

Managerial Accounting Foundations: Making better business decisions with the current budgets and use tools to optimize cash flows and reduce the payback period of investments. This is important as credit terms will be an important factor in partner negotiations.

- Manage supply side analytics and optimization, by tracking and analyzing results to identify opportunities for improvement and optimization; and source, evaluate, and test new user acquisition channels (30%)
 - The director of UA will be responsible for acquisition analytics. For this he will need to work closely with [the petitioner's] analytics provider [REDACTED] (both based in San Francisco).

Relevant Coursework:

Bachelor[']s of Science: Computer & Internet Skills: Advanced Excel skills are needed.

Operations Management: Implementation of analytics into every day operations of [the petitioner].

Master[']s of Business Administration: Information & Technology management. How do our partners contribute to the overall objectives of [the petitioner].

Data analysis: Combining analytics from various partners into one funnel for analysis.

- Recruit marketing staff for the US office and be in charge of office related matters (15%)
 - The director of UA is responsible for staffing the US office of [the petitioner] by finding talent in the local market. Positions will depend on business needs but the emphasis will be on marketing analysts and creative advertising roles.

Relevant Coursework:

Bachelor[']s of Science: Human Resource Management: How to assess candidates for potential employment and structure the organization for it.

Master[']s of Business Administration: Management of Organization: Structure your organization and set it up for success during expansions. Being a young company [the petitioner] will need to be shaped by the early employees.

"Challenges, Opportunities, and Options of Starting Up": Learning from a successful entrepreneur how to set up shop and deal with challenges along the way.

The petitioner submitted an additional opinion letter from [REDACTED] General Manager [REDACTED] [REDACTED] a developer and publisher of mobile and tablet games. Mr [REDACTED] concludes that the role of Director of User Acquisition at the petitioner requires the minimum of a "Bachelor's of Business degree."

The director denied the petition, finding that the petitioner failed to establish that the beneficiary is qualified to perform the duties of the specialty occupation.

The petitioner filed a motion to reopen and reconsider, primarily asserting that the beneficiary's degree is not generalized. In addition, the petitioner asserted that the proffered position requires "a Bachelor's in Business Administration with courses in: Business, Advertising, Statistics, Economics, Internet and Technology, Computer Science, Product Management, Media, Statistics, Quantitative Analysis, etc." The petitioner reaffirmed that the proffered position is consistent with a marketing manager position as described in the Department of Labor's *Occupational Outlook Handbook*

("Handbook"), which "clearly shows that a Marketing Manager's degree will relate to a specific field in which they are employed."

The director granted the motion to reopen and reconsider, and denied the petition on two grounds: (1) that the petitioner failed to establish that the beneficiary is qualified to perform the duties of the specialty occupation; and (2) that the petitioner failed to establish that the proffered position is a specialty occupation.

The petitioner now files this appeal. On appeal, the petitioner makes the same arguments as previously made on its motion to reopen and reconsider, and refers back to previously submitted evidence.

II. SPECIALTY OCCUPATION

USCIS is required to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether a beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation]."). Therefore, we will first address the issue of whether the petitioner has demonstrated that the proffered position qualifies as a specialty occupation.

A. The Law

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

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

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

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

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

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

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

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

degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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

B. Preliminary Findings

The director found that the proffered position is more similar to a general manager as described in the *Handbook*. We will withdraw this finding. We find that the duties described by the petitioner reasonably fall within the range of duties under the marketing managers occupational classification as described in the *Handbook*.

Notwithstanding, we find that the evidence of record does not consistently reflect what the minimum educational requirement is for the proffered position.

More specifically, in its March 26, 2013 letter, the petitioner stated that the proffered position requires a minimum of a "Bachelor's Degree in Business Administration, Finance, Economics, or a related quantitative field." In counsel's letter dated October 29, 2013 submitted in response to the RFE, counsel states that the proffered position requires a minimum of a bachelor's degree "in a related field," without specifying which field(s) is related. On motion and on appeal, the petitioner asserts that the proffered position requires a minimum of "a Bachelor's in Business Administration." Moreover, in their letters, Dr. Gould opines that the proffered position requires a minimum of "bachelor's-level training in Business Administration, Marketing Management, or a related field." Mr. [REDACTED] opines that the proffered position requires a minimum of a "Bachelor's of Business degree."

Taken as a whole, it is not clear what the petitioner asserts is the minimum educational requirement for the proffered position, i.e., whether it is a bachelor's degree in business or business Administration, finance/economics, marketing management, or other unspecified fields.

If it is the petitioner's claim that the minimum educational requirement for the proffered position is an otherwise unspecified bachelor's degree in business administration, this degree is insufficient to establish that the proffered 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 at 147.¹

The assertion that an otherwise unspecified bachelor's degree in business administration would be a sufficient educational qualification for the proffered position is tantamount to an admission that the proffered position does not require a minimum of a bachelor's degree in a specific specialty or its equivalent and does not, therefore, qualify as a specialty occupation position. On this basis alone, the petition could not be approved.

With respect to Dr. [REDACTED] assertion that the proffered position can also be satisfied by a degree in marketing management, we find this assertion to be unsupported by the evidence in the record. In particular, the petitioner has not expressly stated that the proffered position could be satisfied by degree in marketing management. Instead, the petitioner states that a bachelor's degree in business administration, or alternatively, a degree in finance, economics, or "a related quantitative field" is necessary. The petitioner has not explained with any specificity how marketing management is closely related to a degree in business administration, or alternatively, how it is a "quantitative field" that is closely related to finance or economics.

¹ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

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

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

We acknowledge that the petitioner has listed *some* marketing courses as providing the necessary knowledge needed to perform the duties of the proffered position. For instance, the petitioner listed the following seven bachelor's courses it claims provides the necessary knowledge to perform the proffered duties: (1) Business Research; (2) Computer and Internet skills; (3) Consumer Behavior; (4) Marketing, Introduction; (5) Accounting, Introduction; (6) Human Resources Management; and (7) Operations Management.² However, of these seven courses, only two of the courses - Consumer Behavior and Marketing, Introduction - appear to be marketing-specific. The petitioner has not explained how these two courses, or even all seven of the above-listed courses, are representative of an established curriculum leading up to a bachelor's degree in marketing management. Moreover, the petitioner has not explained how these courses demonstrate the relationship, if any, between a degree in marketing management, and a degree in business administration, finance, or economics. Overall, there is insufficient support to conclude that marketing management is closely related to business administration or finance/economics, such that Dr. [REDACTED] assertion is consistent with the petitioner's assertions.

Overall, the record contains inconsistent descriptions regarding the minimum educational requirement for the proffered position. That is, the record contains claims that a bachelor's degree in business/business administration, finance/economics, marketing management, and/or other unspecified fields are sufficient for the proffered position, without any explanation of which of the above fields actually represents the required specific specialty. This critical failure to articulate the specific specialty in which a degree is required precludes any finding that the proffered position constitutes a specialty occupation. As explained above, 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.

² We note that the petitioner also lists several master's-level courses as providing the necessary knowledge to perform the proffered duties. However, the petitioner does not assert that a master's degree is the minimum educational requirement for the proffered position.

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).

C. Opinion Letters

Here, we will address why the opinion letters from Dr. [REDACTED] and Mr. [REDACTED] lack probative value in establishing the proffered position as a specialty occupation. Both Dr. [REDACTED] and Mr. [REDACTED] conclude that the proffered position requires a bachelor's degree in business or business administration. However, as discussed earlier, a requirement of a general-purpose bachelor's degree in business administration, 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 at 147. Additionally, as discussed earlier, Dr. [REDACTED] assertion that a degree in Marketing Management is sufficient for the proffered position is not consistent with the petitioner's assertions nor supported by the evidence in the record.

Accordingly, we find that the opinion letters do not establish that the proffered position requires a minimum of a bachelor's degree in a specific specialty or its equivalent, as required to qualify as a specialty occupation position.

We may, in our discretion, use an advisory opinion or statement submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). As a reasonable exercise of our discretion, we decline to regard the advisory opinion letter as probative evidence of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, we will not discuss these letters further. For efficiency's sake, we hereby incorporate the above discussion regarding the opinion letters into our analyses of each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) below.

D. Discussion of Specialty Occupation Criteria

Moreover, it cannot be found that the proffered position is a specialty occupation due to the petitioner's failure to satisfy any of the supplemental, additional criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2) requires the petitioner to demonstrate that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position; or a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors we consider when determining these criteria include: whether the *Handbook* on which we routinely rely for the educational requirements of particular occupations, reports the

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

We will first address the requirement under 8 C.F.R. § 214.2(h)(4)(iii)(A)(I): A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. We recognize the *Handbook*, cited by counsel, as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.³

The petitioner claims in the LCA that the proffered position corresponds to SOC code and title 11-2021, Marketing Managers, with which we agree. The *Handbook* states the following about the educational requirements of marketing manager positions:

How to Become an Advertising, Promotions, or Marketing Manager

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

Education

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

Most marketing managers have a bachelor's degree. Courses in business law, management, economics, 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> (last visited Oct. 8, 2014).

On appeal, counsel asserts that the *Handbook* "clearly shows that a Marketing Manager's degree will relate to a specific field in which they are employed" The *Handbook* states, at most, that

³ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.bls.gov/oco/>. Our references to the *Handbook* are to the 2014 – 2015 edition available online.

"[c]ourses in business law, management, economics, finance, computer science, mathematics, and statistics are advantageous" for marketing managers; it states nothing of required degrees in specific specialties. The *Handbook* makes clear that marketing manager positions do not, as a category, require a minimum of a bachelor's degree in a specific specialty, or the equivalent. Rather, it indicates only that a bachelor's degree, without any particular specialty, is required for "most" positions.⁴ However, the requirement of a bachelor's degree, without further specification, is inadequate to establish that a position qualifies as a specialty occupation. 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. Again, 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.

Where, as here, the *Handbook* does not support the proposition that the proffered position satisfies this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise satisfies this criterion by a preponderance of the evidence standard, notwithstanding the absence of the *Handbook's* support on the issue. In such a case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that supports a favorable finding with regard to this criterion. The petitioner has not provided documentation from any other authoritative sources with regard to this criterion.

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

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

⁴ The statement that "most" positions requiring a bachelor's degree does not equate to a minimum entry requirement. For instance, the first definition of "most" in *Webster's New College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of marketing manager positions require at least a bachelor's degree, it could be said that "most" marketing manager positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position 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.

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

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other reliable and authoritative source, indicates that there is a standard, minimum entry requirement of at least a bachelor's degree in a specific specialty or its equivalent.

Also, there are no reliable submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions.

The record of proceeding contains no other evidence pertinent to this particular criterion. Thus, 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 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 has not, therefore, satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The evidence of record also 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." A review of the record indicates that the petitioner has failed to credibly demonstrate that the duties that comprise the proffered position entail such complexity or uniqueness as to constitute a position so complex or unique that it can be performed only by a person with at least a bachelor's degree in a specific specialty.

In this matter, the evidence of record does not establish that this position is significantly different from other marketing manager positions such that it refutes the *Handbook's* information to the effect that there is a spectrum of degrees acceptable for such positions, including degrees not in a specific specialty. In other words, the record fails to distinguish the proffered position as unique from or more complex than positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

For example, the petitioner describes general marketing duties such as "[d]evelop new network relationships with agencies and advertising agencies," "[w]ork with the newly established partners to drive, execute and optimize user acquisition campaign strategies," "[d]evelop new network relationships with agencies and advertising agencies," "[m]anage the allocation of total marketing budgets;" and "[r]ecruit marketing staff for the US office and be in charge of office related matters. Even the petitioner's more "detailed" breakdown of the above duties, such as "[e]nter into negotiations with new partners to obtain the best possible pricing for [the petitioner's] advertising channels," do not distinguish the duties of the proffered position as more complex or unique as compared to the typical duties of other marketing managers. Rather, these duties, as so generally described, fall within the umbrella of typical duties of marketing managers as described in the *Handbook*. Specifically, the *Handbook* lists typical duties of marketing managers as including: "[n]egotiate advertising contracts"; "[p]lan advertising and promotional campaigns"; "[w]ork with department heads or staff to discuss topics such as budgets and contracts, marketing plans, and the selection of advertising media"; and "[d]irect the hiring of advertising, promotions, and marketing staff and oversee their daily activities." *Id.* at <http://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm#tab-2> (last visited Oct. 8, 2014).

Furthermore, it is important to note that the petitioner designates the proffered position as a Level I (entry level) position on the LCA.⁵ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance."⁶ A Level I wage rate is described as follows:

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

⁵ Wage levels should be determined only after selecting the most relevant O*NET code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.

⁶ Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

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.

See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

Thus, in designating the proffered position at a Level I wage, the petitioner has indicated that the proffered position is a comparatively low, entry-level position relative to others within the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that he would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results. The petitioner's designation of the proffered position as a Level I (entry) position undermines the credibility of any claim as to the proffered position or the duties comprising it as being particularly complex or unique.

As the petitioner fails to demonstrate how the proffered position is so complex or unique relative to other positions within the same occupational category that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

We will next address the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which may be satisfied if the petitioner demonstrates that it normally requires a minimum of a bachelor's degree in a specific specialty or its equivalent for the proffered position.⁷

As evidence of this criterion, the petitioner submits a page from its website describing jobs within the petitioning company. No educational requirements were mentioned on this page. The petitioner

⁷ While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in a specific specialty or its equivalent. See *Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. See § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

also submitted its job postings for Product Manager and Marketing Manager Internship positions. However, the petitioner did not submit any job posting for the proffered position. Moreover, the petitioner's job postings for the Product Manager and Marketing Manager Internship positions do not mention any specific educational requirements. The petitioner did not submit any other reliable evidence pertinent to this criterion, and as such, has failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

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

Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. The duties of the proffered position have not been shown to be of a nature so specialized and complex that they require knowledge usually associated with attainment of a minimum of a bachelor's degree in a specific specialty or its equivalent. In other words, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than the duties of marketing manager positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent.

Furthermore, we reiterate our earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four assignable levels). That is, the Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category, and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, DOL indicates that a Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence and explanation, it is not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems." The petitioner has submitted inadequate probative evidence to satisfy the criterion of the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons above, the evidence of record fails to satisfy any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies for classification as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

III. BENEFICIARY QUALIFICATIONS

The director also found that the beneficiary would not be qualified to perform the duties of the proffered position if the job had been determined to be a specialty occupation. However, a

beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the evidence of record does not establish that the proffered position requires a baccalaureate or higher degree in a specific specialty or its equivalent. In fact, the petitioner's failure to articulate in what specific specialty a degree is required precludes any meaningful analysis of the beneficiary's qualifications for the proffered position. Therefore, we need not and will not address the beneficiary's qualifications further.

IV. CONCLUSION

The evidence of record fails to establish that the proffered position qualifies as a specialty occupation. 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.