



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: AUG 11 2015

PETITION RECEIPT #: [REDACTED]

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

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

ON BEHALF OF PETITIONER:

[REDACTED]

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, initially approved the nonimmigrant visa petition. Upon subsequent review of the record of proceeding, the Director issued a notice of intent to revoke (NOIR), and ultimately did revoke the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

I. BACKGROUND

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the Vermont Service Center on August 13, 2012. In the Form I-129 visa petition, the petitioner described itself as a marine supply business established in [REDACTED] with two employees. In order to extend the beneficiary's employment in what it designated as a marketing manager position, the petitioner sought 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 approved the petition; subsequently, a site visit was conducted. Thereafter, the Director issued a NOIR, and ultimately did revoke the approval of the petition on the basis that the petitioner violated the terms and conditions of the approved petition. The petitioner submitted an appeal of the decision.

The record of proceeding contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's NOIR; (3) the response to the NOIR; (4) the director's revocation notice; and (5) the Notice of Appeal or Motion (Form I-290B) and supporting documents. We have reviewed the record in its entirety before issuing our decision.

II. REVOCATION

The regulations at 8 C.F.R. § 214.2(h)(11)(iii), which governs revocations, states :

- (A) Grounds for revocation. The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:
- (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or
 - (2) The statement of facts contained in the petition was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or
 - (3) The petitioner violated terms and conditions of the approved petition; or
 - (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
 - (5) The approval of the petition violated paragraph (h) of this section or

involved gross error.

- (B) Notice and decision. The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

We find that the content of the NOIR comported with the regulatory notice requirements, as it conveyed grounds for revocation encompassed by the regulation at 8 C.F.R. § 214.2(h)(11)(iii)(A), and allotted the petitioner the required time for the submission of evidence in rebuttal that is specified in the regulation at 8 C.F.R. § 214.2(h)(11)(iii)(B). As will be discussed below, we further find that the Director's decision to revoke approval of the petition accords with the evidence or lack of evidence in the record of proceeding, and that neither the response to the NOIR nor the submissions on appeal overcome the grounds for revocation indicated in the NOIR. Accordingly, the appeal will be dismissed, and approval of the petition will remain revoked.

III. VIOLATION OF TERMS AND CONDITIONS OF EMPLOYMENT

A. The Petitioner and the Proffered Position

As noted above, the petitioner indicated on the Form I-129 that it is a marine supplies business established in [REDACTED] with two employees. The petitioner indicated that it seeks to extend the beneficiary's employment as a marketing manager and described the duties of the proffered position as follows:

As a Marketing Manager at [the petitioner], [the beneficiary] will continue to be responsible for formulating, directing and coordinating marketing activities and policies to promote [the petitioner's] products and services working with advertising and promotion agencies. He will continue to identify, develop, and evaluate marketing strategy, based on knowledge of establishment objectives, market characteristics, and cost and markup factors. He will also continue to evaluate the financial aspects of business, such as budgets, expenditures, research and development appropriations, and return-on-investment and profit-loss projections. He will continue to develop pricing strategies, balancing [the petitioner's] objectives and customer satisfaction. [The beneficiary] will compile lists describing the company's products.

[The beneficiary] will continue to have ultimate responsibility for the direction of marketing strategies. [The beneficiary] will use sales forecasting and strategic planning to ensure the sale and profitability of the company's products, analyzing business developments and monitoring the market trends. He will also initiate

market research and analyze their findings. He will meet with clients and vendors to cultivate relationships as necessary and will be responsible for analyzing expansion proposals. Further, he will continue to consult with buyers to gain advice regarding the types of products and services expected to be in demand. As a result of surveys, [the beneficiary] will monitor trends that indicate the need for new products and services. He will also develop pricing strategies with the goal of maximizing [the petitioner's] profits or share of the market while ensuring existing customers are satisfied. [The beneficiary] will continue to direct and participate in the negotiation of contracts with current and future clients of [the petitioner].

Further, the letter also stated that the "position of marketing manager is a professional position within a specialty occupation. It requires a Bachelor's degree in Business Administration, Finance, Marketing, Economics, Commerce or experience in a related field."

The petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B. The petitioner indicates that the proffered position corresponds to the occupational category "Marketing Managers"-SOC (ONET/OES Code) 11-2021, at a Level I (entry level) wage.

In response to the Director's RFE, the petitioner provided additional job duties and time allocation figures:¹

Job Duties	Percentage of Time
<ul style="list-style-type: none"> Formulating, directing and coordinating marketing activities and policies to promote [the petitioner's] products 	30%
<ul style="list-style-type: none"> Identify, develop, and evaluate marketing strategy 	15%
<ul style="list-style-type: none"> Evaluate the financial aspects of business, such as budgets, expenditures, research and development appropriations, and return-on-investment and profit-loss projections 	8%

¹ The petitioner also stated in the RFE response, "In our experience, we have found that individuals who have attained a baccalaureate-level education or its equivalent in Computer Science, Engineering, Mathematics or a related field are particularly well suited for the Systems Analyst function. The degree in Computer Science provides a foundation in technical software concepts and design techniques as well as management and teamwork approaches that are needed to oversee software projects of high technical complexity. " In as much as this description of a systems analyst position appears to have been included in support of the instant petition in error, we will continue our analysis based on the information submitted that identifies the proffered position as a marketing manager position. However, we note that the discrepancies in the record would preclude an affirmative finding on this petition, even if the other bases for revocation were overcome. 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).

• Develop pricing strategies	5%
• Hiring, Training, Managing and Evaluating Employees	12%
• Identify and secure Business Partners and Alliances	10%
• Attend Industry Conferences	2%
• Client Outreach	18%

The petitioner also stated:

By way of elaboration, Marketing Manager who will be responsible for such duties are required to demonstrate academic training and/or professional experience in computer information systems, management information systems, or a related functional area, in order to competently execute the required job duties. Bachelor's level training allows an individual to analyze and design the types of programs required in accordance with company parameters, and to perform the business process analysis and general industry knowledge associated with the position. Indeed, it would be impractical to employ a Marketing Manager who lacks an educational or professional background in business, marketing or a related field.²

B. Analysis

In the NOIR, the Director notified the petitioner that "a commercial database indicates that the beneficiary is the 'key executive' or vice president of your company." The Director further stated that it appears that the beneficiary is in "an executive position" "more or less controlling all operations in the [United States]." The Director requested copies of evaluations and sampling of the beneficiary's work.

In response to the NOIR, the petitioner indicated that "[o]n advice of our CPA, [the beneficiary] signed off as a Vice President representing and with full authority of our parent company" on its tax returns. The petitioner further asserted that "[t]his signature of [the beneficiary] on the tax return is an isolated example and this [in] no way contravenes the responsibilities and functions that he undertakes for our company in the position of Marketing Manager."³

² Here, the petitioner indicates that the marketing manager would need experience in computer information systems, management information systems or a related area to perform the requisite duties. This is inconsistent with the statements made previously which indicated that the position of marketing manager requires a bachelor's degree in Business Administration, Finance, Marketing, Economics, Commerce or a related field. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Absent an explanation from the petitioner, we cannot determine the true requirements for the position.

³ We note that the 2012 and 2013 corporate tax returns in the record of proceeding list the beneficiary as an officer and beneficiary is paid compensation as an officer.

Moreover the petitioner submitted a letter from the partner/CEO of the foreign entity that owns the petitioner. In the letter, the CEO asserts that the "[beneficiary]'s job duties and title are that of a marketing manager." However, he also states "[b]ecause [the beneficiary] is our highest ranking employee in this company, we request him to also act as our Vice President when a contract requires a Vice President level signatory and in selected communications where a Vice President position is more suitable." Similarly, the petitioner indicated in its response to the NOIR, that "as a company of two employees in the United States, [the beneficiary] and the undersigned undertake multiple responsibilities as per the directions of our parent company but in no way has any of those undertakings violated the terms of the beneficiary's employment with our company."

As noted, both the CEO and the petitioner acknowledge that the beneficiary performs multiple functions in the company including that of a Vice President.⁴ While the petitioner asserts that the beneficiary undertakes responsibilities pursuant to direction of the parent company, its statements are not supported by evidence in the record.⁵ For example, the petitioner submitted copies of job performance appraisals from 2012 and 2013. Notably, the review was signed by the petitioner's signatory, the only other employee in the United States, whose position title is "business operations supervisor." The review lists the beneficiary's goals, action taken, completion status, and comments, but there is no indication that any of the items contained in the review was executed under the direction of the parent company. Likewise, the petitioner also submitted copies of emails from the beneficiary to its clients, but there is no indication that the beneficiary was acting under the guidance of its parent company.

The petitioner further asserted that the beneficiary has "executed the responsibilities of his position and in the past year has grown the business of our company significantly." In support, the petitioner submitted a statement of the beneficiary's achievements such as the beneficiary "was involved with the marketing of high end carbon racing canoes that led to new sales" or "participated in the [redacted] at the [OffShore] Technology Conference" "to obtain insight on successful marketing strategies for the [redacted] construction market." Again, there is no indication that the beneficiary's duties were performed under the direction of its parent company. It

⁴ While USCIS should not limit its review to the size of a petitioner and must consider the actual responsibilities of the proffered position, we also note that it is reasonable to assume that the size of an employer's business has or could have an impact on the claimed duties of a particular position. See *EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v. Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the actual duties of a particular position.

⁵ We note that the ownership of the company has changed multiple times from 2010 to 2013. According to 2010 and 2011 corporate tax returns, [redacted], a corporation from Turkey had 100% of voting stock. Notably, the petitioner's letter dated July 13, 2012 indicates that the beneficiary worked as CEO/Partner of [redacted]. The 2012 corporate tax return states an individual named [redacted] from Israel owned 100% of the voting stock. The 2013 corporate tax return indicates [redacted] a corporation in [redacted] owns 100% of voting stock. With multiple ownership changes, it is not clear, how the parent company directed the petitioner or the beneficiary's activities.

appears that the beneficiary is working at an executive level at its company, controlling all operations in the United States.⁶ The petitioner was notified of this ground in the NOIR, but did not submit sufficient evidence in response to the NOIR or the appeal, and has not overcome the basis of the revocation. Therefore, the petitioner violated the terms and conditions of the approved petition.

IV. BEYOND THE DIRECTOR'S DECISION-SPECIALTY OCCUPATION

To comply with the notice requirements of 8 C.F.R. § 214.2(h)(11)(iii), a Director's decision to revoke a previously approved petition must be preceded by a NOIR which "shall contain a detailed statement of the grounds for the revocation." While the director issued a NOIR calling into question the proffered position's eligibility as a specialty occupation, the only factual basis for revocation articulated in the NOIR was that the petitioner is not employing the beneficiary in a specialty occupation consistent with the terms and conditions of the approved petition. Therefore, the Director's statement that the petitioner has not submitted any evidence to establish that this position qualifies as a specialty occupation will be withdrawn. However, we note that the evidence in the record does not establish that the proffered position qualifies as a specialty occupation. Consequently, even if the petitioner had overcome the basis of the Director's revocation, that is, that the petitioner violated the terms and conditions of the approved petition, which the petitioner has not overcome, this case would have been remanded to the director to issue a proper notice on the grounds 8 C.F.R. § 214.2(h)(11)(iii)(A)(5) that the approval of the petition violated paragraph (h) of this section or involved gross error.

A. Legal Framework

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

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

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

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

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human

⁶ Notably, the beneficiary's position could be classified as chief executive SOC (O*NET/OES) code 11-1011 or, general operations manager, SOC (O*NET/OES) code 11-1021, which may have higher prevailing wage.

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 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 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 387. 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. Analysis

A baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position

We will now discuss the proffered position in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

USCIS 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 that it addresses.⁷ The petitioner asserted in the LCA that the proffered position falls under the occupational category "Marketing Managers."⁸ We reviewed the section of the *Handbook* regarding this occupational category, including the section entitled "How to Become an Advertising, Promotions, or Marketing Manager," which states the following:

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

⁷ All of the references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>. The excerpts of the *Handbook* regarding the duties and requirements of the referenced occupational category are hereby incorporated into the record of proceeding.

⁸ As noted, while there are inconsistencies in the record of proceeding regarding the proffered position, we will assume that the proffered position is a marketing manager position as the petitioner represents.

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.

Work Experience in a Related Occupation

Advertising, promotional, and marketing managers typically have work experience in advertising, marketing, promotions, or sales. For example, many managers are former sales representatives; purchasing agents; buyers; or product, advertising, promotions, or public relations specialists.

U.S. Department of Labor, Occupational Outlook Handbook, 2014-15 Edition, Advertising, Promotions, and Marketing Managers, on the Internet at <http://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm> (visited July 30, 2015).

The *Handbook* does not state that a baccalaureate or higher degree, in a specific specialty, or its equivalent is normally the minimum requirement for entry into the proffered position. The *Handbook* specifically states that a bachelor's degree is required for most advertising, promotions, and marketing management positions," but it does not indicate that these positions require a bachelor's degree in a specific specialty, or its equivalent.

The *Handbook* states that there are several paths available for marketing managers. The *Handbook* indicates that baccalaureate degrees in various fields (advertising, journalism, economics, computer science) may be adequate for entry into this occupation. We note that, in general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's of higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields, such as engineering, science, and business, would not meet the statutory requirement that the degree be "in the specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(b).

In response to the RFE, the petitioner references the Occupational Information Network (O*NET) Summary Reports to establish that the proffered position qualifies as a specialty occupation normally requiring at least a bachelor's degree or its equivalent in a specific specialty. Contrary to the petitioner's assertions, O*NET OnLine does not state a requirement for a bachelor's degree in a specific specialty. Rather, it assigns this occupation a Job Zone "Four" rating, which groups it among occupations of which "most," but not all, "require a four-year bachelor's degree." Further, O*NET OnLine does not indicate that four-year bachelor's degrees required by Job Zone Four occupations must be in a specific specialty directly related to the occupation. Therefore, the information provided by O*NET OnLine does not support the assertion that the proffered position is a specialty occupation.⁹

It is incumbent upon the petitioner to provide persuasive evidence that the proffered position qualifies as a specialty occupation under this criterion, notwithstanding the absence of *Handbook* support on the issue. 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." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

*The requirement of a baccalaureate or higher degree in a specific specialty,
or its equivalent, is common to the industry in parallel
positions among similar organizations*

Next, we will review the record regarding 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 for positions that are identifiable as being (1) in the petitioner's industry, (2) parallel to the proffered position, and also (3) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ

⁹ We note that the petitioner's RFE response again references the position of computer systems analyst, stating "[t]he O*Net OnLine, . . . state[s] that the SVP range for a Computer Systems Analyst is greater than 7 but less than 8."

and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook* (or other independent, authoritative source) reports a standard industry-wide requirement for at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter.

In response to the Director's RFE, the petitioner asserted that:

Similar organizations employ individuals possessing a minimum of a Bachelor's degree in the position of a Computer Systems Analyst. Annexed as Exhibit C are copies of postings in Jobcentral.com, www.careerbuilder.com and by other organizations for the position of Marketing Managers with similar job requirements. These postings clearly evidence the fact that bachelor's degree is the minimum academic requirements for a Marketing Manager position. Even when the requirement for a Bachelor's degree is not mandated, the skill requirement is such that only a person with an advanced college degree will be able to perform the duties of that position or will be able to even understand the underlying technical requirements.¹⁰

In support of the above assertion, the petitioner submitted copies of job advertisements. In the Form I-129, the petitioner stated that it is a marine supply business with 2 employees. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 423840.¹¹ This NAICS code is designated for "Industrial Supplies Merchant Wholesalers." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

This industry comprises establishments primarily engaged in the merchant wholesale distribution of supplies for machinery and equipment generally used in manufacturing, oil well, and warehousing activities.

U.S. Dep't of Commerce, U.S. Census Bureau, 2012 NAICS Definition, 423840 Industrial Supplies Merchant Wholesalers, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last viewed July 30, 2015).

¹⁰ We note that once again the petitioner's letter discusses both a computer systems analyst position and a marketing manager. As this appears to be in error, we will focus our analysis on the submission of the job advertisements as they may relate to a marketing manager position.

¹¹ According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity and, each establishment is classified to an industry according to the primary business activity taking place there. *See* <http://www.census.gov/eos/www/naics/> (last viewed July 30, 2015).

For the petitioner to establish that an organization is similar under this criterion of the regulations, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such information, evidence submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner.

When determining whether the petitioner and the organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

In the instant case, the petitioner submitted four vacancy announcements. The announcements are from [REDACTED] a leading provider of technical, professional and industrial staffing services; [REDACTED] in the healthcare industry; The [REDACTED] provider of expert ERP and IT staffing solutions; and [REDACTED] a leading marketing company with broadcasting stations in three markets. We will briefly note that, without more, the job postings do not appear to be from organizations similar to the petitioner.

Further, the petitioner has not established that the advertisements are for parallel positions. For example, the position with [REDACTED] requires a "minimum of five to seven years of related work experience." The posting from the [REDACTED] requires "3-5 years of marketing experience in a corporate environment," while the posting from the [REDACTED] requires "5-8+ years of Marketing Management experience preferably in a technology driven organization," and [REDACTED] requires "4-6 years of experience in the marketing industry." As previously discussed, the petitioner designated the proffered position on the LCA through the wage level as a Level I (entry level) position relative to others within the occupation. The advertised positions appear to be for more senior positions than the proffered position. More importantly, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.

As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary.¹² That is, as the evidence does not establish that similar organizations in the same

¹² Even if all of the job postings indicated that a bachelor's degree in a specific specialty, or its equivalent, is common to the industry in parallel positions among similar organizations (which they do not), the petitioner does not demonstrate what inferences, if any, can be drawn from these advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995).

industry routinely require at least a bachelor's degree in a specific specialty, or its equivalent, for parallel positions, not every deficit of every job posting has been addressed.

The petitioner has not established 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 (1) in the petitioner's industry, (2) parallel to the proffered position, and also (3) located in organizations that are similar to the petitioner. For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The particular position is so complex or unique that it can be performed only by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent

We will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner shows that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

In response to the RFE, the petitioner asserts that the petitioner's industry makes this proffered position unique, in that:

[A] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the position of marketing Manager at a company like [the petitioner], which deals in specialized equipment sales and service and derives its edge by offering highly specialized offerings with technical complexity to its clients. In order to compete, these clients are early adapters of best in class products and seek out providers like [the petitioner], which possesses exceptional skill sets and know-how and who offer products and services that allow a high level of assurance.

However, the record does not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its normal is so complex or unique that it can be performed only by an individual with a degree." To begin with, the record does not sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of marketing manager. Specifically, the petitioner does not demonstrate how the marketing manager duties described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty or its

As such, even if the job announcements supported the finding that the position required a bachelor's or higher degree in a specific specialty, or its equivalent (for organizations in the same industry that are similar to the petitioner), it cannot be found that such a limited number of postings that appear to have been consciously selected outweigh the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not normally require at least a baccalaureate degree in a specific specialty, or its equivalent, for entry into the occupation in the United States.

equivalent is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the position it claims is so unique. While a few courses in business or marketing may be beneficial in performing certain duties of a marketing manager, the petitioner has not demonstrated how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty or its equivalent is required to perform the duties of the particular position here proffered.

Therefore, 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 education levels acceptable for marketing manager positions. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than a marketing manager position or other closely related positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent. Consequently, as the petitioner does not demonstrate how the proffered position of marketing manager is so complex or unique relative to other marketing manager positions 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).

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. The LCA indicates a wage level at a Level I (entry) wage, which is the lowest of four assignable wage levels.¹³ Without further evidence, the record does not demonstrate that the proffered position is complex or unique as such a position falling under this occupational category 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 example, 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."¹⁴ The evidence of record does not establish that this position is significantly different from other positions in the occupational category such that it

¹³ The issue here is that the petitioner's designation of this position as a Level I, entry-level position undermines its claim that the position is particularly complex, specialized, or unique compared to other positions within the same occupation. Nevertheless, it is important to note that a Level I wage-designation does not preclude a proffered position from classification as a specialty occupation. In certain occupations (doctors or lawyers, for example), an entry-level position would still require a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor's degree in a specific specialty or its equivalent. That is, a position's wage level designation may be a consideration but is not a substitute for a determination of whether a proffered position meets the requirements of section 214(i)(1) of the Act.

¹⁴ For additional information regarding wage levels as defined by DOL, 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.

refutes the *Handbook's* information that a bachelor's degree in a specific specialty, or its equivalent is not required for the proffered position.

The petitioner did not establish that its particular position is so complex or unique that it can only be performed by an individual with at least a bachelor's degree in a specific specialty, or its equivalent. The petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The employer normally requires a baccalaureate or higher degree in a specific specialty, or its equivalent, for the position

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. To this end, we review the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position, and any other documentation submitted by a petitioner in support of this criterion of the regulations.

To merit approval of the petition under this criterion, 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 performance requirements of the position. While a petitioner may assert that a proffered position requires a specific degree, that statement 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 petitioner 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 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if 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").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in 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 proffered 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 claimed that it hired another marketing employee, [REDACTED] and provided a copy of her Master of Business Administration diploma. The petitioner indicated that [REDACTED] is responsible for "conducting cold phone calls" and "gathering marketing materials, preparing and following up quotations." Based on this information, it appears that [REDACTED] duties are limited. In other words, the petitioner has not established that [REDACTED] duties are similar or same as the proffered position. Further, we note that 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. USCIS has consistently stated that, 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).

Therefore, the record does not establish that the petitioner normally requires a bachelor's degree in a specific specialty, or its equivalent, for the proffered position and that performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge. Therefore, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 in a specific specialty, or its equivalent

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

The petitioner has not claimed that the nature of the specific duties of the position in the context of its business operations 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, or its equivalent. Nonetheless, we have reviewed and evaluated the petitioner's statements regarding the proffered position and its business operations in light of this criterion. The relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent.

We further incorporate our earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a Level I position (the lowest of four assignable wage-levels) relative to others within the occupational category. Without more, the position is one not likely distinguishable by relatively specialized and complex duties. That is,

without further evidence, the petitioner's has not demonstrated that its proffered position is one with specialized and complex duties as such a position falling under this occupational category would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a substantially higher prevailing wage.¹⁵

The petitioner has submitted insufficient evidence to satisfy this criterion of the regulations. Thus, the petitioner has not established that the nature of the specific duties of the proffered position is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. We, therefore, conclude that the petitioner did not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has not established that it has satisfied 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 as a specialty occupation.

Based upon a complete review of the record of proceeding, the petitioner has not overcome the revocation grounds specified in the NOIR and the subsequent revocation decision.¹⁶ Accordingly, the appeal is dismissed. The approval of the petition remains revoked.

The burden of proof in this proceeding rests solely with the petitioner. Section 291 of the Act. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition remains revoked.

¹⁵ As noted previously, the issue here is that the petitioner's designation of this position as a Level I, entry-level position undermines its claim that the position is particularly complex, specialized, or unique compared to other positions within the same occupation. Nevertheless, it is important to note that a Level I wage-designation does not preclude a proffered position from classification as a specialty occupation. In certain occupations (doctors or lawyers, for example), an entry-level position would still require a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor's degree in a specific specialty or its equivalent. That is, a position's wage level designation may be a consideration but is not a substitute for a determination of whether a proffered position meets the requirements of section 214(i)(1) of the Act.

¹⁶ We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). However, as the appeal is dismissed, and the petition is revoked for the reasons discussed above, we will not further discuss the additional issues and deficiencies that we observe in the record of proceedings.