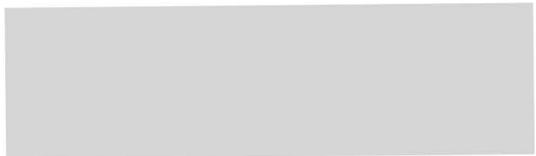




U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **AUG 20 2015**

PETITION RECEIPT #:

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:



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](http://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, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

## I. PROCEDURAL BACKGROUND

In the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a music record label, with 12 employees, established in [REDACTED]. In order to employ the beneficiary in what it designates as a social media manager position, the petitioner seeks to classify her 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 evidence of record did not establish that the proffered position qualifies as a specialty occupation. On appeal, the petitioner asserts that the Director's basis for denial was erroneous and contends that it satisfied all evidentiary requirements.

The record of proceeding contains: (1) the Form I-129 and supporting documentation; (2) the Director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the Director's letter denying the petition; and (5) the Notice of Appeal or Motion (Form I-290B) and supporting documentation. We reviewed the record in its entirety before issuing our decision.<sup>1</sup>

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

## II. SPECIALITY OCCUPATION

The primary issue is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation.

### 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 of a specialty occupation.

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

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<sup>1</sup> We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

- (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 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. Proffered Position

On the Form I-129, the petitioner indicated that it wishes to employ the beneficiary as a social media manager on a part-time basis (25 hours per week) for \$20 per hour. In the support letter, the petitioner describes itself as "an independent record label that specializes in rock, metal, indie and electronic music." According to the petitioner, the social media manager "will work within [its] strategic marketing and public relations divisions, focusing on the music industry." The petitioner describes the proffered position as follows:

[The beneficiary] will serve as an advocate for clients seeking to build and maintain positive relationships with the public through social media. As a manager, she will be responsible for assisting artists with finding the link between proper social media practices and advising on strategy and policy of their communications. [The beneficiary] will be participating in a variety of artists' social media account projects on behalf of the company's considerable and

continually growing roster of clients in the music and entertainment industries. The accounts she will manage include Facebook, Twitter, Tumblr, Vine, Instagram, YouTube, website maintenance (WordPress, Bandcamp) along with a variety of other apps (Bandsintown, Static HTML, BandPage, etc).

Within the context of the specific segment/genre of music or entertainment the clients assigned to her are engaged in, [the beneficiary] will be involved in the processes of conceptualizing and executing a variety of DTC (Direct-To-Consumer) campaigns including contests and giveaways. She will study the nature, objectives and needs of each client's business to facilitate her team's development of social media campaigns and promotional strategies. Furthermore, [the beneficiary] will contribute to the educational process of informing artists on social media best practices such as tagging, hashtags, and content as well as account optimization for all digital touchpoints.

The role to be filled by the beneficiary will additionally include research key demographic, psychographic and geographic information on artist fan bases. She will provide digital and physical marketing and preorder campaigns with prime retail outlets such as iTunes, Amazon, Google Play, Spotify, RDIO, AIMS, Best Buy, Hot Topic and a variety of other outlets. Additional tasks that may be performed by the beneficiary will include coordinating communication between press and radio campaigns, creating marketing plans for artists, handling database maintenance, promotional mailings, working with ERP/CRM accounting software, creating and editing VBA scripts, financial reporting and day-to-day administrative functions.

The petitioner also stated that "an applicant must have the breadth and depth of knowledge associated with attainment of at least a relevant baccalaureate degree."

The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position corresponds to the occupational classification of "Public Relations Specialist"-SOC (ONET/OES Code) 27-3031, at a Level I (entry) wage.

In response to the Director's RFE, the petitioner provided additional details about the job duties and the percentage of time spent on each duty, stating:

1. Optimizing label and artist social media campaigns with artists (posting buy links, reviews, interviews, contesting and giveaways);
2. Executing social media strategy with the marketing and public relations teams i.e. posting and coordinating timelines;
3. Creating, analyzing, monitoring marketing plans for artists and new releases;
4. Managing and hiring all office interns;

5. Reporting sales to artists and internally on a day-to-day, weekly, and monthly basis;
6. Handling social media networking (Facebook, Twitter, Google+, Tumblr, YouTube, Spotify, Rdio, etc);
7. Coordinating sales and other promotional campaigns; and
8. Optimizing label and artist social media pages with headers, analytics, and best practices consultations.

The position can be subdivided into two basic components: (1) Social Media; and (2) Marketing. These two components are subdivided even further to outline the responsibilities and the skills required to effectively perform these responsibilities along with a breakdown of percentages of time devoted to each job responsibility as evidenced below:

**SOCIAL MEDIA 60%**

- 40%: Analyze online properties for each artist on the label; currently 50 artists and coordinate social media initiatives for [the petitioner's] social platform as well as bands/artists' social pages

This responsibility involves analytical skills by gathering statistics and analyzing demographics, comparing growth patterns, developing strategic steps that generate fan engagements, building long term relationships with fans, and utilizing postings to directly impact album sales.

- 10%: Conducting research and discovering new trends in [a] constantly evolving and ever expanding field of social media

This responsibility requires attending regular meetings with all digital retail accounts, researching social media strategy sites, presenting and educating all departments internally with the latest trends and encouraging adoptions of the most effective strategies into the company culture.

- 5%: Creating in depth social media proposals

This responsibility involves utilizing marketing skills in order to present social media findings and trends to internal departments, sub-labels that the company distributes, other territories outside the USA, and new artists the company seeks to collaborate with in the future.

- 5%: Liaising with the company's distribution company to secure street team promotion

This responsibility requires providing plans with artist's activities including tours and other engagements, creating assets as needed in conjunction with the creative and production departments: art, banner, posters, flyers, etc., receiving and analyzing progress reports to share with the appropriate departments.

### **MARKETING 40%**

- 20%: Creating in depth Marketing plans for artists and management that includes social media, press, radio, TV and marketing updates

This responsibility involves multi-page overviews that cover all phases of the release that can span one to two years, coordinating with all departments at the label and distributor to analyze all relevant marketing information, collecting statistics on the artists past album sales and social media sites to help create a targeted campaign, establishing a budget based on projections from the previous year[']s data.

- 10%: Creating Profit and Loss Reports

This responsibility requires monitoring monthly and quarterly results based on actual album sales and deciding if more marketing is needed to help the development of the release. Reports are then provided for current and future signed artists in order to anticipate the success of a release.

- 5%: Creating Turnkey pitches for releases on marketing programs

This responsibility involves assisting the band pitching for premiere placement and support for the album on all digital platforms. The turnkey pitches are released to digital retailers such as iTunes, Amazon, Spotify, Rdio, Google Play, and more. These submissions usually entail a full overview of the release and can be multiple pages per release.

- 5%: Reporting venue sales of each artist

This responsibility requires gathering and processing the appropriate data needed to gain a better understanding of the artists' fan base and top markets for venue sales while on tour.

In response to the RFE, the petitioner also amended the educational requirements of the proffered position, stating that "in order to successfully perform the above duties, a minimum of a Bachelor's in one of the business disciplines including Marketing, Communications, Music or its equivalent, is

required as well as some experience within the music business."<sup>2</sup> On appeal, the petitioner reiterated the duties as described in the RFE response.

### C. 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)(1), 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 *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>3</sup> The petitioner asserts in the LCA that the proffered position falls under the occupational category "Public Relations Specialists."<sup>4</sup>

We reviewed the section of the *Handbook* covering "Public Relations Specialists," including the section entitled "How to Become a Public Relations Specialist," which states the following:

Public relations specialists typically need a bachelor's degree. Employers prefer candidates who have studied public relations, journalism, communications, English, or business.

#### **Education**

Public relations specialists typically need a bachelor's degree in public relations, journalism, communications, English, or business. Through such programs,

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<sup>2</sup> USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

<sup>3</sup> All 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.

<sup>4</sup> The Director stated that the duties of the proffered position did not indicate that the position was that of a public relations specialist. We also note that many duties provided in the job description in response to the RFE overlap with the duties detailed in the occupational category "Market Research Analysts." The petitioner further asserted that marketing consists of 40% of the beneficiary's duties. According to the Department of Labor (DOL)'s "Prevailing Wage Determination Policy Guidance," if the proffered position is a combination of O\*NET occupations, the petitioner should choose the relevant occupational code for the higher paying occupation, in this case "Market Research Analysts."

students produce a portfolio of work that demonstrates their ability to prospective employers.

### **Training**

Entry-level workers typically begin by maintaining files of material about an organization's activities, skimming and retaining relevant media articles, and assembling information for speeches and pamphlets. After gaining experience, public relations specialists begin to write news releases, speeches, articles for publication, or carry out public relations programs.

### **Other Experience**

Internships at public relations firms or in the public relations departments of other businesses can be helpful in getting a job as a public relations specialist.

Some employers prefer candidates that have experience communicating with others through a school newspaper or a leadership position in school or in their community.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Public Relations Specialist, available on the Internet at <http://www.bls.gov/ooh/media-and-communication/public-relations-specialists.htm> (last viewed August 14, 2015).

Here, although the *Handbook* indicates that a bachelor's or higher degree is required, it also indicates that baccalaureate degrees in various fields, public relations, journalism, communications, English or business, are acceptable for entry into the occupation. To demonstrate 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 specific specialty, or its equivalent. 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. In addition to recognizing degrees in disparate fields, i.e., English and business, the *Handbook* also states that a general business degree is acceptable. Although a general-purpose bachelor's degree, such as a degree in business, 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. Therefore, the *Handbook's* recognition that a general, non-specialty business degree is sufficient for entry into the occupation strongly suggests that a bachelor's degree *in a specific specialty* is not a standard, minimum entry requirement for this occupation. Accordingly, as the *Handbook* indicates that working as a public relations specialist does not normally require at least a bachelor's degree in a specific specialty or its equivalent for entry into the occupation, it does not support the particular position proffered here as being a specialty occupation.

In response to the RFE, the petitioner asserts that the proffered position is a specialty occupation according to the Occupational Information Network (O\*NET) since the occupational category "Public Relations Specialist" falls under Job Zone "Four" and 81% of individuals in this occupation

hold a bachelor's degree or higher. However, we note that while O\*NET assigns this occupation a Job Zone "Four" rating, it does not indicate that the bachelor's degrees must be in a specific specialty directly related to the occupation. As noted, 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. Therefore, O\*NET information is not probative evidence to establish that the proffered position is a specialty occupation.

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 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.

There are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement. However, in response to the Director's RFE, the petitioner did submit a number of internet articles discussing the rise and importance of social media. These articles included pieces published online at forbes.com, nytimes.com, huffingtonpost.com, USAToday.com, and theguardian.com. While the articles may speak to the growing importance of the role of social media in the economy and in the music industry, none of the articles submitted state that companies in the music industry require a baccalaureate or higher degree in a specific specialty, or its equivalent, for entry into the field of public relations generally, or into the position of social media manager specifically. Therefore, the articles do not support the assertion that the degree requirement is common to its industry in parallel positions among similar organizations.

The petitioner further submitted copies of job advertisements in support of the assertion that the degree requirement is common to its industry in parallel positions among similar organizations. However, upon review of the documents, we find that the petitioner's reliance on the job announcements is misplaced.

On the Form I-129, the petitioner stated that it is a music record label with 12 employees. The petitioner reported its gross income at \$2 million. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 512220.<sup>5</sup> This NAICS code is designated for "Integrated Record Production/Distribution."

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. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

In the instant case, the petitioner submitted copies of vacancy announcements in response to the Director's RFE. The announcements are from [REDACTED] an event production company and pioneer of the experiential entertainment industry; [REDACTED] a division of [REDACTED] offering designer fashion and lifestyle brands; [REDACTED] America's most successful premium television company; an unnamed "major record label"; and [REDACTED] which does not contain information about the advertising employer. On appeal, the petitioner submitted additional job postings which include [REDACTED] an online marketplace for sports and concert tickets; [REDACTED] a publically traded magazine and book publisher, internet content provider, and U.S. radio broadcaster, that owns approximately 100 radio stations; and [REDACTED] a leading entertainment and media company, owning and operating numerous cable channels, a group of local

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<sup>5</sup> According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity and, each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last viewed August 14, 2015).

stations in the United States, motion picture companies, several television production companies, and branded theme parks. 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 "3-7 years of professional experience in social media, corporate communications, or multichannel marketing." The posting from [REDACTED] requires "4+ years of comparable online marketing or social media management on the agency side," while the posting from [REDACTED] requires "5+ years experience in marketing for a Media or Lifestyle brand with at least 3 years in digital," and the posting from Salem Communications requires "3-5 years' experience in a related field of work." 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.<sup>6</sup> The advertised positions appear to be for more senior positions than the proffered position. Further, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.

In addition, some job postings do not indicate that a bachelor's degree in a specific specialty is required. For example the job postings from [REDACTED] and the unnamed "major record label" state a bachelor's degree as a requirement, but do not indicate a specific specialty, and the posting from [REDACTED] states that "a Bachelor[']s Degree, preferably in Marketing, General Business or Analytical Driven Disciplines" is acceptable. As discussed, the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a specific specialty that is directly related to the specialty occupation claimed in the petition.

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<sup>6</sup> The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." 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 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.

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.<sup>7</sup> That is, as the evidence does not establish that similar organizations in the same 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.

Therefore, 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 support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted various documents, including copies of the beneficiary's work product, such as email correspondence, samples of marketing plans, and copies of social media posts. We reviewed the record in its entirety and find that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent.

Specifically, the record does not sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of social media manager. Even though the petitioner asserts that some of

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<sup>7</sup> 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).

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.

the proffered position's duties are so complex and unique that a bachelor's degree is required (specifically conducting market studies and developing marketing and promotional campaigns), the petitioner does not demonstrate how the social media 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 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 it claims are so complex and unique. The petitioner asserts that coursework in advertisement, marketing, journalism, speech, project management, and finance and accounting in communications, are all courses that would prepare an individual for the proffered position. While a few courses may be beneficial in performing certain duties of a social media manager position, 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.

The petitioner further asserts "[i]t should be clear from the listed responsibilities/job duties that the position involves a high level of complex cognitive abilities in the performance of research and analysis involved as well as the constant research of new social media trends to successfully develop the artists' brand and campaigns." However, the LCA indicates a wage level at a Level I (entry) wage, which is the lowest of four assignable wage levels. The wage-level of the proffered position indicates that (relative to other positions falling under this occupational category) the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results. Without further evidence, the evidence 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.<sup>8</sup> 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."<sup>9</sup>

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<sup>8</sup> 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.

<sup>9</sup> 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\\_](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_)

Therefore, the evidence of record does not establish that this position is significantly different from other public relations specialists positions such that it refutes the *Handbook's* information to the effect that there is a spectrum of preferred degrees acceptable for public relations specialists positions, including degrees not in a specific specialty. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than public relations specialists/ social media managers 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, the petitioner has not demonstrate how the proffered position of social media 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.

The petitioner claims that the beneficiary is well qualified for the position. However, the test to establish a position as a specialty occupation is not the education or experience of a proposed beneficiary, but whether the position itself requires at least a bachelor's degree in a specific specialty, or its equivalent. 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. Therefore, 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.

In response to the Director's RFE, the petitioner submitted evidence of its recruiting history in the form of an undated posting for the position of social media manager.<sup>10</sup> The posting states that the social media manager must "have a Bachelor Degree in a related field (Music, Communication, Marketing)." We note that the petitioner has not explained whether or not this posting was in fact used to advertise the position, and if it was, where and when this posting would have been used. The petitioner also submitted the resumes and academic transcripts of the individuals who previously held the social media manager position. The educational backgrounds of the former social media managers include a bachelor's degree in music and a bachelor's degree in music and Spanish.

The petitioner states that it first hired Ms. [REDACTED] in the position of social media manager, and once Ms. [REDACTED] was promoted to the position of marketing coordinator, the petitioner hired Ms. [REDACTED] to fill the role of social media manager. However, we note that the resumes submitted show that Ms. [REDACTED] was employed as the social media manager from September 2011 to July 2012, at which time she left the petitioner for another employer. We further note that according to Ms. [REDACTED] resume, she filled the position of social media manager for the petitioner from September 2011 to April 2012, at which time she was promoted to the position of public relations and marketing director. Therefore, the hiring history, as told by the petitioner, is inconsistent with the evidence submitted. 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).

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<sup>10</sup> The petitioner also submitted a posting for "Internship/Junior Publicist" and the resumes and transcripts of two additional employees filing to positions of "Director of Art and Production" and "Online Media Specialist (Motion Graphics Designer)." However, as these positions do not appear to be the same as the proffered positions, these submissions are not material to the inquiry at hand.

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.

Upon review of the record of the proceeding, we note that the petitioner has not provided sufficient evidence to satisfy this criterion of the regulations. In the instant case, 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.<sup>11</sup>

The petitioner has submitted insufficient evidence to satisfy this criterion of the regulations. 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.

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<sup>11</sup> As previously discussed, 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" and requires a significantly higher wage.



III. CONCLUSION AND ORDER

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.<sup>12</sup>

**ORDER:** The appeal is dismissed.

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<sup>12</sup> Since the identified bases for denial are dispositive of the petitioner's appeal, we will not address other grounds of ineligibility we observe in the record of proceeding.