



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF T-B-O-W- LLC

DATE: OCT. 2, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a restaurant and bar, seeks to employ the Beneficiary as an advertising/promotions manager and classify him as a nonimmigrant worker in a specialty occupation. *See* 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, Vermont Service Center, denied the petition and subsequently denied the Petitioner's motion to reopen and reconsider. The matter is now before us on appeal. The appeal will be dismissed.

The Director denied the motion to reopen and reconsider, finding that the motion did not provide new facts to support reopening or give supported reasons for reconsideration. The Petitioner now files this appeal, asserting that the proffered position constitutes a specialty occupation.

We note that when an appeal is filed in response to a Director's unfavorable action on a motion, the scope of the appeal is limited to the Director's decision on that motion. For instance, the regulatory provision at 8 C.F.R. § 103.3(a)(2)(i) states: "The affected party must submit the complete appeal including any supporting brief as indicated in the applicable form instructions *within 30 days after service of the decision* (emphasis added)." Thus, if the Petitioner wished to appeal the Director's decision to deny the petition, it should have elected to file that appeal within 30 days of the Director's decision. Here, the Petitioner elected to file a motion instead and, thereby, limited the scope of the instant appeal to the merits of the Director's decision to deny that motion.

The record of proceeding contains: (1) the Petitioner's Form I-129 and the supporting documentation filed with it; (2) the Director's request for additional evidence (RFE); (3) the Petitioner's response to the RFE; (4) the Director's decision denying the petition; (5) the Petitioner's motion to reopen and reconsider and supporting documentation; (6) the Director's decision denying the motion; and (7) the Petitioner's appeal and submissions on appeal.

**I. THE DIRECTOR'S MOTION DECISION**

We will first determine whether the Director's decision to deny the motion to reopen and reconsider was correct.

A. Overarching Requirement for Motions by a Petitioner

The provision at 8 C.F.R. § 103.5(a)(1)(i) includes the following statement limiting USCIS’s authority to reopen the proceeding or reconsider the decision to instances where “proper cause” has been shown for such action: “the official having jurisdiction may, for proper cause shown, reopen the proceeding or reconsider the prior decision.”

Thus, to merit reopening or reconsideration, the submission must not only meet the formal requirements for filing (such as, for instance, submission of a Form I-290B that is properly completed and signed, and accompanied by the correct fee), but the Petitioner must also show proper cause for granting the motion. As stated in the provision at 8 C.F.R. § 103.5(a)(4), *Processing motions in proceedings before the Service*, “[a] motion that does not meet applicable requirements shall be dismissed.”

B. Requirements for Motions to Reopen

The regulation at 8 C.F.R. § 103.5(a)(2), “*Requirements for motion to reopen*,” states that “[a] motion to reopen must [(1)] state the new facts to be provided in the reopened proceeding and [(2)] be supported by affidavits or other documentary evidence. . . .”

This provision is supplemented by the related instruction at Part 4 of the Form I-290B, which states:<sup>1</sup> “**Motion to Reopen:** The motion must state new facts and must be supported by affidavits and/or documentary evidence demonstrating eligibility at the time the underlying petition or application was filed..”

Further, the new facts must possess such significance that, “if proceedings . . . were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case.” *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992); *see also Maatougui v. Holder*, 738 F.3d 1230, 1239-40 (10th Cir. 2013).

C. Requirements for Motion to Reconsider

The regulation at 8 C.F.R. § 103.5(a)(3), “*Requirements for motion to reconsider*,” states:

A motion to reconsider must [(1)] state the reasons for reconsideration and [(2)] be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must [(3)], [(a)] when filed, also [(b)] establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

---

<sup>1</sup> The regulation at 8 C.F.R. § 103.2(a)(1) states in pertinent part: “[e]very benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 CFR chapter 1 to the contrary, such instructions are incorporated into the regulations requiring its submission.

These provisions are augmented by the related instruction at Part 4 of the Form I-290B, which states: “**Motion to Reconsider:** The motion must be supported by citations to appropriate statutes, regulations, or precedent decisions when filed and must establish that the decision was based on an incorrect application of law or policy, and that the decision was incorrect based on the evidence of record at the time of decision.”

A motion to reconsider contests the correctness of the prior decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new facts. *Compare* 8 C.F.R. § 103.5(a)(3) and 8 C.F.R. § 103.5(a)(2).

A motion to reconsider should not be used to raise a legal argument that could have been raised earlier in the proceedings. *See Matter of Medrano*, 20 I&N Dec. 216, 219 (BIA 1990, 1991) (“Arguments for consideration on appeal should all be submitted at one time, rather than in piecemeal fashion.”). Rather, any “arguments” that are raised in a motion to reconsider should flow from new law or a *de novo* legal determination that could not have been addressed by the affected party. *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006) (examining motions to reconsider under a similar scheme provided at 8 C.F.R. § 1003.2(b)); *see also Martinez-Lopez v. Holder*, 704 F.3d 169, 171-72 (1st Cir. 2013). Further, the reiteration of previous arguments or general allegations of error in the prior decision will not suffice. Instead, the affected party must state the specific factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision. *See Matter of O-S-G-*, 24 I&N Dec. at 60.

#### D. Discussion

As previously stated, when an appeal is filed in response to a Director’s unfavorable action on a motion, the scope of the appeal is limited to the Director’s decision on that motion. In other words, the issue before us is whether the Director’s July 15, 2014 decision was correct in denying the Petitioner’s motion to reopen and reconsider. As will be discussed below, we find that the Director’s decision to deny the combined motion was correct.

On motion, the Petitioner resubmitted evidence that was previously submitted in support of the original petition. We find that the Petitioner’s submissions on motion did not establish any new facts, and thus, did not meet the requirements of a motion to reopen. Further, the Petitioner’s motion to reconsider did not establish that the Director’s December 31, 2013 decision denying the petition was erroneous based on the evidence of record at the time of the initial decision.

The submission does not meet the applicable requirements for a motion for an additional reason. More specifically, the motion does not contain a statement pertinent to whether the validity of the unfavorable decision has been or is the subject of any judicial proceeding, which is required by 8 C.F.R. §103.5(a)(1)(iii)(C). Thus, the combined motion must also be dismissed for this reason.

Although the scope of the appeal is limited to the Director's July 15, 2014 decision on the Petitioner's combined motion to reopen and reconsider, we are nevertheless providing a discussion of the specialty occupation issue below.

## II. SPECIALTY OCCUPATION

### A. Legal Framework

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

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

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

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

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must 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. The Proffered Position

The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position corresponds to Standard Occupational Classification (SOC) code and occupation

(b)(6)

*Matter of T-B-O-W- LLC*

title “11-2011, Advertising and Promotions Managers” from the Occupational Information Network (O\*NET). The LCA further states that the proffered position is a Level I, entry-level position.

In a letter dated March 29, 2013, the Petitioner described itself as “an Irish restaurant and bar located in the [REDACTED] neighborhood of [REDACTED].” With respect to the proffered position, the Petitioner attested that the “Advertising/Promotions Manager is a key management position which encompasses the day-to-day planning and organization of Petitioner’s advertising and marketing activities.” The Petitioner stated that the proffered position “requires the minimum of a Bachelor’s degree in marketing, advertising or a closely related degree or its equivalent.” The Petitioner listed the job duties of the proffered position as including the following:

- Design, develop and implement annual marketing plans that combine advertising with purchasing incentives to increase sales.
- Design and develop advertising campaigns for print and other media, including using social media for marketing and promotions.
- Translate business objectives and strategies to develop brand objective.
- Develop print and online promotional materials including marketing collateral and print copies.
- Develop novel ways to use the company’s website.
- Develop a knowledge database of established policy and practices, nature of market, cost and markup factors.
- Plan and administer the company’s marketing budget and analyze return on investment.
- Negotiate with media agents to secure collaboration agreements across an array of media sources.
- Manage day to day activities with public relations, press and communications agencies.
- Liaise with other local businesses to promote the restaurant.

In a letter dated October 22, 2013 submitted in response to the Director’s RFE, the Petitioner explained that the Beneficiary will be relieved from performing non-qualifying functions such as cooking, serving, dishwashing and bussing tables, as the Petitioner employs a other staff to handle such duties. Specifically, the Petitioner claimed that it employs four managers, two hosts, nine servers, five bartenders, one barback, six bussers, nine cooks, two dishwashers, and one person to clean. The Petitioner stated that the Beneficiary “will only perform professional and managerial duties.”

On appeal, the Petitioner highlighted that the proffered position is a “key management position which encompasses the coordination of day-to-day planning and organization of all advertising and marketing activities.” The Petitioner emphasized that it has sufficient staffing and funding to relieve the Beneficiary from performing non-qualifying duties. The Petitioner also highlighted that “the [REDACTED] restaurant market is growing and is extremely competitive,” and therefore, the Petitioner requires a “highly qualified Advertising/Promotions manager with professional knowledge

in the field of marketing and advertising, which can only be gained through formal higher education.”

### C. Discussion

Upon review, we find the evidence of record insufficient to establish that the proffered position is a specialty occupation that satisfies any of the supplemental, additional criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

*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 first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which is satisfied by establishing that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position that is the subject of the petition.

We recognize the U.S. Department of Labor’s (DOL’s) *Occupational Outlook Handbook (Handbook)*, cited by the Petitioner, as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>2</sup> In pertinent part, the *Handbook* states the following with regard to the educational requirements necessary for entry into the “Advertising, Promotions, and Marketing Managers” occupational group:

#### **Education**

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

Most marketing managers have a bachelor’s degree. Courses in business law, management, economics, finance, computer science, mathematics, and statistics are advantageous. For example, courses in computer science are helpful in developing an approach to maximize traffic through online search results, which is critical for digital advertisements and promotions. In addition, completing an internship while in school is highly recommended.

U.S. Dep’t of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., <http://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm#tab-4> (last visited Sep. 29, 2015).

---

<sup>2</sup> The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.bls.gov/oco/>. Our references to the *Handbook* are to the 2014 – 2015 edition available online.

(b)(6)

*Matter of T-B-O-W- LLC*

The *Handbook* does not support a finding that a bachelor's degree *in a specific specialty*, or its equivalent, is normally the minimum requirement for entry into the particular position. Rather, it indicates only that a bachelor's degree, without any particular specialty, is required for most positions. The requirement of a bachelor's degree, without further specification, is inadequate to establish that a position qualifies as a specialty occupation. To prove that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a Petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. Again, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) as requiring a degree in a specific specialty that is directly related to the proposed position. While the *Handbook* states that some employers "prefer" a bachelor's degree in advertising or journalism, this statement falls short of establishing that a bachelor's degree in these fields is normally *required*. Simply stated, a preference is not a requirement.

We withdraw the Director's statement that "the position of an Advertising and Promotions Manager is normally considered professional, and that most of these positions require prospective employees to hold at least a bachelor's degree in marketing, business administration, or a closely related field." The Director did not provide any analysis for this conclusion. In addition, we disagree with the Director's implication that the position of an Advertising and Promotions Manager would normally be considered a specialty occupation by virtue of a requirement for a bachelor's degree in business administration without further specification. To qualify as a specialty occupation, a proffered position must require a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish a position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

The Petitioner submitted an opinion from [REDACTED], a Professor at the [REDACTED] School of Business at the [REDACTED] who concluded that "the position of Advertising/Promotions Manager and the duties inherent therein require the minimum of a U.S. bachelor's degree in marketing, advertising or a closely related degree or its equivalent."

Upon review of the letter, we note that [REDACTED] opinion is not based upon sufficient information about the Petitioner's operations or the particular position being proffered here. For instance, [REDACTED] does not relate any personal observations of the Petitioner's business operations. We note that [REDACTED] refers to the competitive nature of the "advertising and marketing industry," but does not specifically address the Petitioner's actual industry, i.e., the restaurant industry. [REDACTED] also does not mention specific, concrete aspects of the proffered position within the scope of the Petitioner's business operations. For example, [REDACTED] states that Advertising/Promotions Managers "may work with sales staff and/or management . . . [and] the finance department." However, she does not relate these duties to the Petitioner's actual personnel and staffing, which the Petitioner has described as consisting of four managers, two hosts, nine servers, five bartenders, one barback, six bussers, nine cooks, two dishwashers, and one cleaning person.

(b)(6)

*Matter of T-B-O-W- LLC*

Furthermore, [REDACTED] does not sufficiently explain the factual bases for her conclusions. In particular, she states that a bachelor's degree in marketing, advertising or a closely related degree is required and is standard in the industry "in large part, due to the fact that the position of Advertising/Promotions Manager is so complex or unique that such a degree or its equivalent is required." These brief, circular statements do not shed any light upon the claimed complexity or uniqueness of the duties. 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'l Comm'r 1972)).

Moreover, [REDACTED] does not indicate whether she considered, or was even aware of, the fact that the Petitioner submitted an LCA certified for a wage-level that is only appropriate for a comparatively low (entry-level) position relative to others within its occupation which, as discussed above, signifies that the Beneficiary is only expected to possess a basic understanding of the occupation. We consider this a significant omission, in that it suggests an incomplete review of the position in question and a faulty factual basis for her ultimate conclusion as to the educational requirements of the position upon which she opines.

Accordingly, we conclude that [REDACTED] opinion letter does not establish the proffered position as qualifying as a specialty occupation. We may, in our discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988).

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

*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

(b)(6)

*Matter of T-B-O-W- LLC*

and recruit only degreed individuals.” See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)). Here and as already discussed, the evidence does not demonstrate that the proffered position is one for which the *Handbook*, or another reliable, authoritative source, indicates that there is a standard, minimum entry requirement of at least a bachelor’s degree in a specific specialty or its equivalent.

The Petitioner submitted several opinion letters for consideration under this prong, all of which attest to a claimed standard minimum educational requirement in the restaurant industry in general. At the outset, we note that these letters are insufficient under the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which not only calls for a Petitioner to establish the common degree requirement in the industry, but also for positions that are parallel to the proffered position and located in similar organizations within the industry. As indicated above, these letters attest to the minimum degree requirement in the restaurant industry in general. They do not, however, address any specific job duties or characteristics of the restaurants to establish that the positions being discussed are parallel to the proffered position, and are located in similar organizations within the industry.

Moreover, these letters are deficient as they largely contain conclusory statements. For instance, the opinion letter from [REDACTED], Professor of Culinary Arts, [REDACTED] attests that Advertising/Promotions positions and their constituent duties are complex, unique, and highly specialized, such that they can only be performed by an individual with a bachelor’s degree in marketing, advertising, or its equivalent. [REDACTED] does not further explain in factual detail why the duties are complex, unique, and highly specialized. He also does not specifically identify what bodies of highly specialized knowledge are required to perform the proffered duties, which particular courses of study provided such knowledge, and how these courses represent an established curriculum leading to a baccalaureate or higher degree in marketing, advertising, or its equivalent. Nor is it clear that the types of positions [REDACTED] is discussing are the types of entry-level positions that the Petitioner claimed the proffered position to be by virtue of its wage-level designation on the LCA.

The letters from several restaurant owners attest, almost identically, that the position of Advertising/Promotions Manager in the restaurant industry requires an individual who possesses the minimum of a U.S. bachelor’s degree in marketing, advertising, or a closely related degree or its equivalent.<sup>3</sup> The letters do not provide any additional explanation or factual support for these assertions. These letters also attest, almost identically as well, that individuals relied upon by their restaurants to perform the function of Advertising/Promotions Manager have all possessed a U.S. bachelor’s degree in marketing, advertising, or a closely related degree or its equivalent. However, no corroborating evidence of these individuals’ claimed degrees was provided. Again, going on

---

<sup>3</sup> The use of identical language and phrasing across the various letters suggest that the language in the letters is not the authors’ own. Cf. *Surinder Singh v. BIA*, 438 F.3d 145, 148 (2d Cir. 2006) (upholding an adverse credibility determination in asylum proceedings based in part on the similarity of the affidavits); *Mei Chai Ye v. U.S. Dept. of Justice*, 489 F.3d 517, 519 (2d Cir. 2007) (concluding that an immigration judge may reasonably infer that when an asylum applicant submits strikingly similar affidavits, the applicant is the common source).

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.

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

*The 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*

The evidence of record also does not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree."

In this matter, the evidence of record does not distinguish the proffered position as unique from or more complex than other advertising, promotions, and marketing manager positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent. For instance, the *Handbook* lists typical duties of advertising, promotions, and marketing managers as including directing and overseeing the daily activities of advertising, promotions, and/or marketing staff. U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., <http://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm#tab-2> (last visited Sep. 29, 2015). Consistent with these managerial duties, the Petitioner asserted that the proffered position is "a key management position which encompasses the day-to-day planning and organization of all advertising and marketing activities."

However, the Petitioner has not adequately explained which of its employees the Beneficiary will be managing. In other words, the Petitioner has not explained who, if not the Beneficiary, will be executing the actual, day-to-day advertising, marketing, and promotions-related activities. The Petitioner does not expressly claim to have any advertising, promotions, and/or marketing staff. Moreover, some of the proffered duties are so generally worded that they could reasonably encompass the actual advertising, marketing, and sales-related activities, such as "implement annual marketing plans," "develop advertising campaigns for print and other media, including using social media for marketing and promotions," and "administer the company's marketing budget." As such, it appears that the Beneficiary will be performing the day-to-day advertising, marketing, and promotions-related activities, rather than managing them. This aspect of the Beneficiary's duties does not support a finding that the proffered position is unique from or more complex than other advertising, promotions, and marketing manager positions.

As the Petitioner does not demonstrate how the proffered position is so complex or unique relative to other positions within the same occupational category that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it

cannot be concluded that the Petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

We turn next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. To this end, we usually review the Petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position. In addition, the Petitioner may submit any other documentation it considers relevant to this criterion of the regulations.

With respect to this criterion, the Petitioner indicates that it has never previously hired for the proffered position. Specifically, the Petitioner stated that "[t]he position of Advertising/Promotions Manager with Petitioner is a new professional and managerial position within the organization." While a first-time hiring for a position is certainly not a basis for precluding a position from recognition as a specialty occupation, it is unclear how an employer that has never recruited and hired for the position would be able to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a demonstration that it *normally* requires at least a bachelor's degree in a specific specialty or its equivalent for the position.

The Petitioner repeatedly claims that the duties of the proffered position can only be employed by a degreed individual. The Petitioner explains that it previously used the General Manager or other restaurant managers to market the restaurant, but that "these duties were not properly handled because the managers lacked professional knowledge in the field of marketing and advertising which can only be gained through formal higher education."<sup>4</sup> However, while a Petitioner may assert that a proffered position requires a degree in a specific specialty, 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 employer created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty, or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a Petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree, or its equivalent, to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation"). Here, the Petitioner has not established the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

---

<sup>4</sup> The Petitioner did not submit any evidence regarding the educational credentials of its General Manager or other restaurant managers.

(b)(6)

*Matter of T-B-O-W- LLC*

As the record of proceeding does not demonstrate that the Petitioner normally requires at least a bachelor's degree in a specific specialty or its equivalent for the proffered position, it does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

*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*

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

In support of the petition, the petitioner submitted documentation regarding the proffered position and its business operations. The duties of the proffered position, however, have not been shown to be of a nature so specialized and complex that they require knowledge usually associated with attainment of a minimum of a bachelor's degree in a specific specialty or its equivalent. In other words, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than the duties of marketing manager positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent. We reiterate our earlier discussion with regard to the claimed managerial duties of the proffered position and the Petitioner's apparent lack of advertising, promotions, and/or marketing staff.

On appeal, the Petitioner claimed that "the [redacted] restaurant market is growing and is extremely competitive," and therefore, the Petitioner requires a "highly qualified Advertising/Promotions manager with professional knowledge in the field of marketing and advertising, which can only be gained through formal higher education." However, the Petitioner has not adequately explained how the nature of the proffered 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.<sup>5</sup> In this regard, we note again that the Petitioner has designated the proffered position as a Level I (entry level) position on the LCA. In designating the proffered position at a Level I wage, the Petitioner has indicated that the proffered position is a comparatively low, entry-level position relative to others within the occupational group. 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](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf). The Petitioner's designation of the proffered position as a Level I, entry-level position is inconsistent with the claim that the proffered position or the duties comprising it are particularly specialized or

---

<sup>5</sup> According to the *Handbook*, advertising, promotions, and marketing managers work in a variety of industries. See U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., <http://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm#tab-3> (last visited Sep. 29, 2015).

complex compared to other positions within the occupation.<sup>6</sup>

For the reasons discussed above, we find that the evidence of record does not satisfy any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies for classification as a specialty occupation.

Thus, the Director's December 31, 2013 decision that the proffered position is not a specialty occupation was correct. The Director's decision to deny the Petitioner's combined motion to reopen and reconsider was also correct. For both of these reasons, the appeal will be dismissed and the petition denied.

### III. CONCLUSION

The Director did not err in the decision to deny the combined motion to reopen and reconsider.<sup>7</sup> Accordingly, the appeal will be dismissed.

In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

Cite as *Matter of T-B-O-W-LLC*, ID# 13193 (AAO Oct. 2, 2015)

---

<sup>6</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>7</sup> As the identified ground of ineligibility is dispositive of the appeal, we will not address any of the additional deficiencies we have identified.