MATTER OF F-G- INC.  

APPEAL OF CALIFORNIA SERVICE CENTER DECISION  

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

The Petitioner, a food delivery platform, seeks to employ the Beneficiary temporarily as a “marketing information manager” on a part-time basis under the H-1B nonimmigrant classification for specialty occupations. See Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both: (a) the theoretical and practical application of a body of highly specialized knowledge; and (b) the attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director of the California Service Center denied the petition, concluding that the record did not establish that the proffered position qualifies as a specialty occupation. On appeal, the Petitioner asserts that the Director erred in denying the petition.

Upon de novo review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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) largely restates this statutory definition and adds a non-exhaustive list of fields of endeavor.
II. ANALYSIS

A. Labor Condition Application

As an initial matter, the Petitioner has not established that the petition is supported by a labor condition application (LCA) which corresponds with the petition. The purpose of the LCA wage requirement is “to protect U.S. workers’ wages and eliminate any economic incentive or advantage in hiring temporary foreign workers.” It also serves to protect H-1B workers from wage abuses. A petitioner must demonstrate that it will pay an H-1B worker the higher of either the prevailing wage for the occupational classification in the area of employment or the actual wage paid by the employer to other employees with similar duties, experience, and qualifications. Section 212(n)(1) of the Act; 20 C.F.R. § 655.731(a). While the Department of Labor (DOL) certifies the LCA, we determine whether the LCA’s content corresponds with the H-1B petition. See 20 C.F.R. § 655.705(b) (“DHS determines whether the petition is supported by an LCA which corresponds with the petition, . . .”).

In this matter, the Petitioner indicated that the proffered position falls under the standard occupational classification (SOC) code 11-2021 for “marketing managers” at a Level II wage. The Occupational Information Network (O*NET) summarizes the duties of marketing managers as follows:

Plan, direct, or coordinate marketing policies and programs, such as determining the demand for products and services offered by a firm and its competitors, and identify potential customers. Develop pricing strategies with the goal of maximizing the firm's profits or share of the market while ensuring the firm's customers are satisfied. Oversee product development or monitor trends that indicate the need for new products and services.

According to the Petitioner, in addition to the duties that generally fall under the umbrella of marketing managers as described in O*NET, the Beneficiary will:

- Design stable, reliable and effective databases to store and maintain collected requirements and marketing information, and create complex SQL queries from scratch through PostgreSQL and optimize queries to improve efficiency
- Dive into complex datasets from different sources, including PostgreSQL, MixPanel, and Tableau to analyze marketing trends, identify opportunities and find out reasons for indicators [significant changes]
- Collect and analyze traffic information stored in PostgreSQL and build dashboards in Tableau to optimize route for efficient delivery
- Create different KPI [key performance indicators] using calculated key figures and parameters
- Develop and manage digital marketing campaigns utilizing a range of techniques, including Google Adwords, Facebook Ads, Google Analytics and SEO [search engine optimization] to grow users, increase user engagement and achieve profit growth


Monitor and make improvements to ongoing campaigns and employ A/B testing via Facebook Ads and other testing protocols to ensure optimal performance.

Formulate bilingual promotion strategy and develop marketing literature in conjunction with target market via different platforms/tools including Facebook, Instagram, Wechat, and Sengrid.

Establish recruitment requirements for hiring Chinese drivers and post openings online.

Evaluate candidates and conduct trainings for the new hires.

Manage drivers and make schedules for different shifts using WhenIWork on a daily basis.

Many of the above duties appear to fall under the SOC code 15-1199.10 for “search marketing strategists,” which is generally described as follows:

Employ search marketing tactics to increase visibility and engagement with content, products, or services in Internet-enabled devices or interfaces. Examine search query behaviors on general or specialty search engines or other Internet-based content. Analyze research, data, or technology to understand user intent and measure outcomes for ongoing optimization.

The specific tasks listed under the search marketing strategists SOC code on O*NET\(^3\) include:

- Collect and analyze Web metrics, such as visits, time on site, page views per visit, transaction volume and revenue, traffic mix, click-through rates, conversion rates, cost per acquisition, or cost per click.
- Identify appropriate Key Performance Indicators (KPIs) and report key metrics from digital campaigns.
- Assist in setting up or optimizing analytics tools for tracking visitors' behaviors.
- Coordinate with developers to optimize Web site architecture, server configuration, or page construction for search engine consumption and optimal visibility.
- Conduct online marketing initiatives, such as paid ad placement, affiliate programs, sponsorship programs, email promotions, or viral marketing campaigns on social media Web sites.
- Participate in the development or implementation of online marketing strategy.
- Improve search-related activities through ongoing analysis, experimentation, or optimization tests, using A/B or multivariate methods.
- Optimize digital assets, such as text, graphics, or multimedia assets, for search engine optimization (SEO) or for display and usability on internet-connected devices.
- Create content strategies for digital media.
- Manage tracking and reporting of search-related activities and provide analyses to marketing executives.
- Optimize Web site exposure by analyzing search engine patterns to direct online placement of keywords or other content.
- Combine secondary data sources with keyword research to more accurately profile and satisfy user intent.
- Optimize shopping cart experience or Web site conversion rates against Key Performance Indicators (KPIs).

\(^3\) See https://www.onetonline.org/link/summary/15-1199.10 (last accessed Apr. 29, 2019).
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- Execute or manage social media campaigns to inform search marketing tactics.
- Conduct market research analysis to identify search query trends, real-time search and news media activity, popular social media topics, electronic commerce trends, market opportunities, or competitor performance.
- Purchase or negotiate placement of listings in local search engines, directories, or digital mapping technologies.
- Conduct financial modeling for online marketing programs or Web site revenue forecasting.
- Develop transactional Web applications, using Web programming software and knowledge of programming languages, such as hypertext markup language (HTML) and extensible markup language (XML).

Here, the Petitioner asserts that a Level II wage is appropriate because the position requires additional coursework at a master’s degree level, but does not address the duties that fall outside of the marketing manager SOC code, some of which appear under the search marketing strategist SOC code. In addition, the Beneficiary will recruit, evaluate, manage and schedule Chinese delivery drivers, as well as formulate bilingual promotion strategies. Therefore, it appears that the Petitioner should have increased the wage level at Step 4 for the tasks and knowledge that fall outside of those provided under the marketing manager SOC code, as well as for the foreign language requirement. As a result, the Petitioner has not established that the LCA corresponds with the petition.

B. Specialty Occupation

For the reasons set out below, we have also determined that the proffered position does not qualify as a specialty occupation. Specifically, the record does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.

1. First Criterion

We turn first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position. We recognize the DOL’s Occupational Outlook Handbook...

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4 We apply the Department of Labor’s guidance, which provides a five step process for determining the appropriate wage level. U.S. Dep’t of Labor, Emp’t & Training Admin., Prevailing Wage Determination Policy Guidance, Nonagric. Immigration Programs (rev. Nov. 2009). The wage level begins at a Level I and may increase up to a Level IV based on a comparison of the duties and requirements for the employer’s proffered position to the general duties and requirements for the most similar occupation as provided by the Occupational Information Network (O*NET). Generally, we must first identify whether the O*NET occupation selected by the petitioner is correct and then compare the experience, education, special skills and other requirements, and supervisory duties described in the O*NET entry to those required by the employer for the proffered position.

5 According to the Beneficiary’s May 19, 2017 offer letter for his previous position as a “marketing operations manager,” one of his key responsibilities was to “[w]ork closely with Chinese restaurant[] owners who are Mandarin only speakers to collect requirement and product reviews.” The Beneficiary will continue to work with Chinese restaurant owners in the proffered position.

6 Although some aspects of the regulatory criteria may overlap, we will address each of the criteria individually.

7 While we may not discuss every document submitted, we have reviewed and considered each one.
As discussed above, on the LCA submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category “marketing managers” and states that the position requires a bachelor’s degree in management information systems, plus additional coursework from a master’s of business administration degree. We reviewed the Handbook’s subchapter entitled “How to Become an Advertising, Promotions or Marketing Manager,” which states, in pertinent part, that:

Most marketing managers need 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 online traffic, by utilizing online search results, because maximizing such traffic is critical for the success of digital advertisements and promotions. In addition, completing an internship while in school can be useful.

The Handbook does not report that a bachelor’s degree in a specific specialty is required to perform the duties of a marketing manager, nor does it support the Petitioner’s claim that it requires a bachelor’s degree in management information systems, with additional master’s level coursework. While the Handbook notes that a variety of courses may be “advantageous,” it does not specify that a marketing manager requires those courses, or that such courses cumulatively lead to a bachelor’s degree in a specific specialty. Thus, the Handbook does not support the assertion that a baccalaureate degree in a specific discipline is normally the minimum requirement for entry into a marketing manager position.

On appeal, the Petitioner cites to Residential Finance Corp. v. USCIS, 839 F. Supp. 2d 985 (S.D. Ohio 2012) for the proposition that “[t]he knowledge and not the title of the degree is what is important.” While we agree with the aforementioned proposition, the district judge’s decision in that case appears to have been based largely on the many factual errors made by the Director in the decision denying the petition. We further note that the Director’s decision was not appealed to us. Based on the district court’s conclusions and description of the record, if that matter had first been appealed through the available administrative process, we may very well have remanded the matter to the service center for a new decision for many of the same reasons articulated by the district court if these errors could not have been remedied by us in our de novo review of the matter.

Naturalization Service (INS) was reasonable in requiring a bachelor’s degree in a specific field, it abused its discretion by ignoring the portion of the regulations that allows for the equivalent of a specialized baccalaureate degree. According to the court, INS’s interpretation was not reasonable because then H-1B visas would only be available in fields where a specific degree was offered, ignoring the statutory definition allowing for “various combinations of academic and experience based training.” *Tapis Int’l v. INS*, 94 F. Supp. 2d at 176. The court elaborated that “[i]n fields where no specifically tailored baccalaureate program exists, the only possible way to achieve something equivalent is by studying a related field (or fields) and then obtaining specialized experience.” *Id.* at 177.

We agree that, if the requirements to perform the duties and job responsibilities of a proffered position are a combination of a general bachelor’s degree and experience such that the standards at both section 214(i)(1)(A) and (B) of the Act have been satisfied, then the proffered position may qualify as a specialty occupation. We do not conclude, however, that the court is stating that any position can qualify as a specialty occupation based solely on the claimed requirements of a petitioner.

Instead, we 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*, 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 a specific specialty as the minimum for entry into the occupation as required by the Act.

In addition, the court does not state in *Tapis* that, simply because there is no specialty degree requirement for entry into a particular position in a given occupational category, we must recognize such a position as a specialty occupation if the beneficiary has the equivalent of a bachelor’s degree in that field. In other words, we do not conclude that *Tapis* stands for either (1) that a specialty occupation is determined by the qualifications of a beneficiary being petitioned to perform it; or (2) that a position may qualify as a specialty occupation even when there is no specialty degree requirement, or its equivalent, for entry into a particular position in a given occupational category.

First, we cannot determine if a particular job is a specialty occupation based on the qualifications of a beneficiary. A beneficiary’s credentials to perform a particular job are relevant only when the job is first found to qualify as a specialty occupation. We are required instead to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether the beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed. *Cf Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 (Comm’r 1988) (“The facts of a beneficiary’s background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].”). In other words, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself qualifies as a specialty occupation. Thus, whether or not the Beneficiary in this case has completed a specialized course of study directly related to the proffered position is not relevant to the issue of whether the proffered position qualifies as a specialty occupation, i.e., whether the duties of the proffered position require the theoretical and practical application of a body of highly
specialized knowledge and the attainment of a bachelor’s degree or higher in a specific specialty, or its equivalent. Section 214(i)(l) of the Act; 8 C.F.R. § 214.2(h)(4)(ii).

Second, in promulgating the H-1B regulations, the former INS made clear that the definition of the term “specialty occupation” could not be expanded “to include those occupations which did not require a bachelor’s degree in the specific specialty.” Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act, 56 Fed. Reg. 61,111, 61,112 (Dec. 2, 1991) (to be codified at 8 C.F.R. pt. 214). More specifically, in responding to comments that “the definition of specialty occupation was too severe and would exclude certain occupations from classification as specialty occupations,” the former INS stated that “[t]he definition of specialty occupation contained in the statute contains this requirement [for a bachelor’s degree in the specific specialty, or its equivalent]” and, therefore, “may not be amended in the final rule.” Id.

In any event, the Petitioner has not established that the facts of the instant petition are analogous to those in either Residential Finance or Tapis. Further, in contrast to the broad precedential authority of the case law of a United States circuit court, we are not bound to follow the published decisions of a United States district court in matters arising even within the same district. See Matter of K-S-, 20 I&N Dec. 715, 719-20 (BIA 1993). Although the reasoning underlying a district judge’s decision will be given due consideration when it is properly before us, the analysis does not have to be followed as a matter of law. Id.

Regardless, without additional evidence, the Petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

2. Second Criterion

To satisfy this first prong of the second criterion, the Petitioner must establish that the “degree requirement” (i.e., a requirement of a bachelor’s or higher degree in a specific specialty, or its equivalent) is common to the industry in parallel positions among similar organizations.

In this matter, the Petitioner acknowledges that it does not meet this prong. We, therefore, will not address it further. Instead, we will 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.

The Petitioner’s claims regarding the complexity and uniqueness of the position are undermined by its repeated assertions that “its Marketing Information Manager position is equivalent to the [Handbook] and O*NET definitions of Marketing Manager.” In addition, its claim that “the position’s complexity and uniqueness is, in part, a function of the fact that the Petitioner is a start-up corporation that has experienced exponential growth in its very short existence” is not persuasive or sufficient to meet this criterion.

Here, the evidence of record does not establish that this position is significantly more complex or unique such that it refutes the Handbook’s information and establishes that it requires a bachelor’s
degree in a specific specialty. Further, the Petitioner’s claims that the Beneficiary is well qualified for the position and references to his qualifications do not establish that the proffered position meets this criterion. As previously discussed, 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.

For these reasons, the Petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

3. Third Criterion

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. Evidence provided in support of this criterion may include, but is not limited to, documentation regarding the Petitioner’s past recruitment and hiring practices, as well as information regarding employees who previously held the position.

As the Petitioner concedes that it does not meet this criterion, we will not discuss it further.

4. Fourth Criterion

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.

As a preliminary matter, because the Petitioner repeats its assertions from the second criterion, we incorporate our prior discussion here.

We also note that the Petitioner indicated on the Form I-129, Petition for Nonimmigrant Worker, that it employs three individuals and had a net annual income of $(-226,856). While the size of a petitioner’s business is normally not a factor in determining the nature of a proffered position, both level of income and organizational structure are appropriately reviewed when a petitioner seeks to employ an H-1B worker. It is reasonable to assume that the size of an employer’s business has an impact on the duties of a particular position. See EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security, 467 F. Supp. 2d 728 (E.D. Mich. 2006). In matters where a petitioner’s business is relatively small, we review the record for evidence that its operations, are, nevertheless, of sufficient complexity to indicate that it would employ the Beneficiary in a position requiring a level of knowledge that may be obtained only through a baccalaureate degree in a specific specialty, which in this matter is management information systems, or a related field. Here, for example, the Petitioner has not provided sufficient information regarding the duties and responsibilities of its other employees such that we may ascertain how the Beneficiary would be relieved from performing non-qualifying duties. The Petitioner has already indicated that the Beneficiary will be responsible for the recruiting, training, managing, and scheduling of the delivery drivers, duties which would not normally fall to a marketing information manager and which the Petitioner has not established would require a degree in a specific specialty. Predictable, recurring, or
substantive job responsibilities must be specialty occupation duties or the proffered position as a whole cannot be approved as a specialty occupation. Further, given the stated size of the company, we are left to question who the “product development personnel,” “the department heads” and “developers, advertisers, or production managers” are that the Petitioner claims the Beneficiary will be interacting and working with.

Without additional information, we cannot conclude that the Petitioner has established that its proffered position is one with duties sufficiently specialized and complex to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

III. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision. In visa petition proceedings, it is a petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. In this matter, the Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as Matter of F-G- Inc., ID# 3658122 (AAO May 1, 2019)