



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

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

In Re: 8758513

Date: SEPT. 30, 2020

Appeal of California Service Center Decision

Form I-129, Petition for Nonimmigrant Worker (H-1B)

The Petitioner, a website design and marketing company, seeks to temporarily employ the Beneficiary as a “marketing strategist” under the H-1B nonimmigrant classification for specialty occupations. 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 proffered position does not qualify as a specialty occupation. The matter is now before us on appeal.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). We review the questions in this matter *de novo*. See *Matter of Christo’s Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will dismiss the appeal.

I. 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) largely restates this statutory definition, but adds a non-exhaustive list of fields of endeavor. In addition, the regulations provide that the proffered position must meet one of the following criteria to qualify as a specialty occupation:

- (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.

8 C.F.R. § 214.2(h)(4)(iii)(A). We construe the term “degree” to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proposed 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”).

II. PROFFERED POSITION

The Petitioner describes the proffered position’s duties, and the percentage of the Beneficiary’s time required to perform them, as follows:

Search Engine Marketing (60% of the total time)

- Collect and analyze Digital Marketing metrics, including but not limited to Impressions, Impression Share (IS), Clicks, Click through Rate (CTR), Sessions, Session Duration, Bounce Rate, Page Views per Session, Costs, Cost per Click (CPC), Conversions, Conversion Rates, and Cost per Acquisition (CPA); collect and analyze search volume data, patterns, and trends; identify appropriate Key Performance Indicators (KPIs) for each client’s digital marketing activities, and report key metrics from digital campaigns;
- Set up and optimize suitable analytics tools such as Google Analytics, Facebook Analytics, WordPress, hotjar, etc. to track visitor’s [*sic*] behaviors for monitoring the visibility and engagement of a business;
- Coordinate with web development team for technical Search Engine Optimization audit and webpage loading speed optimization, which makes consumers more likely to further interact with the website; advise on adding/adjusting contents and functions to website;
- Improve search-related activities through on-the-go analysis, experimentation, and optimization tests with multiple advanced analysis methods, including but not limited to one-sample t[-]tests, independent-sample t[-]tests, paired-samples t[-]tests, two-way contingency tests such as Chi-square χ^2 tests, one-way analysis of variance such as ANOVA, and multivariate analysis methods;

- Optimize website exposure by creating content strategies for digital media, namely, consumer perspective-oriented Google Ads keyword pool design and creative ad copywriting to better direct potential customers to clients' websites; and
- Utilize multiple tools to quantify and assess hosts' quality, which is indicated by Domain/Page Authority; communicate and negotiate collaborations and compensations with merchants, webmasters, bloggers, or online editors to strategically place blogs/reviews and links.

Market Research Analysis and Marketing Efforts (20% of the total time)

- Google Search Volume sampling, analysis, and interpretation.
 - For example, create a 10-keyword-sample probing technique using keywords DESCRIPTION, VALUES, BRAND NAMES, PERIPHERALS, QUESTIONS to extract market intelligence; analyze search terms and deduce consumer's [*sic*] possible journey through sophisticated training in consumer behavior;
 - Adopt time-series examination techniques to analyze for any potential monthly/seasonal patterns or recurring data anomalies.
- Establish profiles of consumer psychology based on data collected from Google Search Volume analysis; reverse-engineer communications/keywords into consumer psychology and find advertising triggers that could potentially yield high visibility and engagement for clients;
- Proficiently utilize Chinese and U.S. databases and researches to find credible intelligence to guide marketing strategies and activities; track important marketing metrics in different languages such as English, Chinese Simplified, Chinese Traditional, and basic Spanish; and
- Conduct primary intake with clients; participate in the development or implementation of online marketing strategy; devise creative marketing tactics; collaborate with other marketing staff to integrate and complement marketing strategies across multiple digital marketing platforms.

Business Development (20% of the total time)

- Draft Playbooks for clients which will suggest basic marketing strategy sets to maximize a client's visibility and engagement based on the client's available assets, including but not limited to budget, profitability, uniqueness of product, flexibility to upgrade offering and market niche size; provide potential clients with playbook-specific case studies for them to have an overview of services provided;
- Consult with potential Chinese-speaking clients about marketing strategies and help them understand the difference of marketing strategies between China and United States; go through marketing contract details and nail the commitment; and
- Track business data boosted by marketing strategies and draft analysis report periodically using data visualization software such as Microsoft Excel, Tableau, and Google Data Studio; report to client and explain the details of analysis thoroughly.

According to the Petitioner, the position requires “a bachelor’s degree in communication management” and “fluen[cy] in both Mandarin Chinese and English.”

III. ANALYSIS

Upon review of the record in its totality and for the reasons set out below, we determine that the Petitioner has not demonstrated that the proffered position qualifies 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

On appeal, the Petitioner asserts that the position qualifies under the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) and (4); however, it does not assert that the position qualifies under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).² Accordingly, we limit our analysis to the third and fourth criteria.³

A. 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.

The record must establish that a petitioner’s stated degree requirement is not a matter of preference for high-caliber candidates but is necessitated instead by performance requirements of the position. *See Defensor v. Meissner*, 201 F.3d 384, 387-88 (5th Cir. 2000). If we were limited solely to reviewing a petitioner’s claimed self-imposed requirements, an organization could bring any individual with a bachelor’s degree to the United States to perform any occupation as long as the petitioning entity created a token degree requirement. *Id.* 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.

On appeal, the Petitioner asserts that “paystubs, diploma(s), [and] relevant information”⁴ for two of its employees, hired in 2017 and 2019, respectively, with position titles of “marketing strategist” establish that the Petitioner normally requires a bachelor’s degree in a specific specialty, or its equivalent, for the position. The employee hired in 2017 has a master’s degree in advertising and the employee hired in 2019 has a master’s degree in communication management. However, the extent of the documentary evidence in the record regarding the worker hired in 2017 are photocopies of 14 paychecks dated between March 21 and October 6, 2017, and an ICE Form I-20, Certificate of Eligibility for Nonimmigrant Student Status, dated May 2017, requesting employment authorization from June 1 through September 30, 2017. The record does not establish the duties the Petitioner require(d) the worker to perform or whether the Petitioner requires a bachelor’s or higher degree in a specific specialty, or its equivalent, to perform them. Therefore, the probative value of the information

¹ The Petitioner submitted documentation to support the H-1B petition, including evidence regarding the proffered position and its business operations. Although we may not discuss every document submitted, we have reviewed and considered each one.

² Although the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) and (4) are similar, they are distinct.

³ We have reviewed the record in its entirety; however, it does not support the conclusion that the proffered position qualifies as a specialty occupation under the first or second criteria.

⁴ That information includes an H-1B approval notice for the employee hired in 2019.

regarding the worker hired in 2017 for determining whether the Petitioner normally requires a bachelor's or higher degree in a specific specialty, or its equivalent, for the proffered position is minimal.

U.S. Citizenship and Immigration Services (USCIS) records indicate that the Petitioner submitted the petition for the employee hired in 2019 at the same time it filed the petition for the Beneficiary, and the requested employment periods for the two petitions are identical. Therefore, any requirements for another worker petitioned at the same time as the Beneficiary, for an identical employment period, do not establish that, as of the petition filing date,⁵ the Petitioner normally requires a bachelor's or higher degree in a specific specialty, or its equivalent,

We further note that, although the job duties listed in the employment agreement for the other worker hired in 2019 overlap with the description of how the Beneficiary would spend 60% of his time, the remainder of the duty descriptions differ, limiting the extent to which the two positions are similar.

The record also contains a job announcement posted by the Petitioner for a "digital marketing strategist" position dated August 5, 2019, after the petition filing date. We note that the six duties described in the job announcement differ from both the duty description for the proffered position and the duties listed in the employment agreement for the other worker hired in 2019. Additionally, the job announcement indicates that, although an "MS/MA in Marketing, Advertising, Media, [or] Communication is preferred," the Petitioner would accept a "BS/BA with equivalent work experience." The job announcement does not specify whether the BS or BA must be in a specific specialty, or the qualification to which the work experience must be equivalent. The job announcement later repeats "Education: Bachelor's (Required)," without indicating that the *required* degree, or its equivalent, must be in a specific specialty. The job announcement further reports that the position entails "[u]sually 1-3 month[s] of internship and training period to start with," obscuring whether a bachelor's or higher degree in a specific specialty, or its equivalent, rather than the initial "1-3 month . . . training period" ultimately prepares a worker for the performance requirements of the position. Furthermore, even if the job announcement established that the Petitioner requires a bachelor's or higher degree in a specific specialty, or its equivalent, which it does not, a single job announcement dated after the petition filing date does not establish whether, as of the petition filing date, the Petitioner normally requires such a degree for the position. *See* 8 C.F.R. § 103.2(b)(1); *see also Matter of Michelin Tire Corp.*, 17 I&N Dec. at 249.

The Petitioner also asserts on appeal that, because "USCIS has previously approved two [of the Petitioner's] H-1B petitions for the position of Marketing Strategist . . . USCIS has agreed that the Marketing Strategist offered by [the] Petitioner is in fact a specialty occupation." However, we are not required to approve a petition where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988); *see also Sussex Eng'g, Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987). Furthermore, we are not bound to follow a contradictory decision of a service center. *La. Philharmonic Orchestra v. INS*, No. 98-2855, 2000 WL 282785, at *2 (E.D. La. 2000).

⁵ Petitioners must establish eligibility at the time of filing the nonimmigrant visa petition and must continue to be eligible for the benefit through adjudication. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after a petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978).

In summation, the Petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

B. 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.

On appeal, the Petitioner asserts that two documents submitted in support of the appeal satisfy the fourth criterion: a letter from “the biggest client of [the] Petitioner” and an opinion letter from [redacted] [redacted] a professor of communications at the University of [redacted].⁶

As a matter of discretion, we may use opinion statements submitted by a petitioner as advisory. *Matter of Caron Int’l, Inc.*, 19 I&N Dec. 791, 795 (Comm’r 1988). However, we may give an opinion less weight if it is not in accord with other information in the record or if it is in any way questionable. *Id.* We are ultimately responsible for making the final determination regarding an individual’s eligibility for the benefit sought; the submission of expert opinion letters is not presumptive evidence of eligibility. *Id.*; see also *Matter of V-K-*, 24 I&N Dec. 500, 502 n.2 (BIA 2008) (“[E]xpert opinion testimony, while undoubtedly a form of evidence, does not purport to be evidence as to ‘fact’ but rather is admissible only if ‘it will assist the trier of fact to understand the evidence or to determine a fact in issue.’”).

We first note that the signatory of the client letter identifies himself as the company’s “marketing department,” without indicating his specific position title, his role in the department, and whether he has the authority to speak on behalf of “a telecom giant in China [with] over \$40 billion revenue” in this regard. To the extent that the signatory has sufficient authority to do so, the client letter addresses three aspects in order to opine, as the Petitioner emphasizes on appeal, that the Beneficiary has “superb theoretical and practical applications of specialized knowledge in business to customer (B2C) digital marketing.”

First, the client letter shares a six-word advertising slogan about international phone calls and asserts that “in order to come up with that ad copy, [the Beneficiary] had learned our selling proposition, the specific target audience’s psychology, common consumer behaviors in the field of interest, the behavior’s costs and benefits, and communication tactics, including nonverbal subliminal communications.” However, we note that the Beneficiary was recently in the client’s target demographic, a Chinese student in the United States, raising questions regarding the extent to which knowledge usually associated with the attainment of a bachelor’s or higher degree in a specific specialty, or its equivalent, rather than the knowledge of being in the target demographic led to performing the position’s specific duties in the example provided.

⁶ The Petitioner submitted another letter from [redacted] in response to the Director’s request for evidence (RFE). In both letters [redacted] emphasizes that he is also an associate director of the Master of Communication Management program and, in that capacity, he manages admissions, academic advisement, and career support.

Second, the client letter observes that “[the Beneficiary] has a data-driven mindset. He rarely makes any statement without adequate research.” Although the client’s observation of the Beneficiary’s behavior is informative, it does not establish whether the nature of the position’s specific duties is so specialized and complex that the knowledge required to perform them is usually associated with a qualifying degree.

Third, the client letter informs that “[the Beneficiary] got us numbers to base each and every decision on,” including using automated reports from Google Ads, Google Analytics, and Google Data Studio to monitor advertisement audience actions. Similar to concerns addressed above, the client informs that familiarity with free software tools created by Google to assist companies in advertising to audiences, rather than knowledge usually associated with a qualifying degree, suffices to perform the position’s specific duties. The record does not establish that Google Ads, Google Analytics, Google Data Studio, or similar software is so specialized and complex that the knowledge required to use it is usually associated with the attainment of a qualifying degree.

Next, []’s opinion letter submitted on appeal primarily clarifies his RFE letter, based on the Director’s analysis of it in the decision. [] asserts that he originally based his opinion on the Beneficiary’s job description, “documents on [the Beneficiary’s projects – evidence on duties he actually performed.” [] also asserts that he “studied [the Petitioner’s] LinkedIn page as well as their [sic] websites” in order “to understand [the Petitioner’s] nature of operation.” In addition, [] concedes that, in his RFE letter, “I did not put much emphasis on drawing documents from other studies” and on appeal he supplements his opinion with citations to 11 new sources, including five studies published in peer-reviewed journals, one book, and five additional undated citations to job advertisements for “marketing strategists.” In other words, on appeal the record establishes that, at the time of the Director’s decision, []’s letter “[was] not supported by copies or citations of research material that may have been used” to form his opinion, as the Director observed.⁷

On appeal, [] identifies three work product documents on which he based his initial opinion. In the RFE opinion, [] stated that “[v]arious qualitative research methods, such as the content analysis observed in [the Beneficiary’s] project for [client S] are also taught in . . . a course dedicated to market research.” He also asserted:

[the Beneficiary] had to calculate correlations from raw data to assess and project business performances [for client J], data mining and analyses [for client U], and industry/market research for every potential client, including market size, demographics distribution, budget calculation, etc., as they are presented raw [sic] data formats or in SPSS or STATA significance tests formats.

The record does not contain the work product relating to client S.⁸ Although the record contains a document referencing client J and “the Beneficiary,” and a document referencing client U and “the Beneficiary,” neither document specifically identifies the Beneficiary by name or establishes that a

⁷ As noted above, a visa petition may not be approved at a future date after a petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. at 249.

⁸ As noted above, an opinion letter “does not purport to be evidence as to ‘fact’ but rather is admissible only if ‘it will assist the trier of fact to understand the evidence or to determine a fact in issue.’” *Matter of V-K-*, 24 I&N Dec. at 502 n.2.

“marketing strategist” created them. Accordingly, the probative value of the documents to assist us in understanding the nature of the specific duties is limited.

The document referencing client J is undated and consists of one page, half of which is a nearly illegible graph of monthly order volume trends, along with a narrative from an unidentified author, asserting that the graph demonstrates “that there is a correlation between cashmere product sales and weather [and] can tell you when, how, by how much, what to expect, and what to do.” Even if the volume trend document established who created it, and when, it does not establish that the knowledge required to create it is usually associated with a bachelor’s or higher degree in a specific specialty, or its equivalent. Instead, it indicates familiarity with using software such as Microsoft Excel to produce a graph of six series of data. Furthermore, because of the graph’s near illegibility, it does not establish what the series of data display.

In turn, the document referencing client U, dated May 2019, is a two-page “Google Ads Report” and a corresponding two-page narrative from an unidentified author regarding work performed by “the Beneficiary,” without identifying him by name. The majority of the two-page report are charts and tables of data automatically generated by Google Ads based on audience activity. The remainder of the report is an analysis written by an unidentified author, summarizing the report’s implications. Although the report depicts a degree of complexity, as noted above it does not establish whether familiarity with free tools created by Google to assist companies in advertising to audiences, rather than knowledge usually associated with a qualifying degree, suffices to perform the position’s specific duties.

Furthermore, the extent of []’s opinion regarding the documents referencing client J and client U is that creating them “would require familiarity with multiple databases, and the ability to read research results.” However, that familiarity and ability is common among various quantitative specialties rather than being knowledge usually associated with a bachelor’s or higher degree *in a specific specialty*, or its equivalent. Accordingly, []’s opinion regarding those work product documents does not satisfy the fourth criterion.

[] explains that he “used [the Petitioner’s] websites to know more about the business,” rather than personally interviewing the Petitioner’s staff to learn about the nature of the position’s duties because “the websites are publicly accessible [and] untruthful statements would cause problems between [the Petitioner] and its clientele.” [] then asserts that the Petitioner’s website “lead me to believe that . . . marketing strategists attract visits [*sic*] to [the Petitioner’s] clients’ websites,” created by the Petitioner’s other workers. [] does not assert that the Petitioner’s website establishes that “marketing strategists attract visits [*sic*],” beyond leading him to believe that; and moreover he does not assert that the Petitioner’s website informs what “marketing strategists” do to attract those “visits,” in order to determine whether the nature of those duties is so complex and specialized that the knowledge required to perform them is usually associated with a bachelor’s or higher degree in a specific specialty, or its equivalent. [] does not elaborate on the materiality of the Petitioner’s LinkedIn page to his opinion regarding the extent of the complexity and specialization of the position’s specific duties.

Beyond the letters discussed above, the Petitioner does not otherwise assert on appeal how the duties, as described in the record, establish that the knowledge required to perform them is usually associated

with a qualifying degree. We note that, similar to the letters, several of the duties in the description inform that the Beneficiary would rely on free tools created by Google to assist companies in advertising to audiences, limiting the extent to which knowledge usually associated with a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform the specific duties, as discussed above. Additionally, the duty description consists of generalized language that does not establish specialization and complexity. For example, the record does not further inform the tasks or knowledge required for the Beneficiary to “[c]ollect . . . [d]igital [m]arketing metrics,” the methodology he would use to “analyze” the metrics, or the process of “[setting] up and optimiz[ing] suitable analytics tools such as Google Analytics.” The record does not demonstrate how the Beneficiary would “[i]mprove search-related activities through on-the-go analysis, experimentation, and optimization tests,” the methodology he would use to perform “Google Search Volume sampling, analysis, and interpretation,” what the Beneficiary would do to “[c]onsult with potential Chinese-speaking clients about marketing strategies and help them understand the difference of marketing strategies between China and United States,” or perform other duties with similarly vague language.

In summation, the Petitioner has not demonstrated in the record 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).

IV. CONCLUSION

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. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.