



U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE: EAC 08 081 51236 OFFICE: VERMONT SERVICE CENTER DATE: DEC 03 2009

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Riew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner avers that it is an importer and seller of custom design jewelry that was established in 2003 and has five employees. It seeks permission to employ the beneficiary as a market analyst and, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the proposed position was not a specialty occupation. On appeal, the petitioner argues that the decision to approve or deny this petition must be based on the proposed duties of the beneficiary. No additional information about the beneficiary's duties was provided on appeal.

The record includes: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's denial decision; and (5) the Form I-290B, along with documentation submitted in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

When filing the H-1B petition, the petitioner stated in an accompanying letter that the beneficiary would be working directly with its president to identify and analyze potential new markets into which the petitioner could expand its operations. The petitioner listed several broad responsibilities of the beneficiary and described what duties he would execute in furtherance of these responsibilities. On February 6, 2008, the director sought additional evidence from the petitioner in the form of an RFE because the director found that the record did not clearly establish that the proffered position was a specialty occupation. The director sought further clarification regarding the procedures that the beneficiary would follow to accomplish his job responsibilities, and whether the petitioner currently employed any other market analysts. The director also asked the petitioner to submit: a detailed statement articulating the beneficiary's daily duties; evidence that businesses similar to the petitioner require a bachelor's degree or its equivalent in a specific specialty for their market analysts; and a copy of the petitioner's "in-house job announcement for the position."

The petitioner responded to the RFE on March 11, 2008. Regarding a more detailed job description, the petitioner stated that the beneficiary would be responsible for identifying and analyzing potential new markets into which the petitioner can expand its operations. The petitioner stated that the beneficiary would accomplish his job by reading trade journals, speaking with vendors and customers, attending professional conferences, and researching internet marketing tools. Regarding whether it currently employed any market analysts, the petitioner stated that it did have one market analyst who had been employed in H-1B status, but he had recently become a lawful permanent resident and resigned to start his own business. The petitioner stated that the beneficiary would be replacing this former employee. To address the director's request for evidence regarding the hiring practices of businesses similar to the petitioner, the petitioner submitted an expert opinion letter from [REDACTED] of Business at Columbia University's Graduate School of Business. Finally, the petitioner submitted a copy of its in-house announcement for the proffered

position, which showed that the incumbent required a bachelor's degree in business and/or marketing or a combination of education and practical job experience equivalent to a bachelor's degree.

On March 24, 2008 the director denied the petition. The director analyzed the job duties and responsibilities that the petitioner had provided and determined that they were not at a professional level to qualify the position as a specialty occupation. Regarding the petitioner's job announcement, the director concluded that it was created to satisfy an evidentiary requirement and was not an announcement that was actually posted or reflected the petitioner's true educational requirements for a market analyst. When discussing the expert opinion letter of [REDACTED] the director found that, when his opinion was considered along with the other evidence in the record, it was not persuasive in establishing that the job offered is a specialty occupation.

On appeal, the petitioner disagrees with the director's findings and presents several arguments in rebuttal. First, the petitioner points to the 2002-2003 edition of the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* to support its argument that the position of a market research analyst is a specialty occupation because "a bachelor's degree in Economics or Marketing provides good preparation for the Market Research Analyst." The petitioner also states that the director erroneously looked at the petitioner's size when he concluded that the job was not a specialty occupation and should have based his decision on the beneficiary's duties.

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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which 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 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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a 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, the position must also 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, 8 U.S.C. § 1184(i)(1), 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 illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

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. 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 professions.

These occupations all require a baccalaureate degree in a specific specialty as a minimum for entry into the occupation and fairly represent the types of professions 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, to determine whether the position qualifies as a specialty occupation. *Defensor v. Meissner*, 201 F. 3d 384.

The AAO routinely consults the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*¹ for its information about the duties and educational requirements of particular occupations. The proffered position, although not a true market research analyst position, is most akin to this occupation in terms of generalized responsibilities. While the *Handbook's* information on educational requirements for the position of market research analyst indicates that a bachelor's degree "is the minimum educational requirement for many market and survey research jobs," the AAO notes the significance of the DOL's declination to state that the bachelor's degree must be in a particular field of study. As stated previously, 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. Here, the occupation of market research analyst does not qualify as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), because the incumbent could hold a bachelor's degree in any number of fields, and a baccalaureate or higher degree or its equivalent in a particular specialty is not normally the minimum requirement for entry into the position.

The AAO now turns to a consideration of whether the petitioner, unable to establish its proposed position as a specialty occupation under the first criterion set forth at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under one of the three remaining criteria: a degree requirement as the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position; or the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree.

The proposed position does not qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first prong of this regulation requires a demonstration that a specific degree requirement is common to the industry in parallel positions among similar organizations. To meet the burden of proof under this prong imposed by the regulatory language, a petitioner must establish that its degree requirement exists in parallel positions among similar organizations. In determining whether there is such a common degree requirement, factors often considered by USCIS include whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc.*

¹ *Occupational Outlook Handbook*, 2008-2009 ed., available at <http://www.bls.gov/oco/ocos086.htm> (accessed November 24, 2009).

v. *Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As noted previously, the *Handbook* does not report that the industry normally requires a bachelor's degree in a specific field of study as a minimum qualification. The petitioner also has not submitted any evidence that the industry's professional associations have made a degree a minimum requirement for entry into a market research analyst position or that businesses similar to the petitioner require a degree in a specific specialty for their positions that are parallel to the one offered here. The AAO has assessed the letter from [REDACTED] as well, but finds that it fails to establish that the proffered position is a specialty occupation. [REDACTED] letter was written to establish why the beneficiary's educational and employment experiences qualify him for a position as a market analyst; the letter is not an analysis of the job duties in relation to the industry standards for market analysts. The AAO notes that a job is deemed to be a specialty occupation based upon the duties associated with the position, not what the beneficiary may be able to bring to the position based upon his qualifications. Furthermore, [REDACTED] opines that "it would not be reasonable to imagine that someone could perform these sophisticated tasks and responsibilities without a solid grounding in business-related concepts and marketing-related methods at the Bachelor degree level"; however, like the *Handbook*, [REDACTED] declines to state that the degree must be in a particular field of study.² The AAO may, in its 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, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). [REDACTED] opinion, in which he concludes that the petitioner's requirement of a bachelor's degree in marketing is reasonable, is not persuasive when viewed in relation to the information in the *Handbook* and in the record. Therefore, the petitioner has failed to establish that a degree requirement is an industry standard, and therefore has not satisfied the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) requires the petitioner to prove that the duties of the proposed position are so complex or unique that only an individual with a degree can perform them. No aspect of the proffered position's duties is particularly unique; the duties involve routine market analysis tasks that would not require any particular specialization. The petitioner, therefore, has not established that the proposed position qualifies for classification as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO next turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires the petitioner to demonstrate that it normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, including the names and dates of employment of those employees with degrees who previously held the position, and copies of those employees' diplomas. Here, the

[REDACTED] states that he agrees with the petitioner on two points and quotes from the petitioner's letter about the incumbent needing a bachelor's degree in marketing or its equivalent for the job. [REDACTED] agreement with the petitioner's self-imposed requirements, however, does not carry the same weight as an opinion that analyzes the job duties in relation to industry standards and makes a conclusion about the educational or work experience the proffered position would require.

petitioner states that since its inception in 2003, it has employed an individual as a marketing analyst in H-1B status. The petitioner has not, however, submitted a copy of the employee's diploma to show that this employee possessed a bachelor's degree or its equivalent in marketing or a related field.³ Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Therefore, the proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The fourth criterion, 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), requires the petitioner to establish that the nature of the proposed position's 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 the specialty. The record contains no evidence that the beneficiary would perform duties that are either specialized or complex that would make the requirement of a specialized degree a necessary qualification. As a result, the record fails to establish that the proposed position meets the specialized and complex threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The proposed position does not qualify for classification as a specialty occupation under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4), and this petition was properly denied.

Pursuant to section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, the burden of proof is upon the petitioner to establish eligibility for the benefit it is seeking. Here, the petitioner has not met its burden. Accordingly, the AAO affirms the director's decision to deny the petition and dismisses the appeal.

ORDER: The appeal is dismissed. The petition is denied.

³ If the H-1B petition of the petitioner's previous employee was approved based on the same evidence that is contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988).