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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
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**MAR 02 2010**

FILE: WAC 07 145 52503 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:  
Beneficiary:

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

ON BEHALF OF PETITIONER:

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 Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The director of the California Service Center 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 is a “startup company” engaged in retail of natural skin and hair care products. It seeks to employ the beneficiary as a vice president marketing and finance 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 concluding that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation. The director noted that the evidence is insufficient to establish that the petitioner’s business processes, products, services, or workforce are of a scope or complexity that it would require a vice president of marketing and finance exclusively for a three-year period.” The director further noted that that the offered position is similar to the duties of a market research analyst, and the record is insufficient to classify the offered position As related to the type of industry in which the beneficiary would be employed.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director’s request for evidence (RFE); (3) counsel’s response to the director’s RFE; (4) the director’s second RFE; (5) counsel’s response to the director’s second RFE; (6) the director’s denial letter; and (7) the Form I-290B, with counsel’s brief, and additional documentation. The AAO reviewed the record in its entirety before reaching its decision.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term “specialty occupation” as one 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.

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 (5<sup>th</sup> 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 the 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.

In determining whether a proposed position qualifies as a specialty occupation, USCIS looks beyond the title of the position and determines, from a review of the duties of the position and

any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty, as the minimum for entry into the occupation as required by the Act.

The petitioner stated in its support letter, dated March 28, 2007, that it is a start-up company and the "U.S. operations have progressed to the point where we need a seasoned finance and marketing professional to take us to the 'next level.'" The petitioner stated the duties of the proffered position as follows:

We believe we have found the ideal candidate to lead this effort in [the beneficiary] and have therefore offered him employment as Vice President of Marketing and Finance. In this capacity, [the beneficiary] will provide strategic management and direction for [the petitioner's] marketing and financial functions, with duties to include market research and strategy, analysis and execution of sales processes, promotion and advertising, pricing, product development, advertising and public relations, as well as accounting and other financial activities. [The beneficiary] will function in the capacity of a senior executive and will have an important voice in the overall operations and direction of the company, both now and in the long-term. Initially, much of the day-to-day marketing and financial activities will be outsourced, according to our business model, but we envision that [the beneficiary] will hire and manage in-house professionals as the business needs of the company rapidly increase.

On May 11, 2007, the director requested the following additional information: (1) evidence that the position of a vice president of marketing in finance is a common position required by similarly sized offices (4 employees) with similar annual incomes, and evidence that the petitioner's competitors normally require degrees for closely related positions to that of vice president of marketing and finance; (2) job listings as evidence to establish a degree requirement is common to the industry in parallel positions among similar organizations; (3) evidence to establish that the petitioner has a past practice of hiring persons with a baccalaureate degree, or higher, to perform the duties of the proffered position; (4) a copy of the petitioner's organizational chart; (5) an explanation of what differentiates the petitioner's products or services from others in the industry and evidence that it requires a bachelor's degree to perform the duties of the proposed position; and, (6) information regarding the nature of the petitioner's business.

In the petitioner's response letter, dated August 1, 2007, the petitioner stated the following:

You have asked us to clarify why a business such as ours requires the services of someone such as [the beneficiary]. As we indicated in the initial evidence that was submitted with this petition, we are a small company which is essentially operating in startup mode. I serve as President of the company and I maintain primary responsibility for many of its functions. However, [the beneficiary] possesses expertise in areas including finance, sales, and marketing which I do not

have, based in part on his background as a chartered accountant in the United Kingdom and his history of employment by and leadership of natural hair and skincare product companies prior to the establishment of ours. As was stated in the initial evidence, we envision a part-time role for [the beneficiary] at first, but foresee that it will expand to full-time as our company continues to ascend its growth curve. Only someone with qualifications such as [the beneficiary's] can give us the chance to meet the revenue targets which we believe we are capable of achieving. It has certainly been my experience that fields such as accounting, finance, and marketing are "professional" fields and that professionals operating in these fields qualify for them through achievement of a bachelor's degree. I am not aware of any of our competitors who think differently than we do regarding these issues.

The petitioner did not submit job listings, or new information regarding the petitioner's business, as requested by the director.

The director denied the petition, finding that the petitioner had satisfied none of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), and therefore had not established that the proposed position qualifies for classification as a specialty occupation. The director also found that the petitioner lacked the "organizational complexity to credibly offer" a position as a market research analyst.<sup>1</sup> The director further noted that the record is insufficient to classify the offered position as a market research analyst position related to the type of industry in which the beneficiary would be employed.

On appeal, counsel for the petitioner contends that the director erred in characterizing the proposed position as similar to a market research analyst, and instead contends that the position is more properly characterized as an executive position. Counsel also states that the position is for a part-time position and not a full-time position since the petitioner is a start-up company. Finally, counsel states that the company does have a need for the proposed position as it requires a manager and executive as a growing company.

As a preliminary matter, the AAO withdraws the director's statement that the petitioner does not engage in the type of business for which a market research analyst would typically be required on a regular full-time or part-time basis. In reviewing the Department of Labor's *Occupational Outlook Handbook* (hereinafter the *Handbook*), the work of market research analysts analyze and propose ways to improve an organization's structure, efficiency, or profits, and provide a company's management with information needed to make decisions on the promotion, distribution, design and pricing of products or services. Market research analysis is applicable to

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<sup>1</sup> In arriving at this conclusion the director noted the petitioner fails to establish that it has "marketing staff or even any marketing specialist to gather market data for analysis by a market research analyst;" a "sales team to implement advertising or sales campaigns as a result of the research performed and recommendation made by a market research analyst;" or evidence that the petitioner's business has "ever produced advertising or sales campaigns through its own in-house account, creative, and media services departments."

a broad range of industries and businesses seeking to improve their market share and profits, and is not limited to management consultant firms or government agencies. The fact that the petitioner is a private company engaged in the distribution of natural skin and hair products does not preclude it from engaging in the type of market research analyst activities described by the *Handbook* as a means of increasing its business opportunities and earnings. However, the petitioner's potential need to conduct market research analysis does not establish the proffered position as a specialty occupation.

The occupation of a market research analyst may be a specialty occupation, in that some employers require those seeking entry-level employment to have the minimum of a bachelor's degree in a related field. However, while the petitioner has identified its position as that of an executive position, its description of the beneficiary's duties lacks the specificity and detail necessary to support the petitioner's contention. On appeal, counsel contends that the very similarity between the petitioner's description of its proffered position and the *Handbook's* discussion of the occupation of an executive position should be a basis for approval. The AAO does not agree. A petitioner cannot establish its employment as a specialty occupation by describing the duties of that employment in the same general terms as those used by the *Handbook* in discussing an occupational title. This type of generalized description is necessary when defining the range of duties that may be performed within an occupation, but it cannot be relied upon by a petitioner when discussing the duties attached to specific employment. In establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in relation to its particular business interests.

In determining whether a proposed position qualifies as a specialty occupation, USCIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty, as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations.

The AAO finds the petitioner's description of the duties of its proffered position to reflect the type of activities generally performed by market research analysts, i.e., the gathering of statistical data on competitors, examining prices, sales, and methods of marketing and distribution, and analyzing data on past sales to predict future sales.

The *Handbook* states the following with regard to the employment of marketing research analysts:

Market and survey researchers gather information about what people think. Market research analysts help companies understand what types of products people want, determine who will buy them and at what price. Gathering statistical data on competitors and examining prices, sales, and methods of marketing and distribution, they analyze data on past sales to predict future sales.

Market research analysts devise methods and procedures for obtaining the data they need by designing surveys to assess consumer preferences. While a majority of surveys are conducted through the Internet and telephone, other methods may include focus group discussions, mail responses, or setting up booths in public places, such as shopping malls, for example. Trained interviewers usually conduct the surveys under a market research analyst's direction.

The *Handbook* states the following educational requirements to fill the position of market research analyst:

A bachelor's degree is the minimum educational requirement for many market and survey research jobs. However, a master's degree is usually required for more technical positions.

In addition to completing courses in business, marketing, and consumer behavior, prospective market and survey researchers should take social science courses, including economics, psychology and sociology. Because of the importance of quantitative skills to market and survey researchers, courses in mathematics, statistics, sampling theory and survey design, and computer science are extremely helpful. Market and survey researchers often earn advanced degrees in business administration, marketing, statistics, communications, or other closely related disciplines.

While the 2010-2011 edition of the *Handbook* reports that a baccalaureate degree is the minimum educational requirement for many market and survey research jobs, it does not indicate that the degrees held by such workers must be in a specific specialty that is directly related to market research, as would be required for the occupational category to be recognized as a specialty occupation.

Accordingly, it finds the record does not establish that the proffered position qualifies as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. Accordingly, the proposed position does not qualify for classification as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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 showing that a specific degree requirement is common to the industry in parallel positions among similar organizations. Even though the director specifically requested further information evidencing the degree requirement is common to the industry, the petitioner did not submit any documentation to establish a baccalaureate or higher degree as an industry norm. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The AAO also concludes that the record does not establish that the proposed position is a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires a showing that the position is so complex or unique that it can only be performed by an individual with at least a bachelor's degree in a specific specialty. The AAO finds no evidence that would support such a finding, as the petitioner's listing of the duties is so generic, so nonspecific that it precludes the AAO from determining precisely what tasks the beneficiary would perform for the petitioner on a daily basis. For example, although the petitioner has stated that the beneficiary would be responsible for the strategic management and direction for the petitioner's marketing and financial function, it offers no indication of what the petitioner would require of the beneficiary in completing such an examination and analysis. The petitioner did not provide detail on the duties the beneficiary will perform in the proffered position. Without this type of description, the AAO is unable to determine whether the responsibilities of the proffered position would require the beneficiary to hold the minimum of a baccalaureate or higher degree or its equivalent to perform them. Accordingly, the petitioner has not established its proposed position as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a showing that the petitioner normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet this criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. However, no such evidence has been submitted to demonstrate that the proposed position qualifies under this criterion since it is a newly-created position.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires a demonstration that 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.

To the extent that they are depicted in the record, the duties of the proposed position do not appear so specialized and complex as to require the highly specialized knowledge usually associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Again, there is no information in the record to support a finding that the proposed position is more complex or unique than similar positions in other, similar organizations. As previously noted, USCIS must examine the actual employment of an alien, i.e., the specific tasks to be performed by that alien, to determine whether a position qualifies as a specialty occupation. However, the

petitioner's description of the duties of its position is so generic that it is not possible to identify those tasks and, therefore, whether the position is that of a market research analyst. Further, without a reliable description of the position's duties, the AAO is unable to determine whether the performance of those duties meets the statutory definition of a specialty occupation -- employment requiring the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation. As a result, the AAO finds the petitioner has failed to establish that it has a specialty occupation for which it is seeking the beneficiary's services. Therefore, the evidence does not establish that the proposed position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The generic description of the duties of the proffered position, which precluded consideration of the proffered position under the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) also makes it impossible to evaluate these duties under the specialized and complex threshold of the fourth criterion. Accordingly, the AAO concludes that the proffered position is not a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Therefore, for the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position meets the requirements for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the AAO shall not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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