

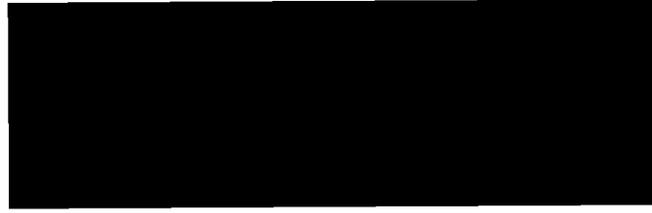
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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Services

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FILE: WAC 07 062 50400 Office: CALIFORNIA SERVICE CENTER Date:

MAR 02 2010

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, as required by 8 C.F.R. 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the 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 petitioner, a radio station seeking to continue to employ the beneficiary as a broadcast technician, filed this H-1B petition to continue the beneficiary's classification and extend his stay 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 because she determined that the petitioner failed to establish the proffered position as a specialty occupation. Based upon its review of the entire record of proceeding as supplemented by the Form I-129 and the petitioner's other submissions on appeal, the AAO finds that the director's decision was correct. Accordingly, the appeal will be dismissed, and the petition will be denied.

In deciding whether a proffered position qualifies as a specialty occupation, the AAO analyzes the evidence of record according to the statutory and regulatory framework below.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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.

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 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.

At the outset, the AAO notes that the chapter “Broadcast and Sound Engineering Technicians and Radio Operators” in the Department of Labor’s *Occupational Outlook Handbook* (the *Handbook*) indicates that the occupational category to which the proffered position belongs is not one that normally requires or is usually associated with a bachelor’s degree or higher in any specific specialty.¹ One of the “Significant Points” bullet-summaries opening the chapter reads:

- Technical school, community college, or college training in broadcast technology, electronics, or computer networking provides the best preparation.

In addition, the “Training, Other Qualifications, and Advancement” section of the “Broadcast and Sound Engineering Technicians and Radio Operators” chapter indicates that “many jobs require a bachelor’s degree” as a function of the high level of competition for them rather than job-performance requirements. More specifically, the pertinent portion of the “Training, Other Qualifications, and Advancement” section states:

For broadcast technicians an associate degree in broadcast technology, electronics, computer networking, or a related field is generally recommended. Because of the competitiveness of the broadcast industry, many jobs require a bachelor’s degree. A four-year degree also gives employees much better prospects for advancement in the field.

Most entry-level employees find jobs in small markets or with small stations in big markets and can transfer to larger, better paying stations after gaining experience and learning the necessary skills. Small stations usually value more general skills since they have fewer employees doing less specialized work. Large stations almost never hire someone without previous experience, and they value more specialized skills. Working at a college radio or television station can be very advantageous for prospective employees.

The petitioner is a subscriber based, foreign-language radio station located in Manhattan and broadcasting from an antenna located on top of the Empire State Building. According to the petitioner’s December 14, 2006 letter of support filed with the Form I-129, as a broadcasting technician, the beneficiary “is responsible for the strength, quality, clarity and volume of programming that reaches our audience”; “sets up, operates, and maintains the station’s electronic equipment used to transmit [the petitioner’s] radio programs”; and “must be in constant contact with the antenna facilities and with the listeners, as he often needs to adjust the radio signal and assist our listeners with their radio receivers.” The petitioner’s August 1, 2007 letter replying to the director’s

¹ The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. Unless otherwise indicated, all of the AAO’s references are to the 2010-2011 edition of the *Handbook*, which may be accessed on the Internet at <http://www.bls.gov/OCO/>.

request for additional evidence (RFE) includes the following statement regarding the duties of the proffered position:

[T]he broadcast technician must constantly monitor outgoing signals, monitor the quality of the signal between the studio and our antenna, quickly repair any problems, and communicate with our listeners and the engineers at the Empire State Building regarding any potential issues.

In his August 30, 2007 letter responding to the RFE, counsel states, in part:

[T]he Broadcast Technician is responsible for [the] quality of the radio signal that travels from the studio to the transmitter (this transmitter is located on the Empire State Building) by optic wires, and then is sent through radio waves to the subscriber's [sic] receivers. Both phases of the transmission are supervised and transmitted and coordinated by the Broadcast Technician, who assures that the signal is clear from interference. Especially now, with the advent of High Definition broadcasting taking over much of [the] airwaves on slightly different frequencies, this position requires constant monitoring and adjustment of the signal.

In addition to the above tasks, the Broadcast technician for [the petitioner] must be able to maintain complicated broadcast equipment on [a] daily basis, and for [sic] other duties that assure that the signal reaches its intended audience.

The submissions on appeal include job advertisements, from (1) Penn State Public Broadcasting (PSPB), for a transmitter site supervisor; (2) PBS, for a "Technician-TMC"; and (3) WYNC, for a Digital Audio Networking Engineer." The AAO finds that these documents have no probative value for satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), as the duties of the advertised positions are materially broader than the proffered position. Further, none of the advertisements specify a bachelor's degree in a specific specialty as an absolute hiring requirement. PSPB requires a "Bachelor's degree or equivalent," without specifying any particular major or academic concentration. For its advertised position, PBS will accept an AS (Associate of Science) degree in Electrical Engineering, Computer Science, IT, a closely associated technical field. The WNYC advertisement specifies only a "Bachelor's degree or equivalent experience."

On appeal, counselor and the petitioner references an April 7, 2008 letter submitted on the petitioner's behalf by the manager of a subscriber-based digital radio station in Brooklyn, New York that broadcasts from New York City in Russian and other foreign languages. Writing as the person responsible for hiring his station's on-air and technical staff, this station manager states:

[A]t our radio station the position of Broadcast Technician requires that the person performing this job has at least a Bachelor's engineering degree, and it is my belief that all of the local radio stations have similar requirements.

At almost all stations this position requires the person to monitor, adjust, and repair the strength, quality[,] and volume of the radio signal. This is especially important nowadays[s], due to the large number of encroaching signals due to the new HD AM and FM stations. Likewise, maintaining and operating the station's equipment requires someone with at least a Bachelor's degree due to the highly complex nature of equipment utilized. One must be thoroughly familiar with the schematics of advanced electronic equipment, must be aware of various physics-related broadcast properties, and must generally have very strong quantitative skills.

Thus, I feel that only a person with a Bachelor's Engineering degree or higher can perform this job, and believe that other radio station managers in New York have the same requirement for this position.

As will next be discussed, the station manager's letter does not merit significant evidentiary weight on the specialty occupation issue.

The station manager's letter does not provide a persuasive factual basis for the author's opinion that performance of the proffered position requires higher training or educational credentials than reported by the *Handbook*, which indicates that technical school, community college, or college training in broadcast technology, electronics, or computer networking best prepares, and therefore sufficiently equips, a person to perform as a broadcast technician. The AAO notes that the manager focuses on aspects of the proffered position that appear common to the broadcast technician occupation (such as working with sophisticated equipment; monitoring, adjusting, and repairing the strength, quality, and volume of the radio signal; and dealing with encroaching signals)² but does not explain why the New York City broadcasting environment or any other aspect of this petition's particular position elevates the educational requirement above what the *Handbook* indicates as adequate preparation for the technical demands of broadcast technician positions.

² Pertinent parts of the *Handbook's* comments about the Broadcast Technician occupation state:

Broadcast technicians set up, operate, and maintain equipment that regulates the signal strength, the clarity, and the ranges of sounds and colors of radio or television broadcasts. These technicians also operate control panels to select the source of the material. Technicians may switch from one camera or studio to another, from film to live programming, or from network to local programming.

* * *

Broadcast and sound engineering technicians and radio operators perform a variety of duties at small stations. At large stations and at the networks, technicians are more specialized, although job assignments may change from day to day. The terms "operator," "engineer," and "technician" often are used interchangeably to describe these workers. They may monitor and log outgoing signals and operate transmitters; set up, adjust, service, and repair electronic broadcasting equipment; and regulate fidelity, brightness, contrast, volume, and sound quality of television broadcasts.

With regard to the station manager's statement that he believes "that other radio station managers in New York have the same requirement for the position," the AAO first notes that the statement does not amount to an assertion that the "Bachelor's of Engineering degree" requirement is an industry-wide or even New York standard.

The evidentiary value of the station manager's letter is further reduced by the facts that it does not address the *Handbook's* information about the educational requirements for the Broadcast Technician occupation, which conflicts with the letter's conclusion, and it does not factually distinguish the proffered position from the general range of broadcast technician positions, for which the *Handbook* indicates that job performance does not require at least a baccalaureate degree in a specific specialty.

For all the above reasons, the AAO accords no probative value to the station manager's letter. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which assigns specialty occupation status to a position for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties.

As already reflected in this decision's discussion of relevant parts of the *Handbook's* chapter "Broadcast and Sound Engineering Technicians and Radio Operators," broadcast technician positions normally do not require at least a bachelor's degree, or the equivalent, in a specific specialty. As the evidence of record does not distinguish the proffered position from the range of broadcast technician positions not requiring at least a bachelor's degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first alternative prong assigns specialty occupation status to a proffered position whose asserted requirement for at least a bachelor's degree in a specific specialty is common to positions in the petitioner's industry that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or

affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As reflected in this decision's earlier comments, the *Handbook* does not indicate that a broadcast technician position as described in this petition would require at least a bachelor's degree in a specific specialty. Thus, the *Handbook* does not support a favorable finding under this criterion. The AAO also notes that the record does not include submissions from a professional association. For the reasons already outlined, the record's job advertisements and the station manager's letter have little evidentiary weight and no probative value toward satisfying any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the petitioner has not satisfied the first alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner also has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." The record does not contain substantive evidence about the proffered position and its duties that distinguish the position as unique from or more complex than the range of broadcast technician positions for which the *Handbook* indicates there is no requirement for a bachelor's or higher degree in a specific specialty.

Next, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), by establishing that the employer normally requires a degree or its equivalent for the position. To merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position.³ This the petitioner has not done.

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance

³ Also, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. This record fails in this regard also. The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. See generally *Defensor v. Meissner*, 201 F. 3d at 384, 387-388. The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. See *id.* at 388.

requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. As reflected in this decision's earlier discussion about the proposed duties as indistinguishable from those of broadcast technician positions not requiring a bachelor's or higher degree, the evidence of record does not establish a level of specialization and complexity above the wide range of broadcast technician positions, for which the *Handbook* indicates that there is no usual association with a bachelor's or higher degree based upon the relative specialization or relative complexity of specific duties.

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision to deny the petition shall not be disturbed.

The petitioner noted that USCIS approved the previous petition that it filed for the beneficiary for the position that is the subject of this extension petition. The director's decision does not indicate whether she reviewed the prior approval of the other nonimmigrant petition. If the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material 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). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). Also, prior approvals do not preclude USCIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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