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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
and Immigration
Services**

D2

FILE:

Office: CALIFORNIA SERVICE CENTER

Date:

NOV 05 2010

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink, appearing to read "Perry Rhew".
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 claims to be a provider of healthcare services with 30 employees. It seeks to employ the beneficiary as a staff development manager 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 failed to establish that the proffered position is a specialty occupation.

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

The primary issue in this matter is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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 (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.

In this matter, the petitioner seeks the beneficiary's services as a staff development manager. The petitioner describes the position's duties as follows:

- Conduct new employee orientation and coordinate competency completion;
- Ensure for or deliver annual mandatory and continuous education for staff;
- Teach in-house courses;
- Coordinate employee health program;
- Monitor and ensure current licensure and certifications of staff;
- Maintain employee education, training and health files;
- Assist in the screening and hiring of nursing and other staff; and
- Complete required forms and documents.

The petitioner also states that the proffered position requires a bachelor's degree in education plus at least two years of experience. The petitioner submitted the beneficiary's education documents together with an education evaluation, indicating that she received the U.S. equivalent of a Master of Education degree.

On May 19, 2009, the director requested additional information from the petitioner. In part, the director requested the following: (1) evidence that the proffered position is a specialty occupation; (2) more information about the nature of the position; and (3) more information about the nature of the petitioner's

business. The director also requested an organizational chart.

Counsel for the petitioner wrote a response and provided an organizational chart for the petitioner along with a copy of the petitioner's brochure and copies of advertisements from other businesses. In response to the RFE, counsel argued that the proffered position is a specialty occupation as it combines the functions of two occupations in the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* - Health Educators and Human Resources, Training, and Labor Relations Managers and Specialists. Counsel also cited to the Occupational Information Network *O*Net On-line* Summary Reports on Health Educators as well as Training and Development Managers as evidence that the proffered position is a specialty occupation.

The organizational chart provided in response to the RFE indicates that the beneficiary would be directly supervised by the petitioner's Administrator. The chart also indicates that the beneficiary would not be responsible for supervising any individuals.

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. In the decision, the director found that the proffered position falls under the section on Human Resources, Training, and Labor Relations Managers and Specialists in the *Handbook*, but she did not agree with counsel that this and the other evidence submitted by the petitioner demonstrated that the proffered position is a specialty occupation requiring at least a bachelor's degree or the equivalent in a specific specialty.

On appeal, counsel for the petitioner argues that the section on Human Resources, Training, and Labor Relations Managers and Specialists in the *Handbook* demonstrates that the proffered position is a specialty occupation and that the director should also have found that the proffered position falls under the *Handbook's* section on Health Educators.

To make its determination whether the proffered position, as described in the initial petition and the petitioner's response to the RFE, qualifies as a specialty occupation, the AAO first turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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)).

USCIS often looks to the *Handbook* when determining whether a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into a particular position. In reviewing the duties provided for the proffered position as well as the organizational chart and other supporting documentation, the AAO disagrees with counsel that the *Handbook's* description of Health Educators is a suitable approximation of the proffered position. The *Handbook*, 2010-11 edition, provides as follows:

Health educators work to encourage healthy lifestyles and wellness through educating individuals and communities about behaviors that can prevent diseases, injuries, and other health problems.

Health educators attempt to prevent illnesses by informing and educating individuals and communities about health-related topics, such as proper nutrition, the importance of exercise, how to avoid sexually transmitted diseases, and the habits and behaviors necessary to avoid illness. They begin by assessing the needs of their audience, which includes determining the appropriate topics to cover. For example, they may hold programs on self-examination for breast cancer to women or may teach classes on the effects of binge drinking to college students. Health educators must take the cultural norms of their audience into account. For example, programs targeted at the elderly need to be different from those aimed at a college-aged population.

After assessing their audiences' needs, health educators must decide how to meet those needs. Health educators have a lot of options in putting together programs. They may organize an event, such as a lecture, class, demonstration or health screening, or they may develop educational material, such as a video, pamphlet or brochure. Often, these tasks require working with other people in a team or on a committee. Health educators must plan programs that are consistent with the goals and objectives of their employers. For example, many nonprofit organizations educate the public about one disease or health topic, and, therefore, limit the programs they issue.

Next, health educators need to implement their proposed plan. This may require locating funding by applying for grants, writing curriculums for classes, or creating materials that would be made available to the public. Also, programs may require dealing with logistical tasks, such as finding speakers or locations for the event.

Generally, after a program is presented, health educators evaluate its success. Methods of evaluation vary based on the program in question. For example, they may ask participants to provide feedback using a survey about the program. Through evaluation, health educators can improve plans for the future by learning from mistakes and capitalizing on strengths.

Although programming is a large part of their job, health educators also serve as a resource on health topics. This may include locating services, reference material, and other resources and referring individuals or groups to organizations or medical professionals.

Even though all health educators share the same overarching goal, their duties can vary depending on where they work. Most health educators work in medical care settings, colleges and universities, schools, public health departments, nonprofit organizations, and private business.

Within medical care facilities, health educators tend to work one-on-one with patients and their families. In this setting, a health educator's goal is to educate individual patients on their diagnosis and how that may change or affect their lifestyle. To this end, they may explain the necessary procedures or surgeries as well as how patients will need to alter their lifestyles to manage their illness or return to full health. They may also direct patients to outside resources, such as support groups, home health agencies, or social services. Often, health educators work closely with physicians, nurses, and other staff to create educational programs or materials, such as brochures, Web sites, and classes. In some cases, health educators train hospital staff about how to better interact with patients.

As stated in this description, the health educator's primary role is to educate individuals and communities about behaviors that can prevent diseases, injuries, and other health problems. Therefore, in the context of the petitioner's business, a health educator would primarily be responsible for educating the patients, and not the petitioner's staff. However, not one of the beneficiary's proffered duties entails educating the petitioner's patients. Moreover, the petitioner did not provide any evidence that the beneficiary would educate the petitioner's staff, or anyone else, on health and wellness, which are the central topics of education for health educators. 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 AAO does not find that the proffered position is a health educator.

Instead, the AAO finds that the proffered position is encompassed within the *Handbook*'s section on Human Resources, Training, and Labor Relations Managers and Specialists. The *Handbook*, 2010-11 edition, notes the following regarding training managers:

Training managers oversee development of training programs, contracts, and budgets. They may perform needs assessments of the types of training needed, determine the best means of delivering training, and create the content. They may provide employee training in a classroom, computer laboratory, or onsite production facility, or through a training film, Web video-on-demand, or self-paced or self-guided instructional guides. For live or in-person training, training managers ensure that teaching materials are prepared and the space appropriately set, training and instruction stimulate the class, and completion certificates are issued at the end of training. For computer-assisted or recorded training, trainers ensure that cameras, microphones, and other necessary technology platforms are functioning properly and that individual computers or other learning devices are configured for training purposes. They also have the responsibility for the entire learning process, and its environment, to ensure that the course meets its objectives and is measured and evaluated to understand how learning impacts performance.

This description seems the most appropriate given that a large part of the beneficiary's duties is employee education and orientation.

With respect to education and training requirements for human resources, training, and labor relations managers and specialists, the *Handbook* states:

The educational backgrounds of human resources, training, and labor relations managers and specialists vary considerably, reflecting the diversity of duties and levels of responsibility. In filling entry-level jobs, many employers seek college graduates who have majored in human resources, human resources administration, or industrial and labor relations. Other employers look for college graduates with a technical or business background or a well-rounded liberal arts education.

Education and training. Although a bachelor's degree is a typical path of entry into these occupations, many colleges and universities do not offer degree programs in personnel administration, human resources, or labor relations until the graduate degree level. However, many offer individual courses in these subjects at the undergraduate level in addition to concentrations in human resources administration or human resources management, training and development, organizational development, and compensation and benefits.

Because an interdisciplinary background is appropriate in this field, a combination of courses in the social sciences, business administration, and behavioral sciences is useful. Some jobs may require more technical or specialized backgrounds in engineering, science, finance, or law. Most prospective human resources specialists should take courses in principles of management, organizational structure, and industrial psychology; however, courses in accounting or finance are becoming increasingly important. Courses in labor law, collective bargaining, labor economics, and labor history also provide a valuable background for the prospective labor relations specialist. As in many other fields, knowledge of computers and information systems is useful. . . .

(Emphasis added.) In other words, according to the *Handbook*, although a bachelor's degree is often obtained by people in these professions, a bachelor's degree in a *specific specialty* is not required.

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, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor 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.

As the *Handbook* indicates that a bachelor's degree in a wide range of fields is acceptable for employment as human resources, training, and labor relations managers and specialists, the AAO concludes that the performance of the proffered position's duties does not require the beneficiary to hold a baccalaureate or higher degree in a *specific specialty*.

As mentioned previously, the AAO does not agree with counsel that the position could, in part, be encompassed in the *Handbook*'s section on Health Educators. Counsel also argues that the proffered position falls under the Occupational Information Network *O*Net On-line* Summary Report on Training and Development Managers and

therefore requires a minimum of a bachelor's degree. On October 13, 2010, the AAO accessed the pertinent section of the *O*Net Online* Internet site, which addresses Personnel Recruiters under the Department of Labor's Standard Occupational Classification code of [REDACTED]. That site is <http://online.onetcenter.org/link/summary/11-3042.00>. Contrary to counsel's assertion, *O*Net Online* does not state a requirement for a bachelor's degree for Health Educators. Rather, it assigns Health Educators a Job Zone Four rating, which groups them among occupations of which "most," but not all, "require a four-year bachelor's degree." Further, the *O*Net Online* does not indicate that four-year bachelor's degrees required by Job Zone Four occupations must be in a specific specialty closely related to the requirements of that occupation. Therefore, the *O*Net Online* information is not probative of the proffered position being a specialty occupation.

Accordingly, the AAO finds that the petitioner has failed to establish its proffered position as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong assigns specialty occupation status to a proffered position with a requirement for at least a bachelor's degree, in a specific specialty, that is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

Again, 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 at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

The petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. The advertisements submitted in response to the RFE do not refute the *Handbook*'s statement that degrees in a wide range of fields are acceptable: one advertisement requires only an associate's degree; another requires one to two years of experience without requiring a degree at all; an additional advertisement requires either a bachelor's degree in healthcare or an RN degree (which could be an associate's degree); and two other advertisements do not list any minimum requirements at all. In addition, the petitioner submitted one advertisement for a Manager, Advanced Practice Center at a Heart Service of a large Children's Medical Center. As this advertisement was placed by a large hospital with a specialization in children's heart issues and the duties encompass training for a large staff of advanced practice nurses and physician assistants, this employer and position are not parallel to the petitioner and the proffered duties. Therefore, the advertisements do not establish that at least a bachelor's degree or equivalent in a *specific specialty* is an industry norm. In fact, none of the advertisements submitted (except for the one from an entity and for a position that are not parallel to the petitioner or the proffered duties) do not state even a bachelor's degree or the equivalent as a minimum requirement. As a result, the petitioner has not established a degree requirement in parallel positions.

The petitioner also failed to satisfy 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 evidence of record does not refute the *Handbook*'s

information to the effect that a bachelor's degree in a specific specialty or its equivalent is not required. The record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than staff development manager positions that can be performed by persons without a specialty degree or its equivalent.

As the record has not established a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty or its equivalent, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its 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 or its equivalent in a specific specialty. The AAO does not find that sufficient evidence was provided to demonstrate that the proffered duties, as described by the petitioner, reflect a higher degree of knowledge and skill than would normally be required of staff development managers performing the vague and generic duties described by the petitioner. The AAO, therefore, finds that the petitioner has also failed to establish that the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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

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.