

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

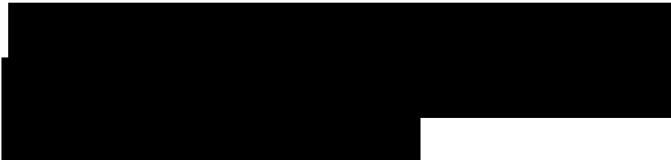
PUBLIC COPY

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:

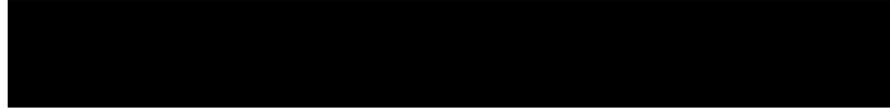


Office: CALIFORNIA SERVICE CENTER

Date: SEP 03 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, with a fee of \$585. 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,

Michael T. Kelley
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 retailer of tobacco products, which claims to have seven employees, some of which are part-time. It seeks to employ the beneficiary as a market research analyst 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 on the grounds that the petitioner failed to establish that the proffered position is a specialty occupation and that it made a credible offer of employment to the beneficiary.

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

The first issue that the AAO will consider is whether the 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 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.

The petitioner states that it is seeking the beneficiary's services as a market research analyst and submitted this H-1B petition and request for extension on July 24, 2008. The petitioner describes the beneficiary's duties as follows:

- Provide market research support and on-site assistance to staff, clients, and executive team members in the tobacco and related industries.
- Research and assess business development, expansion and sales offered to determine effect on business costs.
- Develop marketing strategies.
- Analyze business procurement and purchasing and prepare cost reports.
- Provide marketing analysis as it relates to procurement and purchasing.
- Examine and analyze all institutional data, related tobacco industry statistics, and work closely with vendors and service related companies.

The AAO finds that the duty descriptions and other information provided about the proffered position and the business context in which the duties would be performed are generic and generalized and, as such, do not provide a basis for finding that actual performance of the proffered position's duties would require a

particular level of education, or equivalent training or experience in a specific specialty.

The petitioner stated that it requires at least a bachelor's degree or the equivalent with experience in marketing/or purchasing. The credential evaluation submitted by the petitioner indicates that a combination of the beneficiary's two-year degree and experience is equivalent to a U.S. Bachelor's Degree in Purchasing.

The director's RFE asked for documentation to support a finding that the proffered position is a specialty occupation, including a more detailed job description. The director also asked for documentation regarding the petitioner's business, including evidence of a bona fide job offer, and the beneficiary's credentials.

In response to the director's request, counsel submitted a letter from the petitioner, which indicated that it has two tobacco retail stores and also recently purchased a florist shop. The petitioner stated its projected revenue for the two tobacco stores would be more than \$1,200,000 for 2008. To support this assertion, the petitioner included copies of an Excel spreadsheet and graph created by the petitioner, along with the petitioner's advertisements and fliers, but did not submit any independent evidence to corroborate its claim that projected revenue would be more than \$1.2 million. 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)).

The petitioner included a copy of the petitioner's 2007 federal income tax return, which listed the petitioner's revenue as \$220,012. Additionally, the petitioner submitted copies of quarterly wage reports, which indicated the beneficiary received \$7,500 in the third quarter of 2006, \$7,900 for the first quarter of 2007, \$10,400 for the fourth quarter of 2007, \$2,800 for the first quarter of 2008, and \$10,500 for the second quarter of 2008. The petitioner also provided copies of the beneficiary's Form W-2 and his U.S. federal tax return for 2007, which indicates the petitioner paid him \$35,150 for that year.

The petitioner did not provide a more detailed description of the beneficiary's job duties, as was requested in the RFE, but submitted an organizational chart, which indicates that the beneficiary would directly supervise a store manager and an assistant store manager as well as indirectly supervise a part-time clerk and a part-time cashier.

The director denied the petition on February 18, 2009. On appeal, counsel submits copies of the beneficiary's Forms W-2 for 2006, 2007, and 2008, which indicates he earned \$31,050, \$35,150, and \$2,800, respectively.

As the petitioner did not submit a more detailed job description, as was specifically requested in the RFE, the petitioner failed to provide sufficient evidence for USCIS to make a determine of whether the proffered position is actually that of a market research analyst, as the petitioner claims. Under 8 C.F.R. § 103.2(b)(14), failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition.

Be that as it may, the AAO finds that even if the petitioner could demonstrate, which it did not do, that the proffered position is closest to the description of a market research analyst, the 2010-2011 edition of the in the Department of Labor's *Occupational Outlook Handbook (Handbook)* does not indicate that entry into positions in that occupation normally requires at least a bachelor's degree, or the equivalent, in a specific specialty. While 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. This is evident in the range of qualifying degrees indicated in the Significant Points section that introduces the *Handbook's* chapter “Market and Survey Researchers,” which states: “Market and survey researchers can enter the occupation with a bachelor's degree, but those with a master's or Ph.D. in marketing or a social science should enjoy the best opportunities.”

That the *Handbook* does not indicate that market research analyst positions normally require at least a bachelor's degree, or the equivalent, in a specific specialty is also evident in the following discussion in the “Training, Other Qualifications, and Advancement” section of its chapter “Market and Survey Researchers,” which does not specify a particular major or academic concentration:

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.

Because the *Handbook* indicates that entry into the market research analyst occupation does not normally require at least a bachelor's degree, or the equivalent, in a specific specialty, which is in accordance with the petitioner's example of not requiring at least a bachelor's degree or equivalent in a specific specialty for the proffered position, the *Handbook* does not support the proffered position as being a specialty occupation, even if the petitioner could demonstrate that the proffered position is that of a market research analyst.

As the evidence of record does not establish that the particular position here proffered is one 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, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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.

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 the *Handbook* indicates there is no requirement of at least a bachelor’s degree in a specific specialty for employment as a market research analyst, 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, even if the petitioner could demonstrate that the proffered position is that of a market research analyst. 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).

The petitioner has also 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 petitioner and counsel did not submit any copies of advertisements or other documentation to evidence that the proffered position requires a degree in a specific specialty. As such, the evidence of record does not refute the *Handbook*’s information to the effect that there is a spectrum of degrees acceptable for market research analyst positions, including degrees not in a specific specialty related to market research analysis. Moreover, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than market research analyst 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, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than market research analyst positions that are not usually associated with a degree in a specific specialty.

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). The AAO therefore affirms the director’s decision that the beneficiary is not qualified to perform the duties of a specialty occupation.

Next, the AAO will examine whether the petitioner made a credible offer of employment to the beneficiary. USCIS records regarding the petitioner’s prior petition on behalf of the beneficiary indicate that the proffered wage for the beneficiary was \$39,500 per year from September 16, 2005 through August 30, 2008. As discussed above, the petitioner paid the beneficiary \$31,050 in 2006, \$35,150 in 2007, and \$2,800 in 2008. Therefore, the petitioner has not demonstrated that it paid the proffered wage for any of these years that it employed the beneficiary in H-1B status.

Under the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(B)(2), the petitioner must state on the petition that it will comply with the terms and conditions of the LCA for the duration of the beneficiary's stay. The record does not establish that the petitioner has complied with the terms and conditions of the previously filed LCA on the beneficiary's behalf. The petitioner has not established with consistent evidence that it will comply with the terms and conditions of the current LCA. *Matter of Ho*, 19 I&N Dec. at 591. Therefore, for this reason also, the petition may not be approved as it does not appear that the petitioner has sufficient work and resources to employ the beneficiary on a full-time basis at the proffered salary.

Beyond the decision of the director, the AAO also finds that the petitioner failed to demonstrate that the beneficiary is qualified to perform the duties of a specialty occupation.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), for purposes of paragraph (h)(4)(iii)(C)(4) of this section, equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);

- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

In accordance with 8 C.F.R. § 214.2(h)(4)(iii)(D)(5):

For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. . . . It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

As mentioned previously, the credential evaluation submitted was based on a combination of the beneficiary's education and experience, and thereby is subject to 8 C.F.R. § 214.2(h)(4)(iii)(C). However, no evidence was provided to demonstrate that this evaluation was written by an official who has authorization to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a

program for granting such credit based on an individual's training and/or work experience under 8 C.F.R. § 214.2(h)(4)(iii)(D). As such, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

Finally, the AAO notes that the record indicates that the petitioner currently holds H-1B status. The director's decision does not indicate whether she reviewed the prior approval of the other nonimmigrant petition. However, 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. 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). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of the 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 nonimmigrant petitions on behalf of a 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).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.