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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy
PUBLIC COPY

U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] Office: VERMONT SERVICE CENTER Date: FEB 01 2011

IN RE: Petitioner: [redacted]
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:

[redacted]

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 $630. 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. Kelly

for Perry Rhew
Chief, Administrative Appeals Office

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

On the Form I-129 visa petition the petitioner stated that it was established during 2003 and that it has ten employees. In response to Part 5, Item 10 of the visa petition, "Type of Business," the petitioner entered [redacted]." [Errors in the original]. To employ the beneficiary in what it designates as a training and development specialist position, the petitioner endeavors to classify her 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 record contains a Form G-28 Notice of Entry of Appearance recognizing an attorney with a North Miami Beach law firm as the petitioner's counsel. Although the record contains no indication that counsel participated in the appeal, the petitioner has not repudiated its recognition of that attorney as its counsel and that attorney has not withdrawn his appearance. Therefore, the AAO continues to recognize that attorney as the petitioner's counsel of record, and a copy of this decision will be sent to him.

The director denied the petition, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. On appeal, the petitioner's general manager asserted in a letter that the director's basis for denial was erroneous, and contended that the petitioner satisfied all evidentiary requirements.

The AAO bases its decision upon its review of the entire record of proceedings, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and the petitioner's general manager's letter submitted support of the appeal.

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. The issue before the AAO is whether the petitioner has provided evidence sufficient to establish that it would be employing the beneficiary in a specialty occupation position.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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.

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 occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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 a particular position 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 occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

With the visa petition, counsel submitted a letter, dated March 27, 2009, from the petitioner's general manager and an evaluation of the beneficiary's educational credentials by a professional evaluation service.

In his letter, the petitioner's general manager stated that the beneficiary would be in charge of support, consulting, and training the petitioner's staff; providing advice and assistance to the company in human resource and personnel policies, practices and procedures; executive search and recruitment; and designing and executing specific training programs.

The evaluation is only an evaluation of the beneficiary's credentials. It is not relevant to whether the proffered position qualifies as a position in a specialty occupation.

Because the evidence submitted was insufficient to demonstrate that the visa petition was approvable, the service center, on April 17, 2009, issued a RFE in this matter. The service center requested, *inter alia*, evidence that the petitioner has sufficient specialty occupation work to occupy the beneficiary full-time, and evidence that similar companies in the petitioner's industry employ training and development specialists.

The service center also noted that the petitioner was established in 2003 and asked that it identify the people it had previously employed in the proffered position and provide evidence of their educational credentials. It also asked, that, if the petitioner had never previously employed a training and development specialist, it explain why it requires one now.

In response, the petitioner submitted a letter, dated May 22, 2009, from its general manager. In it, she stated that the petitioner had not previously employed a training and development specialist, but was doing so now because the petitioner had experienced sluggish growth, which management attributed to poor morale and believed the beneficiary could remedy. As evidence that the petitioner, a company with ten employees, would have sufficient specialty occupation work to occupy the beneficiary as a specialty occupation training and development specialist on a full-time basis, the

petitioner's general manager stated that training and development specialists help businesses to develop, that the beneficiary knows how to prepare newly recruited employees for their jobs, and that the beneficiary would assist employees with job transitions in the event of a merger. She did not, however, state that the petitioner is currently planning to hire new employees or that any merger is foreseen.

The general manager further stated that the beneficiary may also instruct employees in new technology, in a new management reporting system, or in safety and health precautions, but did not indicate that the petitioner currently anticipates acquiring new technology or instituting a new management and reporting system.

The general manager asserted that training and development specialists must analyze organizations, discover where training would be most useful, and design new programs to fit the needs discovered. She further stated that training and development specialists should have strong interpersonal and verbal skills, imagination, a good sense of humor, a good understanding of how organizations function, and special competence in the particular area in which they will render training. The general manager did not indicate why a bachelor's degree in education or in any specific specialty is essential to any of those duties, or even helpful in performing them.

The general manager concluded that the beneficiary's degree in education is directly related to the proffered position, but did not reveal how she had reached that conclusion.

On June 11, 2009, the director denied the visa petition finding, as was noted above, that the petitioner had not demonstrated that the proffered position qualifies as a position in a specialty occupation. In that decision, the director asserted that, because the purpose of the proffered position appears to be to improve morale, it does not appear to be a position for a training and development specialist.

On appeal, the petitioner submitted a letter, dated August 4, 2009, from its general manager. That letter argues that training is widely accepted method of improving morale. The petitioner provided no additional evidence, however, that the duties of the proffered position qualify it as a position in a specialty occupation.

The AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook* (*Handbook*) as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.[1] The *Handbook* addresses training and development specialist positions in the section entitled Human Resources, Training, and Labor Relations Managers and Specialists. It describes the duties of training and development specialist positions as follows: "*Training and development managers and specialists* create, procure, and conduct training and development programs for employees."

[1] The *Handbook*, which is available in printed form, may also be accessed on the Internet, at http://www.stats.bls.gov/oco/. The AAO's references to the *Handbook* are to the 2010 – 2011 edition available online, accessed January 31, 2011.

The AAO finds that the duties attributed to the proffered position in the petitioner's general manager's March 27, 2009 letter, and the duties described elsewhere in the record, are consistent with the duties of a training specialist as described in the *Handbook*.

The AAO has considerable doubt, as the director apparently did, that a company with ten employees has sufficient training specialist duties to keep the beneficiary employed full-time in that position. The AAO, however, need not reach that issue.

The *Handbook* describes the educational requirements of Human Resources, Training, and Labor Relations Managers and Specialists positions, including training specialist positions, as follows:

> 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.

That a bachelor's degree is a typical path of entry into those positions does not suggest that such positions require a minimum of a bachelor's degree. Further, that passage does not even suggest that such a position requires a bachelor's degree in a specific specialty, let alone a bachelor's degree in education. Rather, that passage indicates that an interdisciplinary background with a smattering of social science classes, business classes, and behavioral science classes is a perfectly acceptable educational credential for such a position. The petitioner has not demonstrated that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The record contains very little description of the petitioner's business operation, but it appears to export office equipment and supplies. The petitioner has provided no evidence pertinent to the

recruitment and hiring practices of similar firms in its industry, and has not, therefore, demonstrated that a requirement of a minimum of a bachelor's degree in a specific specialty or the equivalent is common to the petitioner's industry in parallel positions among similar organizations. Hence, the petitioner has not demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of the first clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Further, the petitioner did not assert, and provided no evidence to support, that its operation is sufficiently different from other export operations that the proffered position is unique or so complex that it requires a minimum of a bachelor's degree or the equivalent in a specific specialty, notwithstanding that other training specialist positions with other exporters do not. The petitioner has not demonstrated that the particular position proffered is so complex or unique that it can be performed only by an individual with a degree; and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the second clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner's general manager acknowledged that the petitioner has never previously employed anyone in the proffered position. The petitioner has not, therefore demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

As was previously observed, the description of the duties of the proffered position are consistent with those described in the *Handbook* as being characteristic of training specialist positions, which do not categorically require a minimum of a bachelor's degree or the equivalent in a specific specialty. Nothing in the duties described sets the proffered position apart from generic training specialist positions or provides any reason to believe that the proffered position would require a minimum of a bachelor's degree or the equivalent in a specific specialty, whereas other training specialist positions do not. The petitioner has not demonstrated 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. The petitioner has not, therefore, demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO finds that the director was correct in his determination that the record before him failed to establish that the beneficiary would be employed in a specialty occupation position, and it also finds that the argument submitted on appeal has not remedied that failure. Accordingly, the appeal will be dismissed and the petition denied on this basis.

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. The appeal will be dismissed and the petition denied.

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