

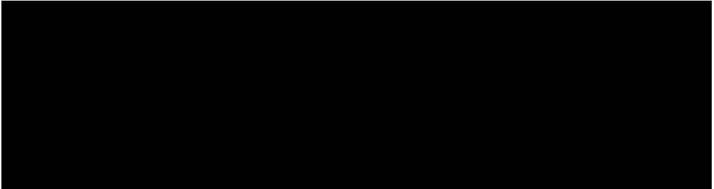
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U.S. Citizenship  
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FILE: EAC 06 061 51828 Office: VERMONT SERVICE CENTER Date: **JAN 09 2008**

IN RE: Petitioner:   
Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The director of the Vermont 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 engaged in the supply and distribution of garments that seeks to employ the beneficiary as a business analyst and developer. The director denied the petition based on his determination that the proffered position was not 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 evidence; (3) counsel's response to the director's request for evidence; (3) the director's denial letter; and (4) the Form I-290B, with counsel's brief, and additional documentation. The AAO reviewed the record in its entirety before reaching its decision.

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

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 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.

Citizenship and Immigration Services (CIS) 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 proposed position.

In the support letter, dated December 15, 2005, the petitioner described the beneficiary's proposed position as the business analyst and developer as follows:

- Manage basic logistics technology and information that ensures effective and economical support for goods;
- Analyze routine contractual commitments, customer specifications and related information to monitor performance and plan improvements;
- Determine contingency requirements and solutions to identify and document maintenance and support; Liaise and negotiate with customers and suppliers;
- Design and conduct researches or technical studies to support logistic and marketing functions; Monitor the quality, cost and efficiency of the movement and storage of goods;
- Develop the business by analyzing logistic and marketing problems and producing new solutions;
- Develop and prepare manuals and information systems to provide marketing support;
- Co-coordinate and control the order cycle and associated information systems;
- Establish new markets and sources in Southeast Asia region, particularly Malaysia and Indonesia.

Counsel in his March 9, 2006 response to the director's request for further information regarding the duties of the proffered position restated the duties previously identified by the petitioner and then further described the duties as follows:

- Working with the owner to document the company's vision and company's projects;
- Identifying target markets and hiring appropriate representatives for each market and negotiating their responsibilities;  
Doing interviews, document analysis, requirement workshops, storyboards, surveys, site visits, business process descriptions, use cases, scenarios, event lists, business analysis, competitive product analysis, task and workflow analysis, and viewpoints;  
Writing requirements specifications according to standard templates, using natural language simply, clearly, unambiguously, and concisely;
- Defining quality attributes, external interfaces, constraints, and other nonfunctional requirements;
- Representing requirements using alternative views, such as analysis models, prototypes, or scenarios, where appropriate;
- Leading requirements analysis and verification, ensuring that requirement statements are complete, consistent, concise, feasible, traceable, and verifiable, and that they conform to standards;

- Participating in requirements prioritization, peer reviews and inspections of requirement documents;
- Establishing and implementing effective requirements practices, including use and continuous improvement of a requirement process;
- Identifying ways to assist product management in product planning through requirements development and analysis;
- Proposing new product features and updates;
- Proposing new markets and updates;
- Identifying market barriers and problem-solving;
- Negotiating import/export deals with business in Asia such as China, Hong Kong, Taiwan, Singapore, Malaysia and Indonesia;
- Identifying and developing resources;
- Developing business solutions.

In the response to the director's request for evidence, counsel for the petitioner stated that the petitioner's business is "currently expanding its markets to Asia, particularly to China, Hong Kong, Taiwan, Singapore, Malaysia and Indonesia." Counsel also stated that the petitioner's need for a business analyst is "due to declining business in recent years and the needs to expand his [the petitioner's] business domestically and globally."

The director denied the petition on March 30, 2006, finding that the petitioner had satisfied none of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), and therefore had not established that the proposed position qualifies for classification as a specialty occupation. The director found that the duties of the proposed position were not those of a market research analyst but were in fact actually those of a marketing manager. The director also noted that the petitioner does not have the organizational complexity to operate the type of business that would require a business analyst and developer.

On appeal, counsel contends that the director erred in denying the petition, and that the proposed position qualifies for classification as a specialty occupation. Counsel further states that the proffered position is similar to the position of market research analyst as described in the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*), which requires a graduate degree to fill the position.

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

Upon review of the job description for the position of business analyst and developer, the AAO disagrees with counsel's statement that the position is similar to the position of market research analyst as described in the *Handbook*. The *Handbook* states that market and survey researchers will "devise methods and procedures for obtaining the data they need," and "they often design telephone, mail, or Internet surveys to assess consumer preferences," and "some surveys are conducted as personal interviews by going door-to-door, leading focus group discussions, or setting up booths in public places such as shopping malls."

The *Handbook* also states that market research analysts “provide a company’s management with information needed to make decisions on the promotion, distribution, design, and pricing of products or services.” According to the job description for the proffered position, the beneficiary’s duties do not clearly indicate the duties as described for a market research analyst. Although the petitioner is interested in expanding its target market in the US and overseas, the proposed duties do not indicate that the beneficiary will be responsible for devising market research methods and obtaining data and preparing reports. Instead, the proposed duties focus on “leading requirements analysis and verification,” and “establishing and implementing requirements practice.” There is no indication in the record of the kinds of market research methods that the business analyst will devise and implement. Nor has the petitioner offered any information regarding the petitioner’s business plan to expand domestically and internationally. The petitioner did not present evidence that the petitioner has the capability to expand its four-person company internationally to the Southeast Asian market. The AAO also notes that market research analysts are not typically employed by the companies who need their services, but rather work for market research companies who contract their services to various companies for defined periods of time. In this case, the petitioner has not submitted sufficiently detailed and extensive information regarding its business operations and aggressive plans for expansion to establish that it would in fact employ the beneficiary as a market research analyst. Simply 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. at 165.

A review of the duties of the proposed position finds them closely aligned to the responsibilities of two occupational groupings discussed in the *Handbook*: (1) advertising, marketing, promotions, public relations, and sales managers, and (2) management analyst.

The *Handbook* describes the duties of advertising, marketing, promotions, public relations, and sales managers as follows:

The objective of any firm is to market and sell its products or services profitably. In small firms, the owner or chief executive officer might assume all advertising, promotions, marketing, sales, and public relations responsibilities. In large firms, which may offer numerous products and services nationally or even worldwide, an executive vice president directs overall advertising, promotions, marketing, sales, and public relations policies. (Executive vice presidents are included in the *Handbook* statement on **top executives**.) Advertising, marketing, promotions, public relations, and sales managers coordinate the market research, marketing strategy, sales, advertising, promotion, pricing, product development, and public relations activities.

Advertising managers oversee advertising and promotion staffs, which usually are small, except in the largest firms. In a small firm, managers may serve as liaisons between the firm and the advertising or promotion agency to which many advertising or promotional functions are contracted out....

*Promotions managers* supervise staffs of promotion specialists. These managers direct promotion programs that combine advertising with purchase incentives to increase sales. In an effort to establish closer contact with purchasers—dealers, distributors, or

consumers—promotion programs may use direct mail, telemarketing, television or radio advertising, catalogs, exhibits, inserts in newspapers, Internet advertisements or Web sites, in-store displays or product endorsements, and special events. Purchasing incentives may include discounts, samples, gifts, rebates, coupons, sweepstakes, and contests.

*Marketing managers* develop the firm's marketing strategy in detail. With the help of subordinates, including *product development managers* and *market research managers*, they estimate the demand for products and services offered by the firm and its competitors. In addition, they identify potential markets—for example, business firms, wholesalers, retailers, government, or the general public. Marketing managers develop pricing strategy to help firms maximize profits and market share while ensuring that the firm's customers are satisfied. In collaboration with sales, product development, and other managers, they monitor trends that indicate the need for new products and services, and they oversee product development. Marketing managers work with advertising and promotion managers to promote the firm's products and services and to attract potential users.

*Public relations managers* supervise public relations specialists. (See the *Handbook* statement on **public relations specialists**.) These managers direct publicity programs to a targeted audience. They often specialize in a specific area, such as crisis management, or in a specific industry, such as health care. They use every available communication medium to maintain the support of the specific group upon whom their organization's success depends, such as consumers, stockholders, or the general public. For example, public relations managers may clarify or justify the firm's point of view on health or environmental issues to community or special-interest groups.

Public relations managers also evaluate advertising and promotion programs for compatibility with public relations efforts and serve as the eyes and ears of top management. They observe social, economic, and political trends that might ultimately affect the firm, and they make recommendations to enhance the firm's image on the basis of those trends....

The *Handbook* reports the following educational requirement for individuals seeking employment in this field:

A wide range of educational backgrounds is suitable for entry into advertising, marketing, promotions, public relations, and sales managerial jobs, but many employers prefer those with experience in related occupations plus a broad liberal arts background. A bachelor's degree in sociology, psychology, literature, journalism, or philosophy, among other subjects, is acceptable. However, requirements vary, depending upon the particular job.

When a range of degrees, e.g., the liberal arts, or a degree of generalized title without further specialization, e.g., business administration, can perform the duties, the position does not qualify as a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). To

prove that a job requires the theoretical and practical application of a body of specialized knowledge as required by Section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specific course of study.

In addition, the *Handbook's* describes the occupation of management analyst as follows:

As business becomes more complex, the Nation's firms are continually faced with new challenges . . . . Management analysts, often referred to as management consultants in private industry, analyze and propose ways to improve an organization's structure, efficiency, or profits. For example, a small but rapidly growing company that needs help improving the system of control over inventories and expenses may decide to employ a consultant . . . .

Firms providing management analysis range in size from a single practitioner to large international organizations employing thousands of consultants. Some analysts and consultants specialize in a specific industry, such as healthcare . . . while others specialize by type of business function . . . . The work of management analysts and consultants varies with each client or employer, and from project to project . . . . In all cases, analysts and consultants collect, review, and analyze information in order to make recommendations to managers . . . .

After obtaining an assignment or contract, management analysts first define the nature and extent of the problem. During this phase, they analyze relevant data, which may include annual revenues, employment, or expenditures, and interview managers and employees while observing their operations. The analyst or consultant then develops solutions to the problem. In the course of preparing their recommendations, they take into account the nature of the organization, the relationship it has with others in the industry, and its internal organization and culture . . . .

Once they have decided on a course of action, consultants report their findings and recommendations to the client. These suggestions usually are submitted in writing . . . . For some projects, management analysts are retained to help implement the suggestions they have made.

The AAO finds the petitioner's description of the duties of its proffered position to reflect the type of activities generally performed by management analysts, i.e., the review and analysis of a business' structure, finances, operations and policies. However, the petitioner's listing of these duties is so generic, so nonspecific that it precludes the AAO from determining precisely what tasks the beneficiary would perform for the petitioner on a daily basis. For example, although the petitioner has stated that the beneficiary would be responsible for an examination and analysis of its existing operational procedures and management structure, it offers no indication of what the petitioner would require of the beneficiary in completing such an examination and analysis. Without this type of description, the AAO is unable to determine whether the responsibilities of the proffered position would require the beneficiary to hold the minimum of a baccalaureate or higher degree or its equivalent to perform them. Accordingly, it finds the record does not establish that the proffered position qualifies as a specialty occupation under the first

criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

Also, the AAO notes that the petitioner finds acceptable a bachelor's degree in business administration for the position. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close corollary between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialized occupation. *See Matter of Michael Hertz Associates*, 19 I & N Dec. 558 (Comm. 1988). Again, CIS interprets the term "degree" in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

Accordingly, the proposed position does not qualify for classification as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Nor does the proposed position qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations. The AAO has reviewed the nine job postings submitted by counsel on appeal. However, counsel has failed to consider the specific requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) for establishing a baccalaureate or higher degree as an industry norm. To meet the burden of proof imposed by the regulatory language, a petitioner must establish that its degree requirement exists in positions that are parallel to the proffered position and found in organizations similar to the petitioner. The petitioner has not demonstrated that its degree requirement exists in parallel positions among similar organizations.

There is no information in the record to establish that the companies advertising their vacancies in the submitted job postings are similar in size, scope, or scale of operations, business efforts, or expenditures to the petitioner, a garment wholesaler with 4 employees. Simply 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. at 165. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The AAO has no basis to conclude that any of the job postings submitted by counsel are from organizations that may be considered "similar" to the petitioner.

Moreover, these advertisements provide too little information regarding the duties of the positions that would allow the AAO to undertake a meaningful analysis as to whether the positions are in fact "parallel" to the position proposed here. The AAO notes that the positions require a bachelor's degree with no particular field of study. Again, CIS 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.<sup>1</sup> The fact that these positions share a few similar duties with the petitioner's proposed position does not mean that they are in fact parallel positions. Thus, these job

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<sup>1</sup> *See also Matter of Michael Hertz Associates*, 19 I & N Dec. 558 (Comm. 1988).

postings are insufficient to establish the petitioner's degree requirement as an industry norm in parallel positions among similar organizations.

The AAO also concludes that the record does not establish that the proposed position is a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires a showing that the position is so complex or unique that it can only be performed by an individual with at least a bachelor's degree in a specific specialty. The AAO finds no evidence that would support such a finding, as the position proposed in the petition is very similar to the advertising, marketing, promotions, public relations, and sales managers, and management analyst positions described in the *Handbook*. Although counsel for the petitioner asserts that the petitioner requires an employee with a bachelor's degree to fill the position of business analyst and developer since the proposed job duties are "highly complex and specialized," the petitioner did not submit any documentation corroborating this statement. 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 unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Accordingly, the petitioner has not established its proposed position as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a showing that the petitioner normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet this criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. However, no such evidence has been submitted to demonstrate that the proposed position qualifies under this criterion since it is a newly-created position. In response to the director's request for evidence, counsel stated that "due to declining business in recent years and the needs to expand his business domestically and globally, the petitioner needs a 'business analyst and developer' not only to analyze the problems and find the problem-shooting, but also to do research on domestic and international market to expand its business." The petitioner also listed all of its current employees including their job titles, job duties and degrees. The company employs a president, a sales employee, a shipping and a receiving employee. None of the current employees have obtained a bachelor's degree. The president, who supervises the proffered position, does not have a bachelor's degree. The petitioner does not establish its hiring practice for the position of business analyst and developer and does not specify that it exclusively recruits and employs only individuals with a bachelor's degree.

While the petitioner states that a degree is required, 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. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000). 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 in any other way would lead to absurd

results: if CIS 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. Based on the foregoing discussion, the proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires a demonstration that the nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

To the extent that they are depicted in the record, the duties of the proposed position do not appear so specialized and complex as to require the highly specialized knowledge usually associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Again, there is no information in the record to support a finding that the proposed position is more complex or unique than similar positions in other, similar organizations. As the *Handbook* reveals, such organizations do not normally impose a bachelor's degree requirement. The *Handbook* does not indicate any usual association between the type of position here in question and at least a bachelor's degree in a specific specialty. Further, the evidence of record does not demonstrate that the specific duties to be performed by the beneficiary in the context of the petitioner's business operations possess the requisite specialization and complexity. Therefore, the evidence does not establish that the proposed position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The proposed position does not qualify for classification as a specialty occupation under any of the four criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4), and the petition was properly denied. The position in this petition is not a specialty occupation, so the beneficiary's qualifications to perform the duties of a specialty occupation are inconsequential. Accordingly, the AAO will not disturb the director's denial of the petition.

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

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