

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

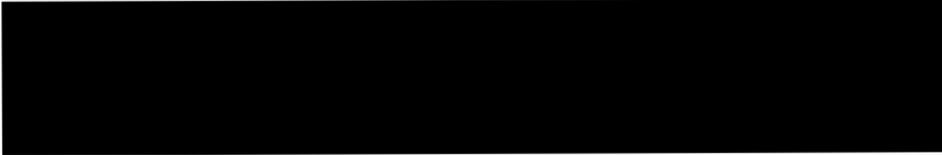
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

Δ,

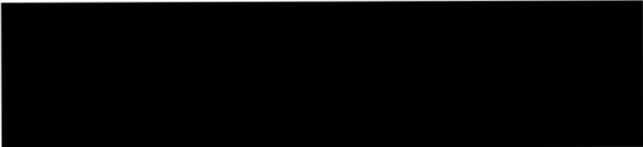


FILE: WAC 08 146 54460 Office: CALIFORNIA SERVICE CENTER Date: NOV 03 2009

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


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 tour service company with 12 employees and a primarily Japanese clientele. It seeks to employ the beneficiary as an international account executive 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: (1) that the proffered position is a specialty occupation; or (2) that the beneficiary is qualified to perform the services of the claimed specialty occupation.

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

The first issue that the AAO will therefore 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 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 an international account executive. Evidence of the beneficiary’s duties includes: the Form I-129; the petitioner’s March 19, 2008 letter of support; and an organizational chart submitted in support of the petition. The support letter indicates the proffered position would require the beneficiary to perform the following duties:

- Communicating and reporting to management, including reporting directly to the President on overall operations and forecasts of company performance; ensuring effectiveness of management plans; preparing a monthly analysis of strengths and weaknesses; creating and updating sales analysis and market activity reports; and analyzing the competitor’s market share, weakness, strength, and strategies (30% of the beneficiary’s time).
- Development of management plans in line with the company’s vision and mission, including improving existing corporate strategies by developing new and innovative policies for the company; research to determine the most competitive and feasible existing corporate plans, comparative analysis of the industry; cross-sectional analysis to find out if the company performs well over the years; and overhaul the company’s current ineffective practices (25 percent of the beneficiary’s time);
- Analysis and decision-making, including negotiation of contracts for goods and services; servicing, administration and translation of contracts; formulation of contractual modifications; and cultivating business relationships (25 percent of the beneficiary’s time);
- Providing advice and consultation regarding company expansion, including strengthening existing networks with clients nationwide and expanding the network of the company; identifying potential opportunities that are outside the scope of immediate business; search for local and international

contacts and enter into agreements with them; administer, extend, terminate, renegotiate, and/or translate contracts and make sure that the contract performances are being monitored to determine necessity for amendment or extension (20 percent of the beneficiary's time).

To make its determination whether the employment just described qualifies as a specialty occupation, the AAO 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 Department of Labor's *Occupational Outlook Handbook (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)).

In the H-1B supporting documents submitted with the petition as well as in the brief on appeal, the petitioner argues that the proffered position, international account executive, most closely resembles the position of marketing manager in the *Handbook*. Although the director does not classify the proffered position specifically as a marketing manager, she agrees with the petitioner that the position best fits under the advertising, marketing, promotions, public relations, and sales managers section of the 2008-2009 edition of the *Handbook*. However, the AAO's examination of supporting evidence calls into question the truthfulness or accuracy of the proffered position description provided by the petitioner. Specifically, the organization chart submitted by the petitioner in support of the petition indicates that the beneficiary works as one of three operation agents, rather than as an international account executive. Moreover, the chart indicates that the operation agents report to an operation manager, rather than directly to the president. No job description for an operation agent is provided, but the job title as well as the reporting order in the organization chart appear to conflict with the information in the support letter provided by the petitioner. Additionally, according to the Labor Condition Application (LCA) submitted in support of the petition, the beneficiary will earn \$25,000 per year, which does not meet the Level 1 prevailing wage for marketing managers at the time the LCA was submitted.¹ The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. See *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The AAO therefore finds that there is not sufficient evidence to support a finding that the proffered position is a specialty occupation as defined at 8 C.F.R. § 214.2(h)(4)(ii).

However, even if there were sufficient evidence to demonstrate that the position offered classifies this position as most closely resembling the duties found in the *Handbook* section describing advertising, marketing, promotions, public relations, and sales managers, the position still would not qualify as a specialty occupation as defined at 8 C.F.R. § 214.2(h)(4)(ii). The training and qualifications required for advertising, marketing, promotions, public relations, and sales managers are described as follows in the DOL *Handbook*:

For marketing, sales, and promotions management positions, some employers prefer a bachelor's or master's degree in business administration with an emphasis on

¹ According to the Foreign Labor Certification Data Center Online Wage Library (www.flcdatcenter.com), using the all industries database for July 2008 to June 2009 (which covers the time the LCA was submitted by the petitioner), the level 1 prevailing wage for a marketing manager in Los Angeles was \$69,181 per year.

marketing. Courses in business law, management, economics, accounting, finance, mathematics, and statistics are advantageous. Additionally, the completion of an internship while the candidate is in school is highly recommended. In highly technical industries, such as computer and electronics manufacturing, a bachelor's degree in engineering or science, combined with a master's degree in business administration is preferred.

For advertising management positions, some employers prefer a bachelor's degree in advertising or journalism. A course of study should include, for example, marketing, consumer behavior, market research, sales, communication methods and technology, and visual arts, and art history and photography.

For public relations management positions, some employers prefer a bachelor's or master's degree in public relations or journalism. The applicant's curriculum should include courses in advertising, business administration, public affairs, public speaking, political science, and creative and technical writing.

Most advertising, marketing, promotions, public relations, and sales management positions are filled by promoting experienced staff or related professional personnel. For example, many managers are former sales representatives, purchasing agents, buyers, or product, advertising, promotions, or public relations specialists. In small firms, where the number of positions is limited, advancement to a management position usually comes slowly. In large firms, promotion may occur more quickly.

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 no specific degree requirement for employment as a marketing manager, 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. Accordingly, the AAO finds that the petitioner is unable 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.

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 already discussed, 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. To establish its degree requirement as an industry norm, the petitioner has submitted five advertisements from other companies for sales and account executive positions. None of this evidence, however, establishes the petitioner's degree requirement as the norm within its industry. Given the conflicting evidence provided by the petitioner, it is not clear what position the beneficiary will actually fill or the duties she will actually perform. Nevertheless, of the five job announcements submitted by the petitioner in response to the director's request for evidence, three are from employers in the hospitality industry for account executive positions and so are not in the same industry as the petitioner. Moreover, despite the title assigned to the position by the petitioner, the record does not establish the proffered position as that of a sales or account executive. Therefore, the announcements are not probative for the purposes of these proceedings. As a result, these announcements cannot establish a degree requirement in parallel positions.

The other two announcements are from employers in the travel industry and both state as follows: "for positions in Finance/Accounting, Management, Human Resources, Market Research, Public Relations, and Computers, our minimum hiring requirement is a Bachelor's Degree in the related field, complemented by two (2) to three (3) years related professional experience." These announcements have little evidentiary weight: they state the practice of only two businesses, they cover a wide range of positions that traditionally do not use the same skill set, and they do not indicate a requirement that the degree be in a specific specialty.

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 there is a spectrum of degrees acceptable for marketing manager positions, including degrees not in a specific specialty related to market management. As evident in the earlier discussion about the generalized descriptions of the proffered position and its duties, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than market management 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).

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. The AAO does not find that there is enough evidence to document that the proffered position is that of a marketing manager. However, even if the position were most closely aligned to that of a marketing manager, the AAO does not find that these duties, as described by the petitioner, reflect a higher degree of knowledge and skill than would normally be required of marketing managers whose business responsibilities require them to survey and analyze industry

trends and consumer behavior. Nor do they represent an amalgam of jobs that would require the beneficiary to possess skills and qualifications beyond those of a marketing manager. The AAO, therefore, concludes that the proffered position cannot be established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The director also found that the beneficiary would not be qualified to perform the duties of the proffered position if the job had been determined to be a specialty occupation. However, a beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the proffered position does not require a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the AAO need not and will not address the beneficiary's qualifications further.

As mentioned above, the AAO also finds beyond the decision of the director that the position described in the LCA does not match the position description as proffered by the petitioner in the support letter. According to the petitioner, the proffered position should be classified as a marketing manager (and the job title listed on the LCA by the petitioner is international account executive). As stated previously, the FLC prevailing wage for a level 1 marketing manager in Los Angeles covering the period when the LCA was submitted was \$69,181 per year. However, the rate of pay and prevailing wage listed in the LCA submitted by the petitioner is \$25,000 per year. Therefore, the prevailing wage used by the petitioner was incorrect according to the petitioner's own classification of this position. Accordingly, the AAO finds that the petition was not supported by an LCA that corresponds with the petition, and it must be denied for this additional reason.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, the DOL regulations note that it is within the discretion of the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) to determine whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification. . . .*

[Italics added].

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). The AAO also affirms the director's assessment that the beneficiary is not qualified in a specialty occupation by virtue of possessing a baccalaureate degree or equivalent in a specific field of study which is clearly related to the position being offered. The petition is also denied for failure to submit a required corresponding LCA. Accordingly, the AAO shall 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.