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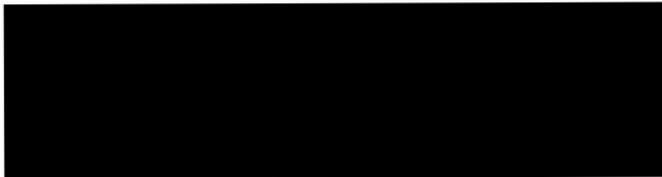
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: EAC 08 148 54264 Office: VERMONT SERVICE CENTER Date: NOV 30 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, 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.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner states that it operates a limousine service, that it was established in 2007, that it employs two persons, and that its projected gross annual income is \$375,000 and projected net annual income is \$159,000. The petitioner seeks to employ the beneficiary as a general manager. Accordingly, the petitioner endeavors to classify the beneficiary 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).

On July 18, 2008, the director denied the petition, determining that the record did not establish that the proffered position is a specialty occupation. On appeal, counsel for the petitioner asserts that the proffered position is a specialty occupation and that the director did not evaluate the substance of evidence and ignored United States Citizenship and Immigration Services (USCIS) regulations which require approval if an employer normally requires a bachelor's degree or there is a recognizable industry standard. Counsel submits a brief, previously provided information, and other documentation.

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

The AAO observes that for purposes of the H-1B adjudication, the issue of *bona fide* employment is viewed within the context of whether the petitioner has offered the beneficiary a position that is determined to be a specialty occupation. Therefore, the AAO will specifically review whether the petitioner has provided sufficient evidence to establish that the services to be performed by the beneficiary are those of a specialty occupation.

Section 214(i)(1) of 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.

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.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation “which [1] 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 [2] 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), 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. 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, to determine whether the position qualifies as a specialty occupation. *Defensor v. Meissner*, 201 F. 3d 384.

In a letter appended to the Form I-129, the petitioner stated that it provides limousine and car services using independent contractors who own their own cars. The petitioner noted that as many as twelve drivers are working although this expands from time to time. The petitioner indicated that the individual in the proffered position of general manager would be “responsible for the overall oversight and management of the company’s services.” The petitioner listed the responsibilities of the position as including:

[M]arketing to new clients including generating written proposals to businesses of all sizes and follow through; managing large projects including five or more cars and overseeing clients who require our services on a daily basis.

The petitioner added that the general manager’s operational responsibilities would also include:

[D]aily oversight of operations including scheduling of working hours, responding to complaints, seeing to the satisfaction of our clients, and making sure that all cars are properly maintained and cleaned.

The petitioner noted that the general manager would also oversee the petitioner’s banking and accounting, as well as management of personnel.

In a June 27, 2008 response to the director’s RFE, the petitioner explained that the general manager’s “marketing duties consist of the use of active leads for developing appropriate approaches to prospective clients and to tailor our services to meet their needs.” The petitioner indicated that its prospective clients are corporate, institutional, colleges, and high schools and that most of the individuals with whom the petitioner deals are college educated and expect to deal with professional marketing people. The petitioner also indicated that oversight of daily operations would require the ability to design and use computer systems such as Excel to work with a high volume of transactions that need appropriate coordinating, assignment and financial monitoring. The petitioner allocated

the beneficiary's time to time and volume management – 40 percent, marketing – 40 percent, and marketing research and formulation, making presentations, and maintaining good customer relationships – 20 percent.

The petitioner noted that the president of the company previously performed the duties of general manager but that the president was not able to make the necessary marketing connections to expand the business. The petitioner indicated that the general manager's position encompassed aspects of a computer systems analyst, a computer and information system manager and a computer programmer as well as a market research analyst. The petitioner implied that the beneficiary's skills verified the credibility and academic requirements of the proffered position.

On July 18, 2008, the director denied the petition noting that despite his request for further evidence, the petitioner did not provide USCIS with a detailed description of the duties to be performed by the beneficiary, did not provide any job postings for general managers of limousine services, and did not submit a copy of the educational degree and wage statements for the individual previously performing the job duties of the position. The director concluded that the evidence of record did not satisfactorily establish that the job offered qualified as a specialty occupation.

On appeal, counsel for the petitioner asserts that the director did not provide an analysis of why the description of job duties was not detailed and further did not evaluate any of the detail that was provided. Counsel notes that the president of the company does not have a degree and that the president's indication that the "volume that I did have overwhelmed my abilities to develop and tailor appropriate computer systems for proper management" is a confirmation that the petitioner needed someone with the skills of a specialty occupation. Counsel contends that the petitioner thus normally requires a degree for the position and a contrary decision would create an exception for small businesses. Counsel references the Department of Labor's *Occupational Outlook Handbook's* (*Handbook*) discussion of advertising, marketing, promotions, public relations, and sales managers and asserts that the duties of marketing and sales manager described in the *Handbook* are quite similar to the duties set forth by the petitioner for the proffered position. Counsel concludes that the duties of the position are so complex they can only be performed by an individual with a degree and that the petitioner normally requires a degree for the position (as the president learned through his own experience that a non-degreed individual does not have the skills to perform the duties). Counsel submits material from the Department of Labor and an article on a limousine company that operates over 150 vehicles, reported more than \$15 million in annual revenue and owns its own vehicles rather than using independent contractors.

Upon review of the evidence in the record and counsel's assertions on appeal, the AAO does not find the evidence of record persuasive in establishing the proffered position is a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO routinely consults the *Handbook* for information about the duties and educational requirements of particular occupations as one method to determine whether a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into a particular position. The AAO has reviewed the *Handbook's* discussion of the occupations of "marketing manager"

under the heading “advertising, marketing, promotions, public relations, and sales managers.” The *Handbook* reports:

Marketing managers. 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.

The AAO has also reviewed the *Handbook’s* report on general and operations managers as listed under the heading “top executives.” The *Handbook* reports:

General and operations managers plan, direct, or coordinate the operations of companies or public and private sector organizations. Their duties include formulating policies, managing daily operations, and planning the use of materials and human resources, but are too diverse and general in nature to be classified in any one area of management or administration, such as personnel, purchasing, or administrative services. In some organizations, the duties of general and operations managers may overlap the duties of chief executive officers.

Upon review of the petitioner’s description of the proffered position, the AAO finds that the petitioner’s indication that the proffered position requires marketing duties using active leads for developing appropriate approaches to prospective clients and tailoring services to meet client’s needs corresponds generally with the *Handbook’s* statement that marketing managers identify potential markets and ensure that the firm’s customers are satisfied. Similarly, the petitioner’s indication that the duties of the proffered position include daily oversight of operation, time and volume management, management of personnel, and oversight of the petitioner’s banking and accounting practices corresponds generally with the *Handbook’s* broadly stated duties of a general and operation manager.

The AAO does not find any description of duties that corresponds to the petitioner’s conclusory statement that the proffered position includes the duties of a market research analyst, a computer programmer, a computer systems analyst, or a computer and information system manager. The AAO acknowledges the petitioner’s statement that the proffered position would require the ability to design and use computer systems such as Excel to work with a high volume of transactions that need appropriate coordinating, assignment and financial monitoring. However, knowledge of a computer program or programs and the ability to use the program(s) are not the duties of a computer programmer, a computer systems analyst, or a computer and information system manager. Similarly, the petitioner does not discuss the necessary detail to establish that the proffered position

includes elements of the occupation of a market research analyst. The record is void of any information discussing the methodology used to collect data, the statistical models employed, or any information that would substantiate that the position encompassed the duties of a market research analyst.

When establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in relation to its particular business interests. The petitioner in this matter stated generally that the beneficiary would:

- market to new clients including generating written proposals to businesses of all sizes and follow through;
- managing large projects including five or more cars and overseeing clients who require our services on a daily basis;
- oversee operations including scheduling of working hours;
- respond to complaints;
- see to the satisfaction of our clients;
- make sure that all cars are properly maintained and cleaned;
- oversee the petitioner's banking and accounting, as well as management of personnel;
- use active leads for developing appropriate approaches to prospective clients and tailor our services to meet their needs; and
- design and use computer systems such as Excel to work with a high volume of transactions that need appropriate coordinating assignment and financial monitoring.

These generally described tasks do not include sufficient detail to conclude that the individual in the position would require a baccalaureate or higher degree or its equivalent as the minimum requirement for entry into the particular position. The petitioner has failed to provide definitive detail that demonstrates that the individual who performs these duties would need specific courses at a university level in a specific field of study in order to accomplish the tasks. These tasks do not include any of the necessary detail to ascertain that the position requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's or higher degree in a specific discipline.

Further, upon review of the *Handbook's* discussion of the educational requirements associated with the position of marketing manager, the AAO finds that a marketing manager position is not a position that requires the attainment of a baccalaureate degree or higher in a specific field of study. The *Handbook* reports:

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

The AAO observes that although some employers may prefer a bachelor's or master's degree in business administration with an emphasis on marketing for a marketing manager position, the *Handbook* does not indicate that such a degree is required by all or most employers. Such a preference does not satisfy the degree requirement set forth in the first criterion. Moreover, the *Handbook* indicates that courses in a variety of listed subjects are advantageous but does not list a specific course of study leading to a specific degree in the field, as required to establish a position as a specialty occupation; thus the *Handbook* does not report that a marketing manager position would categorically qualify under the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) as read in the context of the statutory and regulatory definitions of specialty occupation. It is incumbent on the petitioner to establish that its particular position 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. This, the petitioner has failed to do.

Regarding the education and training for a general or operations manager, the *Handbook* reports:

Many top executive positions are filled from within the organization by promoting experienced, lower-level managers when an opening occurs. In industries such as retail trade or transportation, for instance, it is possible for individuals without a college degree to work their way up within the company and become managers.

Thus, likewise, the *Handbook* does not report that a general or operations manager would categorically qualify under the first criterion 8 C.F.R. § 214.2(h)(4)(iii)(A) as read in the context of the statutory and regulatory definitions of specialty occupation.

The petitioner has not otherwise demonstrated that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the proffered position. In this matter, the record does not establish that the duties of the position require the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation. The petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO now turns to consider whether the petitioner may qualify the proffered position under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), whether a degree requirement is the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree. Factors considered by the AAO when determining these criteria include: whether the *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree; 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)).

A review of the evidence of record finds it insufficient to establish the proposed duties comprise a position that is identifiable with an industry-wide educational standard, or is distinguishable, by its unique nature or complexity, from a similar but non-degree-requiring position. The AAO acknowledges the information submitted on appeal relating to another limousine service. However, the limousine service described in the article is clearly different than the petitioner in terms of number of employees, level of revenue, and in that it owns its own vehicles. Moreover, the article does not substantiate that it is an industry-wide standard to hire only individuals with a bachelor's or higher degree in a specific discipline for a position as a general manager. The record does not contain sufficient evidence demonstrating that the degree requirement is common to the industry in parallel positions among similar organizations. Going on the 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 190 (Reg. Comm. 1972)). The petitioner has not established the first prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner in this matter has also failed to establish the second prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) which requires that the proffered position be of such complexity or uniqueness that it can be distinguished from other marketing or operations managers positions within the same industry. The record does not contain evidence detailing what duties of the proffered position require the attainment of a baccalaureate or higher degree in a specific discipline. The record lacks evidence or analysis establishing that particular duties of the proffered position differ from the routine duties of a skilled marketing manager or operations manager, occupations that do not necessarily require a bachelor's or higher degree in a specific discipline. The petitioner has not provided evidence to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The record also fails to demonstrate that the petitioner has a history of recruiting and hiring degreed candidates for the proffered position. To determine whether the petitioner has fulfilled the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), 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. The petitioner states that it has been in the business since 2007 and explained that the president of the company had performed the duties of the proffered position in the past. Counsel acknowledges on appeal that the president does not have a degree but asserts that the president's statement that he was overwhelmed by the complexity of the duties confirms that the proffered position is a specialty occupation. **The AAO disagrees. The AAO recognizes that the petitioner desires to hire an individual with a degree, but the desire to hire an individual with a certain set of qualifications is insufficient to establish the third criterion.** The critical element is not the title of the position, the beneficiary's qualifications, 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 any other way would lead to absurd results. If USCIS 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 non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate degrees or higher degrees.

As determined above, the general description of the duties of the proffered position provided does not establish that any of the duties require the theoretical and practical application of knowledge usually associated with the attainment of a bachelor's or higher degree in a specific discipline. Moreover, the petitioner in this matter only claims that the successful applicant for the proffered position must have a bachelor's degree; the petitioner does not specify that the degree must be in a specific discipline, a requirement to establish that a position is a specialty occupation. The AAO further notes that the petitioner appears to rely on the specific beneficiary's qualifications as an indication that the proffered position requires a degree. However, a beneficiary's qualifications may not establish that a position is a specialty occupation; rather it is the actual duties that establish whether a position is a specialty occupation. Upon review of the record, the AAO finds that the petitioner has not established that the proffered position is a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The AAO now turns to the fourth criterion and whether the petitioner has established that the duties of the proffered position are sufficiently specialized and complex to require knowledge usually associated with the attainment of a baccalaureate degree in a specific discipline and, therefore, establish the proffered position as a specialty occupation under the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). The duties of the proffered position show that the tasks relate to the routine duties of a generic marketing manager or a general operations manager. Although the petitioner asserts that the duties of the position are the duties of a specialty occupation, the petitioner has not explained what particular duties of the proffered position comprise tasks that require the application of specialized or complex knowledge associated with the attainment of a baccalaureate or higher degree in a specific discipline. The petitioner has not adequately explained how the duties of the proffered position differ from those of a generalist position in marketing or operations management. The petitioner has not substantiated that the nature of its business requires a marketing or operations manager who must perform duties that are specialized and complex such that the position should be designated a specialty occupation. Although the position may require skill, the petitioner has not established that that skill may be attained only through the specialized coursework attendant to a four-year university level education in a specific discipline. The petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4).

The petition will be denied and the appeal dismissed for the above stated reason. 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.