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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office MS 2090  
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U.S. Citizenship  
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FILE: EAC 06 167 53450 Office: VERMONT SERVICE CENTER Date: OCT 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 of the Vermont Service Center revoked the approval of the nonimmigrant visa. 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 dental laboratory, with ten employees. It seeks to employ the beneficiary as a market research analyst pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director's determination revoking the Form I-129 petition was based on the beneficiary's qualifications to perform the duties of a specialty occupation following receipt of a memorandum dated November 22, 2006, from the United States Consulate in Seoul, Korea. That memorandum stated that the beneficiary did not appear to be qualified to perform the duties of a market research analyst by education or experience.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) counsel's response to the director's RFE; (4) the director's notice of intent to revoke (NOIR) and the petitioner's response to the notice; (5) the director's notice of revocation; and (5) Form I-290B, with counsel's brief and accompanying evidence. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the director appropriately revoked the approval of the H-1B petition.

Pursuant to 8 C.F.R. § 214.2(h)(11)(B)(iii), a director shall issue a notice of intent to revoke an approved Form I-129 petition if he or she finds that:

- (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or
- (2) The statement of facts contained in the petition was not true and correct; or
- (3) The petitioner violated terms and conditions of the approved petition; or
- (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
- (5) The approval of the petition violated paragraph (h) of this section or involved gross error.

Pursuant to 8 C.F.R. § 214.2(h)(11)(B)(iii)(5), the director may revoke an H-1B petition if approval of the petition violated paragraph (h) of 8 C.F.R. § 214.2, or involved gross error. In this instance, approval of the petition was in violation of paragraph (h) of the cited regulation in that the beneficiary did not qualify to perform the duties of a specialty occupation. 8 C.F.R. § 214.2(h)(4)(iii)(C). Approval of the petition also constituted gross error, as the record does not establish that the beneficiary possesses the education, or

experience equivalent to a bachelor's degree in a specific specialty, normally required to perform the duties of a specialty occupation. The director thus appropriately revoked the Form I-129 petition on the above stated grounds.<sup>1</sup>

In the May 10, 2007 NOIR, the director stated that the proposed revocation of the petition was based on the petitioner's failure to establish that the beneficiary was qualified to perform the services of a specialty occupation. The director revoked the petition's approval based on a finding that the beneficiary was not qualified to perform the duties of a market research analyst. In determining whether an alien is qualified to perform the duties of a specialty occupation, United States Citizenship and Immigration Services (USCIS) looks to the petitioner to establish that the beneficiary meets one of the requirements set forth at Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2) -- full state licensure to practice in the occupation, if such licensure is required; completion of a degree in the specific specialty; or experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The proffered position is that of a market research analyst. As market research analysts are not licensed, the petitioner must, therefore, establish that the beneficiary has the academic credentials necessary for employment as a market research analyst or experience that is the equivalent of such credentials. To determine what academic background prepares individuals to seek employment as market research analysts, the AAO turns to the discussion of that occupation in the Department of Labor's *Occupational Outlook Handbook (Handbook)*, the resource on which the AAO routinely relies for information about the educational requirements of particular occupations. The *Handbook* states:

A bachelor's degree is the minimum educational requirement for many market and survey research jobs. However, a master's degree may be required, especially for technical positions.

In addition to completing courses in business, marketing, and consumer behavior, prospective market and survey researchers should take other liberal arts and social science courses, including economics, psychology, English, and sociology. Because of the importance of quantitative skills to market and survey researchers, courses in mathematics, statistics, sampling theory and survey design, and computer science are

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<sup>1</sup>The AAO notes that, upon review of the NOIR and the revocation issued on September 7, 2007, the director did not specifically cite to any of the above provisions of 8 C.F.R. § 214.2(h)(11)(iii)(A). However, upon review of the record, the AAO concurs with the director's ultimate conclusions and finds that the director's omission is harmless because the AAO conducts a *de novo* review, evaluating the sufficiency of the evidence in the record according to its probative value and credibility. The AAO maintains plenary power to review each appeal on a *de novo* basis, which has long been recognized by the federal courts. See *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

extremely helpful. Market and survey researchers often earn advanced degrees in business administration, marketing, statistics, communications, or other closely related disciplines.<sup>2</sup>

In the notice of intent to revoke, the director informed the petitioner of the perceived deficiencies in the beneficiary's qualifications, such as his lack of English proficiency and his lack of a master's degree in a pertinent field. Counsel's response to the notice of intent to revoke failed to overcome the deficiencies noted by the director, and the director subsequently revoked the petition. On appeal, counsel contends that the director's denial was arbitrary and capricious, and particularly notes that the director, when initially approving the petition, made no requirement that the beneficiary hold a master's degree to warrant approval. Counsel submits a detailed brief and resubmits previously-submitted evidence in support of the appeal.

The AAO will first address the director's conclusion that the beneficiary was required to possess a master's degree in a pertinent field to be deemed qualified for the proffered position. The director found that the description of the duties of the proffered position suggested that the position was technical in nature. Consequently, based on his interpretation of the educational requirements set forth in the *Handbook*, the director determined that the beneficiary would, at a minimum, be required to hold a master's degree. Upon review of the beneficiary's qualifications, the director concluded that the beneficiary did not possess such a degree and therefore revoked the approval of the petition.

On appeal, counsel contends that the director's failure to require a master's degree at the time the petition was initially approved, but subsequently imposing such a requirement in the notice of intent to revoke, was erroneous. Specifically, counsel contends that the director's requirement that the beneficiary possess a master's degree is arbitrary, capricious, and unreasonable, since the director raised this issue in the RFE but did not deny the petition based on this lack of degree. Counsel asserts that the minimum degree requirement for entry into the proffered position is a bachelor's degree in a related field, and that such a fact was established after the response to the RFE.

By itself, the director's finding that a petition was incorrectly approved is sufficient for the issuance of a notice of intent to revoke a non-immigrant H-1B petition. *See* 8 C.F.R. § 214.2(h)(11)(B)(iii). However, the AAO finds, after a review of the record, that while the ultimate revocation of the petition's approval was proper, the reasons relied upon by the director in issuing the revocation were somewhat misplaced.

Upon review, the key issue to be evaluated in this matter is whether the proffered position is in fact a specialty occupation as contemplated by the regulations.

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

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<sup>2</sup>*Occupational Outlook Handbook*, 2008-2009 Edition, at [www.bls.gov/oco/ocos013.htm](http://www.bls.gov/oco/ocos013.htm).

- (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.

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 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 (5<sup>th</sup> 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.

A reading of the *Handbook's* qualifications for the position of market research analyst indicates that a bachelor's degree is the minimum requirement for entry into the field, with a master's degree commonly being required for technical positions. Regardless of whether the beneficiary possesses the minimal educational credentials, the fact remains that the *Handbook* does not indicate that market research analyst positions normally require at least a bachelor's degree in a *specific specialty*.

While the 2008-2009 edition of the *Handbook* reports that a baccalaureate degree is the minimum educational requirement for many market and survey research jobs, it does not indicate that the degrees held by such workers must be in a specific specialty that is directly related to market research, as would be required for the occupational category to be recognized as a specialty occupation. Specifically, the *Handbook* indicates that entry into the market research analyst occupation normally occurs with a degree with coursework in a variety of subjects but without a specific course of study leading to a specific degree in the field. Therefore, market research analyst positions do not 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.

The AAO disagrees with, and thus withdraws, the director's implied conclusion that the proffered position is a specialty occupation. In conjunction with this conclusion, the AAO also finds that the director's revocation of the petition on the basis that the beneficiary did not possess a master's degree in business administration is likewise misplaced, since there is no specific degree requirement for the position of market research analyst. However, while the director may have erred in reasoning when issuing the revocation, the director's error is harmless because, again, the AAO conducts a *de novo* review, evaluating the sufficiency of the evidence in the record according to its probative value and credibility. *Supra* footnote 1. The director's ultimate decision to revoke the approval of the petition was correct, since the proffered position is not a specialty occupation.

Moreover, the beneficiary would not be qualified to work in the proffered position even if it had been found 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 will not address the beneficiary's qualifications further.

For reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position is that of a specialty occupation. Accordingly, the director's ultimate decision to revoke the approval of the petition was proper. Accordingly, the AAO will not disturb the director's decision.

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 met that burden.

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