



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE:

NOV 03 2014

OFFICE: CALIFORNIA SERVICE CENTER FILE:

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:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg

Chief, Administrative Appeals Office

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

I. PROCEDURAL AND FACTUAL BACKGROUND

On the Form I-129 visa petition, the petitioner describes its business as "Importing and distributing cosmetics and commodity goods." It states that it was established in 2003 and has five employees. In order to employ the beneficiary in what it designates as a full-time copywriter position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

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

As will be discussed below, we have determined that the director did not err in her decision to deny the petition on the specialty occupation issue. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

We base our decision upon our review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's submissions on appeal.

II. THE LAW

The issue before us is whether the petitioner has demonstrated that the proffered position qualifies as 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 regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

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, a proposed 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 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 result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and 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. *See*

Royal Siam Corp. v. Chertoff, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations 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, 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.

III. EVIDENCE

The visa petition states that the period of employment requested is from February 25, 2014 to February 24, 2017 and the wage proffered is \$46,405 per year. The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is a copywriter position, and that it corresponds to Standard Occupational Classification (SOC) code and title 27-3043, Writers and Authors from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a Level I, entry-level, position.

With the visa petition, counsel submitted evidence that the beneficiary received a bachelor's degree from [REDACTED] in Japan. The transcript and diploma provided both state that the beneficiary received her degree from the Department of Humanities, with a major in Art History, and that her degree is a "B.A. in Literature." Counsel also submitted evidence that the beneficiary received a master's degree in business administration from [REDACTED]. The beneficiary's diploma states "Concentration: General."

Counsel submitted the beneficiary's résumé, which lists her employment from 2004 through the date of that résumé. Counsel submitted no evidence to corroborate the beneficiary's claimed employment experience. An evaluation in the record states that the beneficiary's education and employment experience, considered together, are equivalent to a U.S. bachelor's degree in communications.

Further, counsel submitted the chapter of the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* pertinent to Writers and Authors; and a letter, dated February 3, 2014, from the petitioner's president.

The petitioner's president's letter states the following as the duties of the proffered position:

- Write advertising copy for publication and broadcast media to promote the sale of our products by each brand
- Compose materials for our web site and update the site periodically to promote new products and special campaign
- Create promotional materials, such as pamphlets and catalogs of our products
- Write informative and promotional materials, such as the ones used in our newsletters and pamphlets described above, aimed at introducing new products and promoting existing products
- Consult with marketing representatives to obtain information on products and discuss style and length of advertising copy
- Obtain additional background and current information on targeted customers through research and interview in order to create the most effective presentation materials
- Review advertising trends, consumer surveys and other data regarding marketing of specific and related products to formulate presentation approach
- Present preliminary draft to supervisor for final approval and correct and revise copy material as instructed

The petitioner's president also stated that the proffered position "requires at least a Bachelor's Degree in English, Communication or Journalism."

On February 14, 2014, the service center issued an RFE in this matter. The service center requested additional evidence that the petitioner would employ the beneficiary in a specialty occupation. The service center provided a non-exhaustive list of items that might be used to satisfy the specialty occupation requirements.

In response, counsel submitted (1) letters from three other people in the cosmetics distribution industry; (2) a printout of content from the careerinfonet.org website; (3) a letter, dated March 24, 2014, from counsel; and (4) vacancy announcements.

One of the industry letters provided is from [REDACTED] president and CEO of [REDACTED]. He stated that the position of copywriter for a cosmetics distributor requires a minimum of a bachelor's degree or its equivalent in marketing, English, communication, or a related field. He stated that his company's copywriter has a degree in "Communication" and also stated:

Our copy writer is further responsible for collecting and analyzing data regarding product information, beauty industry, market trend, consumption propensity of targeted market, social trend, and others.

In an appendix to that letter, he stated, "[redacted] operates four (4) retail stores directly under the name of [redacted] and assigns a business partner to operate other 30 retail stores in California, Nevada, and Washington."

Another industry letter is from [redacted], president of [redacted] who stated that the duties of a copywriter position require, *inter alia*:

[K]nowledge of media production, communication, and dissemination techniques and methods, as well as knowledge of marketing principles and methods of showing, promoting, and selling products of services. As these skills and knowledge are so specialized and complex, we require that the person who fills the position of our Copywriter must possess at least a bachelor's degree in English, Journalism, Communication, or Marketing. In fact, our present Copywriter holds a Bachelor's degree in English, from [redacted] CA.

In that letter, [redacted] stated that [redacted] employs six people. In an appendix to that letter, she stated that in her position with [redacted] she oversees and manages nine people. The record contains no explanation of that discrepancy. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The third industry letter is from [redacted] president of [redacted] who stated that his company and similar companies in the beauty industry employ and recruit those with a bachelor's degree in English, journalism, communication, or marketing for copy and related positions, such as Advertising and Marketing Specialist. He stated: "[redacted] hires Director of Marketing who has been in charge of writing advertising copies for over 5 years." He further stated:

Obviously, a person who performs the duties of writing advertising copies must possess skill of collecting and analyzing information and data of sales activities, marketing trends, and advertising strategy. Knowledge of the structure and content of English, mass communication, business writing, and marketing principles are further required. [redacted] has established the policy in hiring the professional marketing position, the duty of which includes writing advertising copies that a candidate of that position must hold a Bachelor's or higher degree in Marketing, Communication, Journalism, or English. Our Director of Marketing holds a Bachelor's degree in English from [redacted]

Yet further, he stated:

From my observation and experience in the executive capacity for 18 years, I respectfully state that the companies similarly situated in the beauty industry routinely employ and recruit an individual who holds a Bachelor's degree in English, Journalism, Communication, or Marketing, for the Copy Writer or related position, such as Advertising and Marketing Specialist.

The printout of careerinfonet.org website content states that the typical education needed for entry into writer and author positions is a bachelor's degree.

In her March 24, 2014 letter, counsel stated that the petitioner never employed a full-time copywriter prior to hiring the beneficiary in F-1 OPT status. He stated that the petitioner's president previously performed the duties of the proffered position. Counsel also stated that the evidence submitted demonstrates, "that the job duties [of the proffered position] are so complex and specialized that a bachelor's degree in specific fields, such as English, journalism, communication, marketing or related field is required to carry out those duties."

The director denied the petition on April 1, 2014, finding, as was noted above, that the petitioner had not demonstrated that the proffered position qualifies as a position in a specialty occupation by virtue of requiring a minimum of a bachelor's degree in a specific specialty or its equivalent. More specifically, the director found that the petitioner had satisfied none of the supplemental criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel submitted (1) an addendum to the Form I-290B appeal; (2) a letter, dated April 15, 2014, from [REDACTED] the president of the American Marketing Association; and (3) a brief.

In the Form I-290B addendum, counsel cited the *Handbook*, the industry letters, the web content from careerinfonet.org and other documents provided as evidence that the proffered position requires a specialized degree.

[REDACTED] the president of the American Marketing Association, stated in his April 15, 2014 letter: "Based upon my decades of experience in marketing management, a marketing copywriter position would definitely require at least a bachelor's degree in business, communications or marketing."

On appeal, counsel again asserted that the record demonstrates, by a preponderance of the evidence, that the proffered position qualifies as a specialty occupation position.

IV. ANALYSIS

The petitioner asserts that the proffered position is a copywriter position, and that it corresponds to a position described in the 27-3043, Writers and Authors section of O*NET. However, the petitioner is a distributor of cosmetics and beauty products with only five employees. We do not find it

credible that the petitioner would employ a full-time copywriter for three years. Therefore, although the petitioner has provided a list of duties, we find that the petitioner has not established, by a preponderance of the evidence, the duties the beneficiary would actually perform if the visa petition were approved.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. The petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

Further, even if the petitioner had established that the description of duties provided is accurate and that the proffered position is a writer or author position as described in the *Handbook*, it still would not have established that the proffered position qualifies as a specialty occupation position by virtue of requiring a minimum of a bachelor's degree in a specific specialty or its equivalent. As to the educational requirements of writers and authors, the *Handbook* states that "A bachelor's degree is typically needed for a full-time job as a writer," and that "employers prefer candidates with a degree in English, journalism, or communications." U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Writers and Authors," <http://www.bls.gov/ooh/media-and-communication/writers-and-authors.htm#tab-4> (last visited Oct. 30, 2014). That *many* employers *prefer* candidates with specialized degrees indicates that some employers have no such preference. Additionally, a preference is not a minimum requirement. The language of the *Handbook* does not support the proposition writer and author positions require a minimum of a bachelor's degree in a specific specialty or its equivalent.¹

¹ We further note, again, that in the LCA the petitioner stated that the proffered position is a Level I Writer or Author position. We observe that *some* Writer or Author positions likely require a minimum of a bachelor's degree in a specific specialty or its equivalent. However, the classification that the proffered position as a Level I position, indicating that it is an entry-level position for an employee who has only basic understanding of the occupation (See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf), indicates that the proffered position, even if it were demonstrated to be a writer position, would be a low level writer position, and unlikely to be one of those positions requiring such a specialized degree or equivalent.

V. ADDITIONAL BASIS

The record suggests an additional issue that was not addressed in the decision of denial but that, nonetheless, also precludes approval of this visa petition.

It the petitioner wishes to rely on an evaluation of the beneficiary's education and employment experience, considered together, to show that the beneficiary has the equivalent of a minimum of a U.S. bachelor's degree in a specific specialty, the petitioner must demonstrate that the evaluator "has authority to grant college-level credit for training and/or experience *in the specialty* at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience." [Emphasis supplied.] 8 C.F.R. § 214.2(h)(4)(iii)(D)(I).

In the instant case, the petitioner provided an evaluation by [REDACTED] Ph.D., the Director of Graduate Studies and a senior lecturer in the School of Business at the [REDACTED] which states that the beneficiary's education and employment experience, considered together, are equivalent to a U.S. bachelor's degree in U.S. bachelor's degree in communications. That evaluation is accompanied by a letter, dated September 19, 2012, from the dean of the school of business at the [REDACTED] which states:

[The evaluator] is authorized and qualified to grant "life experience" credits through the [REDACTED] IDEAL ("Innovative Degree Excellence in Accelerated Learning") degree completion program offered through the School of Continuing and Professional Studies.

However, neither that letter, nor any other evidence in the record, indicates that the evaluator's authority extends to awarding credit *in the specific specialty of communications*. Further, insufficient evidence was submitted to corroborate the beneficiary's claimed experience.

For both reasons, the evidence submitted does not satisfy the requirement of 8 C.F.R. § 214.2(h)(4)(iii)(D)(I). The evidence does not, therefore, demonstrate that the beneficiary has the equivalent of a U.S. minimum of a bachelor's degree in a specific specialty or its equivalent and does not demonstrate that she is qualified to work in any specialty occupation position. The petition must be denied for this additional reason.

VI. CONCLUSION

An application or petition that fails to comply with the technical requirements of the law may be denied by us even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that we conduct appellate review on a *de novo* basis).

Moreover, when we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of the enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

The director's decision will be affirmed and the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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