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



U.S. Citizenship
and Immigration
Services

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FILE: EAC 05 166 53343 Office: VERMONT SERVICE CENTER Date: **AUG 07 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)

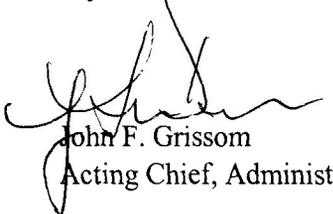
ON BEHALF OF PETITIONER:



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).


John F. Grissom
Acting 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.

The petitioner manufactures plastic film products for hygiene, packaging, and industrial markets. It claims it was established in 1989 and claims to employ approximately 3000 people through its parent company and has in excess of \$43 million in net annual income. It seeks to employ the beneficiary as a business innovation manager- India. 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 September 9, 2005, 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 United States Citizenship and Immigration Services (USCIS) inappropriately applied the criteria for determining whether the position qualified as a specialty occupation. Counsel submits a brief and resubmits previously provided information.

The record includes: (1) the Form I-129, Petition for a Nonimmigrant Worker and supporting documentation; (2) the director's request for evidence (RFE); (3) counsel for the petitioner's response to the director's RFE and documentation; (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.

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 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. However, 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.

On the Form I-129, the petitioner stated that the proffered position is that of a “business innovation manager - India.” In a May 12, 2005 affidavit signed by the petitioner’s manager of human resources, appended to the petition, the petitioner provided the following job description:

[The beneficiary] will promote sales and marketing of personal and household care products in India, with responsibilities including identification of new business opportunities, advising on the design and development of products for this market, introducing new products to customers and tracking growth and revenue in the market. For a position of this kind the Corporation requires a Bachelors or equivalent – level degree in Marketing or closely related field.

In a response to the director’s RFE, the petitioner stated that the business innovation manager – India would lead a team to promote sales and marketing of personal and household care products in the emerging markets in India and responsibilities in this position included managing the team to accomplish:

1. Development and implementation of approaches to breakthrough to these markets where such products are relatively new.
2. Selection of new business opportunities, [sic] and with respect to these opportunities build Staircase capabilities by market, and manage 3 Horizon Growth Models (short, mid and long term growth).
3. Definition of the initial products and base new upstream products for the “Go-to-Market” plans for these business opportunities.
4. Tracking aggregate growth and revenue in the emerging market, and assembling information and documentation to support the company’s investment in the market.
5. Development of an in-depth understanding of the market and needs of consumers in the market to create a customer pull to the new products through upstream product positioning.
6. Development and implementation of customer loyalty initiatives.

7. Determination of future needs of the emerging markets' customers.

The petitioner also provided an August 25, 2005 letter signed by [REDACTED] Director of Human Resources at Sigma-Aldrich Corporation (Sigma) in Saint Louis, Missouri. [REDACTED] stated that Sigma is engaged in the manufacture and distribution of biochemicals and related products worldwide and that he had worked in human resources at Sigma for 15 years. [REDACTED] indicated that he had examined the above job description for the petitioner's business innovation manager – India. [REDACTED] opined that large manufacturing and distribution companies commonly require at least a Bachelor's or equivalent-level degree in marketing or a closely-related field as a minimum requirement for positions of the type described. [REDACTED] opined further that the job duties are sufficiently specialized and complex to necessitate at least a Bachelor's level degree, and perhaps a Master's level degree.

The petitioner also provided: an excerpt from the Department of Labor's *Occupational Outlook Handbook's (Handbook)* discussion of advertising, marketing, promotions, public relations, and sales managers; a summary report for sales managers issued by the Department of Labor's *O*NET Online (O*NET)*; and an excerpt from the Department of Labor's *Dictionary of Occupational Titles (DOT)* discussion of sales managers.

On September 9, 2005, the director denied the petition, noting that the proffered position corresponded to the Department of Labor's *Occupational Outlook Handbook's (Handbook)* discussion of marketing, sales, and promotions management positions. The director acknowledged that the *Handbook's* report regarding the educational requirements to perform the duties of a marketing, sales, and promotions management positions, indicated that some employers preferred a bachelor's or master's degree in business administration with an emphasis on marketing; however, the director pointed out that the *Handbook* also noted that a wide range of educational backgrounds is suitable for entry into advertising, marketing, promotions, public relations, and sales managerial jobs, and that many employers preferred those with experience in related occupations plus a broad liberal arts background. The director concluded from this information that the *Handbook* did not require such positions to have a baccalaureate or higher degree in a specific specialty.

On appeal, counsel for the petitioner asserts that the evidence submitted shows that a bachelor's level degree and perhaps a master's degree is normally a minimum requirement for the proffered business innovation manager position and that such a requirement is common to the industry in parallel positions and that the position's duties are sufficiently complex to require such a degree. Counsel contends that the director inappropriately discounted the information in the *O*NET* and *DOT* and that the requirements in the *Handbook* were misinterpreted. Counsel asserts that Mr. [REDACTED] opinion confirms the statement in the *Handbook* and other government publications that a bachelor's level degree in marketing and perhaps even a master's level degree would normally be required for this type of complex sales manager position. Counsel claims that the proffered position is complex and refers to the type and size of the petitioner as underscoring the complexity of the position. Counsel further asserts that the responsibilities for management of 3 Horizon Growth Models, establishment of Staircase capabilities by market, and tracking and analysis of growth and revenue in emerging markets reflect the need for an advanced understanding of market analysis.

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 as 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 *Handbook* discusses the occupation of "marketing manager" and "sales 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.

Sales managers direct the firm's sales program. They assign sales territories, set goals, and establish training programs for the sales representatives. . . . Sales managers advise the sales representatives on ways to improve their sales performance. In large, multiproduct firms, they oversee regional and local sales managers and their staffs. Sales managers maintain contact with dealers and distributors. They analyze sales statistics gathered by their staffs to determine sales potential and inventory requirements and to monitor customers' preferences. Such information is vital in the development of products and the maximization of profits.

Upon review of the petitioner's description of the proffered position, the AAO finds that the position corresponds generally with the *Handbook's* statements regarding the occupation of a marketing manager. The AAO observes that the petitioner, through counsel, has submitted evidence from the *DOT* and the *O*NET* on the occupation of sales manager, not marketing manager. Nevertheless, the description of the actual duties of the position must correspond with the position title. In this matter, the petitioner has provided a general description of a marketing manager.

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 promote sales and marketing of personal and household care products in India, with responsibilities including identification of new business opportunities, advising on the design and development of products for this market,

introducing new products to customers and tracking growth and revenue in the market. In response to the director's RFE, the petitioner added that the beneficiary, in addition to identifying new business opportunities, would "build Staircase capabilities by market," "manage 3 Horizon Growth Models," and "base new upstream products for the 'Go-to-Market' plans for the business opportunities." These generally described tasks are insufficient to establish the actual daily duties that the beneficiary would be required to perform in the position. In the instant matter, the petitioner has offered no description of the duties of its proffered position beyond the generalized outline it provided at the time of filing. The AAO finds that the beneficiary's duties are so abstractly stated in the descriptions provided that they do not convey the specific nature of the work that the beneficiary would actually perform and, therefore, do not indicate the nature and level of education that the work requires. Without a more specific description of the actual duties of the proffered position, the petitioner has not established that the position meets any of the requirements for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Further, upon review of the *Handbook's* discussion of the educational requirements associated with the position of marketing and sales manager, the AAO finds that neither a marketing nor a sales manager position is 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 director in this matter has correctly interpreted the *Handbook's* report regarding educational requirements for a marketing manager's position. 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; thus the *Handbook* does not report that either a marketing or a sales 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.

The AAO has also reviewed the excerpts from the *DOT* and the *O*NET* regarding the position of sales manager. As noted above, the petitioner's generic description seems to correspond more

generally to the duties of a marketing manager, not a sales manager. However, even if the petitioner believes the position is a sales manager position or a sales/marketing manager position, the AAO has long found that neither the *DOT* nor the *O*NET* are persuasive sources of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. Both the *DOT* and the *O*NET* provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. An SVP or JobZone rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. Again, the record does not demonstrate that the occupation of a sales manager or a marketing manager would require the beneficiary to have attained a bachelor's degree or its equivalent in a specific specialty.

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 that 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 _____ letter and his opinion that large manufacturing and distribution companies commonly require at least a bachelor's or equivalent-level degree in marketing or a closely-related field as a minimum requirement for positions such as the position offered by the petitioner; however such information is not in accordance with the *Handbook*, which offers an overview of national hiring practices, draws on personal interviews with individuals employed in the occupation or from websites, published training materials and interviews with the organizations granting degrees, certification, or licenses in the field, to reach its conclusions regarding the nation's employment practices. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information

or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). Neither is the opinion letter supported by documentary evidence to establish that large manufacturing and distribution companies “routinely employ and recruit only degreed individuals,” in a specific discipline. Mr. ██████ does not reference surveys or established publications to substantiate that the employment of individuals with the general duties described for the proffered position require a bachelor’s or higher degree in a specific discipline. Further, ██████ does not indicate that he interviewed the petitioner, visited the petitioner’s worksite, or otherwise studied the actual daily duties of the proffered position. 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)). Moreover, the opinion of a single individual, even one that represents a large business, is insufficient to establish an industry standard. The record does not contain sufficient evidence demonstrating that the degree requirement is common to the industry in parallel positions among similar organizations. 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/sales positions within the same industry. The record does not contain evidence detailing what duties of the marketing/sales manager position require the attainment of a baccalaureate or higher degree. The record lacks evidence or analysis establishing that particular duties of the proffered position differ from the routine duties of a skilled marketing/sales manager. The AAO acknowledges that the petitioner would require that the beneficiary in addition to identifying new business opportunities, “build Staircase capabilities by market,” “manage 3 Horizon Growth Models,” and “base new upstream products for the ‘Go-to-Market’ plans for the business opportunities.” However, the petitioner does not elaborate on the tasks that are involved in performing these duties. As the described duties are generic and do not include descriptions of the actual tasks involved, the AAO is unable to ascertain that the proffered position would include duties that are more complex and unique than those of a typical marketing/sales manager or are so complex or unique that they can be performed only by an individual with a 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 1989 and has approximately 3000 employees along with its parent company. Despite the director’s specific request to provide a statement on any other individuals who were employed or had been employed in a similar position, the petitioner failed to provide such evidence. Nor did the petitioner explain why it had not hired an individual to fill the proffered position in the past. Again, going on record without supporting documentary

evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Thus, the record does not include any information regarding the petitioner's past educational requirements for individuals, if any, in the proffered position. The AAO also observes that a petitioner's self-imposed employment requirements does not establish that a position is a specialty occupation, as self-imposed employment requirements without additional information, would allow any alien with a bachelor's degree to 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 or higher degrees. The record in this matter does not establish that the petitioner has satisfied the criterion 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 primarily to the routine duties of a marketing 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 degree or higher degree. The petitioner has not adequately explained how the duties of the proffered position differ from those of a generalist position in marketing/sales management. The petitioner has not substantiated that the nature of its business requires a marketing/sales 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 AAO has again reviewed the opinion letter of [REDACTED] who opined that the job duties are sufficiently specialized and complex to necessitate at least a bachelor's level degree, and perhaps a master's level degree. The AAO reiterates that the [REDACTED] does not provide evidence in support of his opinion. The record does not include evidence that [REDACTED] reviewed the nature of the petitioner's business or the specific daily tasks, as opposed to the general description provided, that would require the application of specialized or complex knowledge associated with the attainment of a baccalaureate degree or higher degree 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.