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U.S. Citizenship and Immigration Services
Administrative Appeals Office MS 2090
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U.S. Citizenship
and Immigration
Services

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MAY 05 2009

FILE: WAC 07 146 50062 Office: CALIFORNIA SERVICE CENTER Date:

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:

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, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

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

The petitioner is a fabric wholesaler and seeks to employ the beneficiary as a commercial marketing specialist. Thus, 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).

In denying the petition, the director determined that the beneficiary was not qualified to perform the duties of a specialty occupation. Specifically, the director found that there was no nexus between the beneficiary's degree and the proffered position. On appeal, counsel contends that the director's conclusion was erroneous, and that the beneficiary, *by virtue of his extensive experience in the industry, is in fact qualified to perform the duties of the proffered position.*

As a preliminary issue, the AAO will examine the record to determine whether the proffered position is that of a specialty occupation. Most directors should, and will, first determine whether a job is a specialty occupation before deciding whether the individual is qualified for the job. A beneficiary's credentials to perform a particular job, therefore, are relevant only when the job is found to be a specialty occupation. In this matter, however, the director did not analyze the proffered position to determine whether it met the definition of a specialty occupation. As discussed below, the proffered position does not require a baccalaureate or higher degree, or its equivalent, in a specific specialty.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in 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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting

the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. *These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.*

The description of duties for the proffered position, as set forth in the petitioner’s April 2, 2007 letter of support, indicate that the duties of the proffered position are akin to that of a market researcher or a market research analyst. Specifically, the duties of the proffered position, as identified by the petitioner, include tasks such as “research, identify, follow-up and track sales” and “gather and communicate critical sales feedback.”

According to the Department of Labor’s *Occupational Outlook Handbook (the Handbook)*, duties of a market researcher or a market research analyst are as follows:

Market and survey researchers gather information about what people think. *Market, or marketing, research analysts* help companies understand what types of products people want and at what price. They also help companies market their products to the people most likely to buy them. Gathering statistical data on competitors and examining prices, sales, and methods of marketing and distribution, they analyze data on past sales to predict future sales.

Market research analysts devise methods and procedures for obtaining the data they need. Often, they design surveys to assess consumer preferences *through Internet, telephone, or mail responses*. They conduct some surveys as personal interviews, going door-to-door, leading focus group discussions, or setting up booths in public places such as shopping malls. Trained interviewers usually conduct the surveys under the market research analyst’s direction.

According to the *Handbook*, a bachelor’s degree is generally the minimum requirement for entry into this position. However, the *Handbook* does not indicate that a bachelor’s degree in a *specific specialty* is required; therefore, based on the description of duties provided and the minimal evidence regarding the beneficiary’s work history and experience, it cannot be concluded that the proffered position is a specialty occupation. For this reason, the petition may not be approved.

Even if the petitioner had established that the proffered position requires a bachelor's degree in marketing and is thereby a specialty occupation, the director correctly determined that the beneficiary is not qualified to perform the duties of such a specialty occupation.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. If the alien does not possess the required degree, the petitioner must demonstrate that the alien has 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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The AAO bases its decision upon its consideration of the entire record of proceeding before it, 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 matters submitted in response to the RFE; (4) the director's denial letter; (5) the Form I-290B and its attachments, including counsel's brief in support of the appeal.

The petitioner is seeking the beneficiary's services as a commercial marketing specialist. In a copy of the vacancy announcement for the proffered position, the petitioner stated that a candidate must possess a bachelor's degree and at least three years of experience. The petitioner did not specify that a degree in a specific specialty was required.

The director found that the beneficiary was not qualified for the proffered position because the beneficiary's education, experience, and training were not equivalent to a baccalaureate degree in a specialty required by

the occupation. On appeal, counsel states that the beneficiary is qualified for the position based on an educational evaluation and his work experience.

Upon review of the record, the petitioner has failed to establish that the beneficiary is qualified to perform an occupation that requires a baccalaureate degree in a specific specialty. The beneficiary holds a foreign degree determined to be equivalent to a baccalaureate degree in pharmacy from an accredited university in the United States. Because the field of marketing is entirely different from pharmacy, the petitioner must demonstrate that the beneficiary meets the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4).

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating the beneficiary's credentials to a United States baccalaureate or higher degree shall be determined by one or more of the following:

- (1) An evaluation from an official who 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;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials; or
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

On appeal, counsel claims that by virtue of the beneficiary's thirteen years of experience with different multi-national companies such as Pfizer, Inc., Eli Lilly, Inc., Astra-Zeneca, and Richwin Garments, he is well qualified to perform the duties and responsibilities of commercial marketing specialist for the petitioner. Counsel urges reconsideration of the evidence previously submitted, and submits no new documentation on appeal.

Upon review, the AAO concurs with the director's conclusions. The record contains an educational evaluation from Silvergate Evaluations, Inc., a company that specializes in evaluating academic credentials.

The evaluator concluded that the beneficiary possesses the equivalent of a U.S. bachelor's degree in pharmacy. Therefore, the beneficiary's educational credentials are undisputed in this matter.

When USCIS determines an alien's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation¹;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The record contains the beneficiary's resume, which claims that the beneficiary has been employed by a company identified as Geologistics, Inc. and by various pharmaceutical companies as either a sales representative or marketing specialist. As noted by the director, there are no independent letters from a representative of these companies to corroborate the beneficiary's claimed employment. It is further noted that, while counsel repeatedly claims that the beneficiary's most essential experience was gained while working for Richwin Garments, this company is not listed on the beneficiary's resume nor does the record contain a letter from the company verifying the beneficiary's employment. 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. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

¹ *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

As a result, there are no letters from the beneficiary's prior employers to demonstrate that the beneficiary's duties while employed in the claimed positions involved the theoretical and practical application of specialized knowledge required by the proffered position, which in this case is marketing. Moreover, there is no evidence that the beneficiary has recognition of expertise in the industry. Thus, absent corroborating evidence, the AAO cannot conclude that the beneficiary's past work experience included the theoretical and practical application of a body of highly specialized knowledge in a field related to the proffered position or that the beneficiary has recognition of expertise in the industry. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel on appeal do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

As related in the discussion above, the petitioner has failed to establish that the beneficiary is qualified to perform the duties of the proffered position. For this reason, the petition will be denied.

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.