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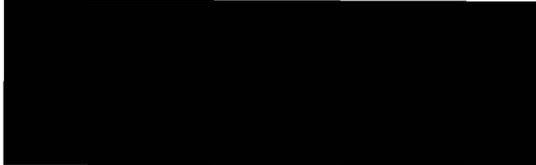


U.S. Citizenship  
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**SEP 23 2009**



FILE: WAC 03 218 50859 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 or reopen, 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 wholesale and retail store that sells antique rugs and furniture to domestic and international markets. The petitioner, which has four temporary marketing consultants and no full-time employees, seeks to employ the beneficiary as a full-time Oriental rug sales and marketing representative. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to § 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 because the petitioner has not demonstrated that the proffered position is a specialty occupation.

On appeal, counsel states that the proffered position “is similar to a combination of both a Market Research Analyst and Sales Manager.” Counsel also states that the proffered position meets the requirements of all four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Counsel also states that USCIS has previously approved several petitions for similar positions.

The issue before the AAO is whether the petitioner’s proffered position qualifies as a specialty occupation. As will be discussed below, the AAO finds that the petitioner has not established that the proffered position is a specialty occupation. Accordingly, the director’s decision to deny the petition shall not be disturbed.

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; and (5) the Form I-290B, counsel’s brief, and additional and previously submitted documentation in support of the appeal.

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.

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), 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 AAO will now discuss and evaluate the evidence of record.

In the July 10, 2003 letter submitted with the Form I-129, the petitioner describes the proposed duties of the proffered Oriental rug sales and marketing representative position as follows:

[The beneficiary] will be responsible for researching market conditions in local, regional and national areas to determine potential competition in these markets. She will establish research methodology and design formats for data gathering, such as surveys, opinion polls, or questionnaires. She will further examine and analyze statistical data to forecast future marketing trends. She will gather data on competitors and “analyzes” prices, sales and methods of marketing and distribution. [The beneficiary] will need to collect data on customer preferences and buying habits. She will prepare reports and graphic illustrations such as charts and pies regarding her findings, using computerized software and spreadsheets. Occasionally, she will have to formulate recommendations, policies, or plans to aid market interpretation. She will formulate new tools and technologies to provide results to our clients faster than many of our competitors. She will have to develop new client relationships, by attending meetings to market the company. This position requires very strong analytical skills and ability to work in a self-motivated environment and sometimes with intense time frames.

In the October 23, 2003 letter of response to the RFE, the petitioner describes the proposed duties and time allocations of the proffered Oriental rug sales and marketing representative position as follows:

**Marketing – 40%**

The job description will include marketing the business both domestically and internationally. [The beneficiary] will meet with potential buyers who wish to purchase antique rugs and furniture and bulk. [The beneficiary] will negotiate with buyers regarding prices. Furthermore, [the beneficiary] will research market conditions in local, regional, or national area to determine potential sales of product, such as our rugs and antique furniture. [The beneficiary] will need to establish research methodology and design format for data for

gathering such as surveys and questionnaires. She will examine and analyze statistical data to forecast future marketing trends. She will “gather” data on competitors and analyze prices, sales, and methods of marketing and distribution. She will collect data on customer preferences and buying habits and furthermore, “prepares” reports and graphic illustrations of findings using computer software such as Power Point and Excel.

**Sales – 60%**

[The beneficiary] will be both an inside and outside “sale” representative, representing [the petitioner’s] entire “products” line including all types of antique rugs and other antique furniture at our exhibitions, trade shows as well as within the business. She will be identifying potential business opportunities through telephone prospecting and exhibitions. The sales process is comprised of prospecting for potential clients, pricing/estimating projects to new and existing customers, and serving as the primary customer service contact for our products. Furthermore, she will analyze sales statistics gathered to determine sales potential and inventory requirements and monitor the preferences of the customers.

The AAO notes that neither the petitioner’s July 10, 2003 letter nor its October 23, 2003 letter of response to the RFE explains or is accompanied by documentary evidence showing the particular methodologies and analytical tools that the beneficiary will employ or are usually associated with at least a bachelor’s degree in a specific specialty. The AAO also finds that the beneficiary’s duties are so abstractly stated in the letter that they do not convey the specific nature of the work that she would actually perform and, therefore, do not indicate the nature and level of education that the work requires.

As evident in the descriptions of the beneficiary’s proposed duties above, the petitioner describes the proffered position exclusively by generalized statements of broad functions. These statements do not convey the applications of highly specialized knowledge in a specific specialty the functions might entail when performed in the context of the petitioner’s business. For example: the petitioner does not identify the analytical methods employed in the beneficiary’s analysis of prices, sales and methods of marketing and distribution; does not explain what theoretical and practical application of highly specialized knowledge would be involved in the beneficiary’s market conditions research; and provides no specific information about the data gathering that the beneficiary will perform.

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which assigns specialty-occupation status to a position 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.

The AAO routinely consults the Department of Labor’s (DOL) *Occupational Outlook Handbook (Handbook)* for its information about the duties and educational requirements of particular occupations. Even if the generic statements that comprise the information about the proffered position and its duties were sufficient to align the position with the broad occupational category of Market Research

Analysts as discussed in the *Handbook*, this position has not been established as a specialty occupation. As indicated in the following excerpt from the “Training, Other Qualifications, and Advancement” section 2008-09 *Handbook’s* chapter “Market and Survey Researchers, which indicates that a major or concentration in a specific specialty is not a normal aspect of the baccalaureate threshold for entry into the market-research-analyst occupation:

### **Training, Other Qualifications, and Advancement**

A bachelor’s degree is usually sufficient for entry-level market and survey research positions. Higher degrees may be required for some positions, however. Continuing education and keeping current with the latest methods of developing, conducting, and analyzing surveys and other data also is important for advancement.

***Education and training.*** 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 extremely helpful. Market and survey researchers often earn advanced degrees in business administration, marketing, statistics, communications, or other closely related disciplines.

While in college, aspiring market and survey researchers should gain experience gathering and analyzing data, conducting interviews or surveys, and writing reports on their findings. This experience can prove invaluable later in obtaining a fulltime position in the field, because much of the initial work may center on these duties. Some schools help graduate students find internships or part-time employment in government agencies, consulting firms, financial institutions, or marketing research firms prior to graduation.

As the *Handbook* indicates that entry into the market-research-analyst occupation may occur with a degree with coursework in the listed subjects but without a specific course of study leading to a specific degree in the field, 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. This information from the *Handbook* does not by itself preclude a particular market-research-analyst position from qualifying as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). However, 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.

It is also noted that no evidence in the *Handbook*, 2008-09 edition, under the category of Advertising, Marketing, Promotions, Public Relations, and Sales Managers, indicates that a baccalaureate or higher degree in a specific specialty is required for a sales manager position. A wide range of educational backgrounds is suitable for entry into sales manager jobs, but many employers prefer individuals with experience in related occupations. Again, this information from the *Handbook* does not by itself preclude a particular sales manager position from qualifying as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). However, 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. The petitioner has failed to do so.

The AAO finds that the evidence of record does not indicate that the proffered position is one that normally requires at least a bachelor's degree, or the equivalent, in a specific specialty. In this regard, the AAO notes that, as reflected in the petitioner's generalized descriptions of the duties of the proffered position, the record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires a specialty occupation's level of knowledge in a specific specialty. The record's evidence is not sufficiently specific and concrete to distinguish the proffered position from positions in the market-research-analyst and sales manager occupational categories that do not normally require at least a bachelor's degree, or its equivalent, in a specific specialty.

As the evidence of record does not establish that the particular position proffered here 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, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong assigns specialty occupation status to a proffered position with a requirement for at least a bachelor's degree, in a specific specialty, that is common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that 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)).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. The record contains job postings for various positions including: a "Marketing Communication Specialist – Public Relations" to work in the corporate office of Glovia International, Inc., a subsidiary of Fujitsu and a leading provider of extended ERP solutions; a marketing specialist for Makita USA Inc., a worldwide technology leader in the power tool industry; a marketing specialist for Trolltech, a leading provider of cross-platform software development tools; an "Entry Level Inside Sales/Outside Sales Representative" for Lanier, a global document management solutions provider; an "Outside Sales Representative" for Pella Windows & Doors, a world leading manufacturer of premium-quality windows and doors; an "Outside Sales Representative" for a large rental company in the construction industry; a marketing/public relations representative for Wesco Co., a rental business; a market research analyst for Countrywide, a financial services company; a market research analyst in the gift shop industry; a research analyst for BizRate.com, a shopping search engine; and a sales representative for Spherion, a business in the document imaging industry. The AAO observes that the advertisers are dissimilar to the petitioner's business that wholesales and retails antique rugs and furniture to domestic and international markets. Moreover, the majority of the advertisements specify only that a bachelor's degree is preferred and do not specify a requirement of a degree in a specific specialty, thereby confirming the position of the DOL in its *Handbook*, namely that market research analyst and sales manager jobs do not require a bachelor's degree in a specialty. Thus, the advertisements are insufficient to establish that a degree requirement is common to the industry in parallel positions among similar organizations.

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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." The evidence of record does not refute the *Handbook's* information to the effect that there is a spectrum of degrees acceptable for market-research-analyst positions, including degrees not in a specific specialty related to market research analysis. Also, as indicated above, a wide range of educational backgrounds is suitable for entry into sales manager jobs, but many employers prefer individuals with experience in related occupations. As evident in the earlier discussion about the generalized descriptions of the proffered position and its duties, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than market research analyst/sales manager positions that can be performed by persons without a specialty degree or its equivalent.

As the record has not established a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. As reflected in the earlier discussion of the limited information about the proffered duties, the proposed duties have not been described with sufficient specificity to show that

they are more specialized and complex than market research analyst/sales manager positions that are not usually associated with a degree in a specific specialty.

On appeal, counsel also submits a copy of an approval notice and the second page of a Form I-129 for another market research analyst position. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. If the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed.

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.