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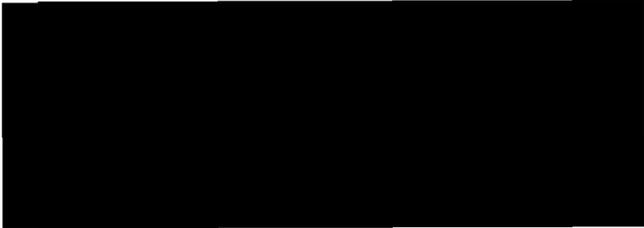
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



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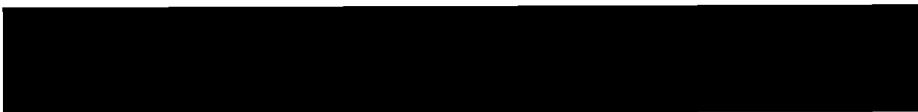
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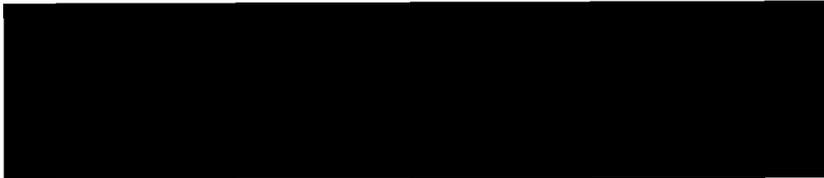
FILE: WAC 08 148 52178 Office: CALIFORNIA SERVICE CENTER Date:

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).

for 
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the California 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 is a film production company with between four and ten employees. It seeks to employ the beneficiary as a part-time Budget Analyst pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition concluding that the petitioner failed to establish that the proffered position is a specialty occupation.

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The AAO will therefore consider whether the position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the 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, 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.

In this matter, the petitioner seeks the beneficiary’s services as a part-time Budget Analyst. Evidence of the beneficiary’s duties includes: the Form I-129; the petitioner’s March 28, 2008 support letter; and a job description provided by counsel in response to the RFE. The support letter indicates the proffered position would require the beneficiary to be responsible for planning, coordinating and implementing the company’s budget process on creative projects for film, television, and commercials and typically will include the following duties:

- Analyze budgeting and accounting reports to maintain expenditure controls on different client projects;
- Direct the preparation of regular and special budget reports on a project basis;
- Provide advice and technical assistance with cost analysis, fiscal allocation, and budget preparation;
- Summarize budgets and submit recommendations for the approval or disapproval of fund requests;
- Seek new ways to improve efficiency and increase profits;
- Review operating budgets to analyze trends affecting budget needs;
- Examine budget estimates for completeness, accuracy, and conformance with procedures and regulations; and
- Perform cost-benefit analyses to compare operating programs, review financial requests, or explore alternative financing methods.

The letter goes on to state that the proffered position requires a Bachelor's Degree in Business Administration, Finance, Auditing, Accounting, Economics or a related discipline. The petitioner submitted documentation evidencing that the beneficiary has a foreign degree that is equivalent to a U.S. Bachelor of Science degree in Accounting.

The Labor Condition Application (LCA) was submitted for a Budget Analyst to work at the petitioner's offices at an hourly rate of \$22.43.

On July 7, 2008, the director requested additional information from the petitioner. In part, the director requested the following: (1) a more detailed description of the work to be performed, including specific job duties and percentage of time to be spent on each duty; (2) the petitioner's past employment practices; and (3) evidence that the petitioner and its competitors normally require a degree for the position of Budget Analyst. The director also requested an organizational chart and evidence pertaining to the petitioner.

Counsel's response provided a more detailed job description of the proffered position that states the beneficiary will be responsible for overseeing budgets for the company's film, television, video, and commercials projects. With respect to the duties provided earlier, counsel states that 80% to 90% of the beneficiary's time will be spent in all of them together, except for the following, which will account for the remaining 10% to 20%:

- Seek new ways to improve efficiency and increase profits;
- Review operating budgets to analyze trends affecting budget needs; and
- Perform special accounting and finance related projects as identified by management.

Counsel also provided fifteen job advertisements from other companies and argued that the proffered position is closest to that of a Budget Analyst listed in the U.S. Department of Labor's *Occupational Outlook Handbook*, 2008-09 edition (*Handbook*).

The director denied the petition, finding that the petitioner had satisfied none of the criteria set forth

at 8 C.F.R. § 214.2(h)(4)(iii)(A), and therefore had not established that the proposed position qualifies for classification as a specialty occupation. In the denial, the director found that the proffered position does not resemble that of a Budget Analyst in the *Handbook* because the petitioner's business lacks the organizational complexity to support a Budget Analyst, but also stated that the position of Budget Analyst as described in the *Handbook* qualifies as a specialty occupation.

On appeal, counsel contends that the director erred in denying the petition, and that the proposed position, in fact, qualifies for classification as a specialty occupation under the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). Counsel asserts that the petitioner's rapid growth and success as an award-winning studio in the entertainment industry justifies its hiring of a part-time Budget Analyst and that the director misread the section of the *Handbook* that pertains to Budget Analysts. Counsel further argues that the proffered position is not that of a traditional Budget Analyst position, but rather requires unique analysis based on each project, rather than a budget cycle, and encompasses duties performed by those in other occupations, such as cost estimators, project managers, or management analysts.

To make its determination whether the proffered position, as described in the initial petition and the petitioner's response to the RFE, qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations, or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. 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 in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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)).

On appeal, counsel for the petitioner argues that the proffered position most closely resembles the position of Budget Analyst in the *Handbook*. The AAO agrees with counsel's assessment that the proffered position most closely resembles that of a Budget Analyst as described in the *Handbook* and the part of the director's assessment concluding that the petitioner lacks the organizational complexity to support a Budget Analyst will be withdrawn. The director also erred in concluding that the position of Budget Analyst as defined in the *Handbook* qualifies as a specialty occupation and this part of the director's decision will also be withdrawn.

However, the AAO agrees with the director that the petitioner has failed to demonstrate that the proffered position constitutes a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A), and therefore affirms the director's decision to deny the petition.

The overarching reason for the AAO's dismissal of this appeal is that, even when considered in light of the record's supporting documentation, such as the budget samples submitted on appeal and the poor returns on investment that they illustrate, the proposed duties as described in the record do not establish that performance of the proffered position requires the theoretical and practical application of at least a bachelor's degree level of highly specialized knowledge in a specific specialty, as required by the H-1B specialty occupation provisions of the Act and their implementing regulations. In this regard, the AAO has considered all of the assertions of counsel in support of the requirements of the position,¹ but finds that they are not supported by documentation in the record. 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)). 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 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).

The record's descriptions of the proposed duties are limited to generic and generalized functions which, even when read in the context of all of the evidence submitted in support of the petition, do not convey the educational level of any body of highly specialized knowledge that the beneficiary would apply theoretically and practically.

The *Handbook's* description of Budget Analysts provides in pertinent part:

¹ For instance, the petitioner's March 28, 2008 letter in support of the petition states:

These are highly complex and sophisticated professional responsibilities, requiring the application of accounting, statistics, economic/financial forecasting, internal auditing, and financial analysis methods for business decisions. Knowledge in these areas is normally acquired through the attainment of at least a Bachelor's degree in Business Administration, Finance, Auditing, Accounting, Economics or a related discipline.

The following statement in the brief on appeal is a representative example of counsel's assertions about the educational credentials required for the proffered position:

These are highly complex and sophisticated professional responsibilities, requiring the application of accounting, statistics, economic/financial forecasting, internal auditing, and financial analysis methods that will be critical to assessing budget needs on commercials, television, and feature film projects. Knowledge in these areas is normally acquired through the attainment of at least a Bachelor's degree in Business Administration, Finance, Auditing, Accounting, Economics or a related discipline. This is precisely why the company chose the beneficiary to assume this position. The beneficiary holds a Bachelor of Science degree in Accounting and as part of her program of study, she completed academic coursework in Economics, Financial Accounting, Management Finance, Cost Control, Marketing, and Auditing Practice [**Exhibit 6**]. All of the foregoing courses are directly related to the responsibilities she will undertake in the position of Budget Analyst.

Budget analysts help organizations allocate their financial resources. They develop, analyze, and execute budgets, as well as estimate future financial needs for private businesses, nonprofit organizations, and government agencies. *In private sector firms, a budget analyst's main responsibility is to examine the budget and seek new ways to improve efficiency and increase profits.* In nonprofit and governmental organizations, which usually are not concerned with profits, analysts try to find the most efficient way to distribute funds and other resources among various departments and programs.

In addition to managing an organization's budget, analysts are often involved in program performance evaluation, policy analysis, and the drafting of budget-related legislation. At times, they also conduct training sessions for company or government personnel regarding new budget procedures.

At the beginning of each budget cycle, managers and department heads submit operational and financial proposals to budget analysts for review. These plans outline the organization's programs, estimate the financial needs of these programs, and propose funding initiatives to meet those needs. Analysts then examine these budget estimates and proposals for completeness, accuracy, and conformance with established procedures, regulations, and organizational objectives. Sometimes they employ cost-benefit analyses to review financial requests, assess program tradeoffs, and explore alternative funding methods. They also examine past budgets and research economic and financial developments that affect the organization's income and expenditures.

After the initial review process, budget analysts consolidate individual departmental budgets into operating and capital budget summaries. These summaries contain statements that argue for or against funding requests. Budget summaries are then submitted to senior management, or as is often the case in government organizations, to appointed or elected officials. Budget analysts then help the chief operating officer, agency head, or other top managers analyze the proposed plan and devise possible alternatives if the projected results are unsatisfactory. The final decision to approve the budget usually is made by the organization head in a private firm, or by elected officials, such as State legislators, in government.

Throughout the year, analysts periodically monitor the budget by reviewing reports and accounting records to determine if allocated funds have been spent as specified. If deviations appear between the approved budget and actual spending, budget analysts may write a report explaining the variations and recommending revised procedures. To avoid or alleviate deficits, budget analysts may recommend program cuts or a reallocation of excess funds. They also inform program managers and others within the organization of the status and availability of funds in different accounts.

Data and statistical analysis software has greatly increased the amount of data and information that budget analysts can compile, review, and produce. Analysts use spreadsheet, database, and financial analysis software to improve their understanding of different budgeting options and to provide accurate, up-to-date information to agency leaders. In addition, many organizations are beginning to incorporate Enterprise Resource Planning (ERP) programs into their budget-making process. ERP programs can consolidate all of an organization's operating information into a single computer system, which helps analysts estimate the effects that a budget alteration will have on each part of an organization.

(Emphasis added.) In short, the description provided above encompasses the duties of the proffered position as described by the petitioner and counsel.

For the description of education and training for Budget Analysts, the *Handbook* states:

A bachelor's degree usually is the minimum educational requirement for budget analyst jobs, but some organizations prefer or require a master's degree. Entry-level budget analysts usually begin with limited responsibilities but can be promoted to intermediate-level positions within 1 to 2 years, and to senior positions with additional experience.

[E]mployers generally require budget analysts to have at least a bachelor's degree, but some prefer or require a master's degree. Within the Federal Government, *a bachelor's degree in any field is sufficient* for an entry-level budget analyst position. State and local governments have varying requirements, but usually require *a bachelor's degree in one of many areas*, including accounting, finance, business, public administration, economics, statistics, political science, or sociology. Because developing a budget requires strong numerical and analytical skills, courses in statistics or accounting are helpful, regardless of the prospective budget analyst's major field of study. Some States may require a master's degree. Occasionally, budget-related or finance-related work experience can be substituted for formal education.

(Emphasis added.)

Even though the *Handbook* states that a bachelor's degree is usually required for Budget Analysts, the bachelor's degree is not required to be *in a specific specialty* as required under Section 214(i)(1) of the Act. To prove that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by Section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study. When a range of degrees, e.g., the liberal arts, or a degree of generalized title without further specification, e.g., business administration, can perform a job, the position does not qualify as a specialty occupation. *See Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). As

such, a budget analyst does not qualify as a specialty occupation under the first criterion.

As the evidence of record does not establish that the particular position here proffered 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. In response to the RFE, counsel for the petitioner submitted fifteen job advertisements. However, the advertisements provided are not evidence of a common degree-in-a-specific-specialty requirement in positions that are both: (1) parallel to the proffered position; and (2) located in organizations similar to the petitioner. Only five of the advertisements are for Budget Analysts – the others are for Financial Analysts, Accountants, Treasury Analyst, Finance Managers, and a Senior Business Analyst, which do not have primary duties that are sufficiently similar to those in the proffered position. The five advertisements for Budget Analysts are not for companies in the petitioner's industry and, moreover, do not require a bachelor's degree *in a specific specialty*.

The petitioner has not satisfied 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 a bachelor's degree is not required in a specific specialty. Counsel's argument on appeal that the budget analysis would be based on each project, rather than a budget cycle, is not sufficient to distinguish the proffered position as unique from or more complex than Budget Analyst positions, such as those as described in the *Handbook*, that can be performed by persons without a specialty degree or its equivalent.

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) -- the employer normally requires a degree or its equivalent for the position. The petitioner has not provided any evidence that it hired someone to fill this position in the past. 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. To the extent that they are depicted in the record, the duties of the proposed position do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Despite counsel's argument on appeal, the proposed duties do not appear to represent an amalgam of jobs that would require the beneficiary to possess educational qualifications beyond those of a Budget Analyst without a degree in a specific specialty closely related to the proffered position. The AAO, therefore, concludes that the proffered position has not been established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the AAO shall not disturb the director's denial of the petition.

The appeal will be dismissed and the petition denied. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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