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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



**U.S. Citizenship
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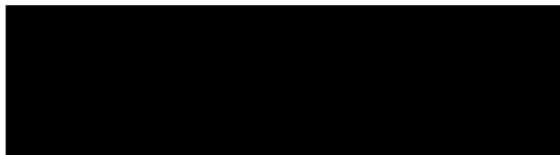
Date: **AUG 03 2010**

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The acting 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 tennis instruction and lesson center. To employ the beneficiary in a position designated as a public relations specialist, the petitioner endeavors to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The acting director denied the petition, finding that the petitioner failed to establish that the petitioner would employ the beneficiary in a specialty occupation position. On appeal, counsel asserted that the acting director's basis for denial was erroneous, and contended that the petitioner satisfied all evidentiary requirements. In support of these contentions, counsel submitted a brief and additional evidence.

The AAO bases its decision upon its review of the entire record of proceedings, 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 response to the RFE; (4) the acting director's denial letter; and (5) the Form I-290B and counsel's brief and attached exhibits 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. The issue before the AAO is whether the petitioner has provided evidence sufficient to establish that it would be employing the beneficiary in a specialty occupation position.

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 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.

The AAO finds that the acting director was correct in his determination that the record before him failed to establish that the beneficiary would be employed in a specialty occupation position, and it also finds that the documents submitted on appeal have not remedied that failure. Accordingly, the acting director's decision to deny the petition shall not be disturbed.

To determine whether a particular job qualifies as a specialty occupation position, the AAO does not solely rely on the job title or the extent to which the petitioner's descriptions of the position and its underlying duties correspond to occupational descriptions in the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*).¹ Critical factors for consideration are the extent of the evidence about specific duties of the proffered position and about the particular business matters upon which the duties are to be performed. In this pursuit, the AAO must examine the evidence about the substantive work that the alien will likely perform for the entity or entities ultimately determining the work's content.

However, the AAO does recognize the *Handbook* as an authoritative source on the duties and educational requirements of a wide variety of occupations. As to the proffered position, the *Handbook* states, in pertinent part,

Many entry-level public relations specialists have a college degree in public relations, journalism, marketing, or communications. Some firms seek college graduates who have worked in electronic or print journalism. Other employers seek applicants with demonstrated communication skills and training or experience in a field related to the firm's business—information technology, healthcare, science, engineering, sales, or finance, for example.

The *Handbook* does not support the proposition that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for an entry-level public relations position. Further, of the public relations specialists who have degrees, the *Handbook* does not support the proposition that they need a degree in a specific specialty, but rather a degree in a number of diverse fields is acceptable.

The requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish that a position is in a specialty occupation. The requirement of a bachelor's degree has no bearing on whether a position qualifies as a position in a specialty occupation unless it is a requirement of a degree in a precise and specific course of study. See *Matter of Michael Hertz, Assoc.*, 19 I&N Dec. 558, 560 (Comm. 1988). Here, the *Handbook* indicates that some employers seek candidates with degrees in public relations,

¹ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>.

journalism, marketing, or communications. That does not demonstrate that the proffered position is in a specialty occupation.

On appeal, counsel cited *Fred 26 Importers v. DHS*, 445 F. Supp. 2d 1180 (C.D. Cal. 2006), for the proposition that the size of a company is immaterial to whether a position is in a specialty occupation.

In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court even in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id* at 719. Further, the case upon which counsel relied arose in the Central District of California, whereas the instant case arose in North Carolina. Regardless, the AAO notes that the case upon which counsel relied does not state that a petitioner's size is immaterial, nor does it even imply that the size of a company may not be relevant to whether it has a *bona fide* need to employ a worker in a particular position.

Counsel also noted that, although the Department of Labor's O*NET service categorizes a public relations specialist as a Job Zone 4 occupation, it also indicates that it is given an Education and Training Code of 5, and asserted that this establishes that the proffered position is in a specialty occupation. As stated above, whether the proffered position is in a specialty occupation is determined by the duties of the position, rather than the job title the petitioner gives the position. Further, even if the proffered position is demonstrated as being a public relations specialist position and is thereby given an Education and Training Code of 5, this would not demonstrate that the proffered position is in a specialty occupation.

A designation of Job Zone 4 -- Education and Training Code: 5 indicates that a position requires considerable preparation. It does not, however, demonstrate that a bachelor's degree in any specific specialty is required, and does not, therefore, demonstrate that a position so designated is in a specialty occupation as defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). More specifically, the Online Wage Library (OWL) statement is a condensed version of what the O*Net actually states about its Job Zone 4 designation. See the O*Net Online Help Center, at www.online.onetcenter.org/help/online/zones, for a discussion of Job Zone 4, which explains that this Zone signifies only that most but not all of the occupations within it require a bachelor's degree. Further, the Help Center's discussion confirms that Job Zone 4 does not indicate any requirements for particular majors or academic concentrations. Therefore, despite counsel's assertions to the contrary, the OWL and O*Net information is not probative of the proffered position qualifying as a specialty occupation.

The record contains no evidence that other tennis instruction centers of the same approximate size as the petitioner employ public relations specialists who are required to have a bachelor's degree in any specific specialty. The evidence does not demonstrate that the proffered position, or the duties of the proffered position, are so specialized, complex, or unique that they can be performed only by an individual with a degree.

At the time the petition was filed, the petitioner had never previously employed anyone in the proffered position, and could not demonstrate that it normally requires a degree or its equivalent for the position. In a letter, dated September 5, 2008, submitted in response to the request for evidence, the petitioner's owner stated, "We employ no other individuals in a similar position.

On appeal, counsel stated that the petitioner, since submitting that letter, has hired one person, Scott Jeffers, to perform some of the duties of the proffered position. Counsel provided copies of [REDACTED] transcript, diploma, and résumé. Counsel provided photocopies of two cancelled checks showing that the petitioner paid [REDACTED] \$225 on October 3, 2008 and \$135 on October 14, 2008. A handwritten inscription on the photocopies states that the payments were for "Marketing Consultant Fee."

The record contains no other evidence that those payments were for performing any portion of the duties of the proffered position rather than, for instance, for providing tennis instruction or some other service, or to generate evidence for use in this appeal.

The assertions of counsel are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof in these proceedings. In this case, although the record contains a scintilla of corroborating evidence in support of counsel's assertion, it is insufficient to show that the petitioner hired Mr. Jeffers to perform the duties of the proffered position.

Further, the AAO notes that the acting director also questioned whether the petitioner has sufficient public relations work to keep the beneficiary employed in a specialty occupation. Even assuming that the proffered position qualifies as a specialty occupation, the payment of a total of \$360, even if it was compensation for public relations work, does little to support the petitioner's claim that it would employ the beneficiary exclusively, or even predominantly, as a public relations specialist.

On appeal, counsel asserted that the acting director found, based on the petitioner's small size, that the petitioner would have insufficient public relations needs to employ the beneficiary in such a specialty occupation, and further asserted that this finding was speculative. This assertion turns the burden of proof in this matter on its head. The acting director did not find that the petitioner has insufficient need for a public relations specialist, nor was he obliged to so find in order to deny the petition. Rather, it is sufficient to find, as the director did, that the evidence is insufficient to support the petitioner's contention that it has such a need. As the acting director phrased it, ". . . [I]t could not be determined that the petitioner would have sufficient H1B level work for the beneficiary to perform such that the proffered position would qualify as a specialty occupation position." The acting director did not find that the petitioner has no such need, but, rather, that the petitioner failed to provide evidence sufficient to demonstrate that it does have that need. That finding was in no way speculative.

Nevertheless, contrary to counsel's assertion, the AAO notes that the size of an employer's business is relevant and material to a determination of whether a proffered position qualifies as a specialty

occupation in that a petitioner's size has or could have an impact on the duties of a particular position. *See EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the duties of a particular position.

Finally, USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Even if the petitioner had demonstrated that it developed a need for a public relations specialist after it filed the petition, that would not render the petition approvable.

The petitioner has not demonstrated, pursuant to any of the tests enunciated in 8 C.F.R. § 214.2(h)(4)(iii)(A), that the position it is offering to the beneficiary qualifies as a position in a specialty occupation. Accordingly, the acting director's decision to deny the petition shall not be disturbed.

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. The appeal will be dismissed and the petition denied.

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