

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

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
and Immigration
Services

12



FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: DEC 03 2010

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:
[Redacted]

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 \$630. 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.

Thank you,

Perry Rhew
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 was represented by counsel when it filed the visa petition in this matter. On appeal, a new attorney entered his appearance for the petitioner by filing a correctly completed and executed Form G-28 Notice of Entry of Appearance. All representations will be considered, but today's decision will be furnished only to the petitioner and the petitioner's current counsel of record.

On the Form I-129 visa petition the petitioner stated that it is a scrap metal recycling firm. To employ the beneficiary in a position designated as a market research analyst position, the petitioner endeavors to classify her 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 director denied the petition, finding that the petitioner failed to establish (1) that the petitioner would employ the beneficiary in a specialty occupation position, and (2) that the beneficiary is qualified to work in a specialty occupation. On appeal, counsel asserted that the 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 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 a particular position 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 a letter submitted with the petition the petitioner's president stated:

[The beneficiary's] primary responsibilities include: Developing assessments that inform key decision makers on whether to develop new market or products, or enhance or retire existing products. She will be expected to develop business intelligence reports across a board [sic] spectrum, including market sizing, analysis of competitive landscape, market penetration and revenue potential. The analyst will be expected to monitor and report on market trends, determine the feasibility of proposed new products or market and will provide input to management as well as its related marketing or promotional plan.

The AAO notes that, although that paragraph accurately states the duties of a market research analyst, it contains no explanation of the benefit of those duties to a scrap metal recycler. The petitioner appears to have little use, for instance, for input on whether to introduce new products or retire old products.

The petitioner's president also stated:

The position of Market Research Analyst can only be filled by an individual who holds the minimum of a Bachelor of Business Administration degree or its equivalent in Marketing, Finances [sic] or related fields.

The service center issued an RFE in this matter on March 6, 2009, requesting as follows:

Please submit a detailed statement setting forth the beneficiary's proposed duties and responsibilities. Indicate the percentages of time devoted to each duty on a weekly basis. Also indicate the educational requirements of the proposed position and how the beneficiary's education relates to the position itself.

Please submit evidence showing that in your company and parallel firms in the scrap metal industry, a baccalaureate degree in a specific field of study is a standard minimum requirement for the job offered.

Submit a list of current and former employees of your company who have held this position along with copies of their educational requirements.

Submit an organization chart for your Company with employee job titles and job description.

In response, previous counsel submitted a letter, dated March 30, 2009, on the petitioner's letterhead. That letter indicates that, in the proffered position, the beneficiary would:

- Collect and analyze data to evaluate existing and potential scrap metal markets, study data from New York Metal Exchange, London Metal Exchange.
- Evaluate and monitor competitors and research market conditions or changes in the industry that may affect sales and price.
- Work with the clients buying habits to recommend business objectives, identify research and analysis needs, manage and implement metal products,
- Deliver analysis results that best meet these needs. Communicate with clients to buildup trading relationships.

Again, the benefit of those duties to the petitioner is unclear. Evaluation of existing scrap metal markets, for instance, does not require statistical manipulation. It requires only reference to published, readily available, price data.¹ As to the percentage of the beneficiary's duties that will be devoted to her various duties, the petitioner stated:

- a. 50% of time will be devoted to work with clients' buyers to understand their business objectives, identify research and analysis needs for new markets, manage and implement marketing programs, deliver analysis results to management team on a weekly basis.
- b. 25% of time will be devoted to evaluate and monitor competitors, research market conditions changes in the industry or other macro economic activities that may affect sales of the company.
- c. 15% of time will be devoted to excellent verbal and written communication with buyers, suppliers to develop and sustain stable business relationship; [and]
- d. 10% of time will be devoted to refine and improvement of the current market research methods as well as backing up of data received in proper file management storage (i.e. MS Access Database).

That letter is unsigned and unattributed. It also states that the beneficiary is the petitioner's first market research analyst. As such, the petitioner is unable to demonstrate that it has required other

¹ C.f. <http://www.metalprices.com/>

market research analysts to possess a minimum of a bachelor's degree or the equivalent in business administration, marketing, or finance.

Further, the duties are abstractly described, and their value to the petitioner is not demonstrated. How the beneficiary, who would allegedly spend half of her time "work(ing) with clients' buyers to understand their business objectives" *etc.* would benefit the petitioner's business is not specified.

The organizational chart submitted shows that the petitioner employs, in addition to the beneficiary and the petitioner's president, a bookkeeper and a logistic coordinator. It also shows that the petitioner anticipates that both of them will report to a general manager, although that position is not currently filled. The chart further shows that the petitioner anticipates that the general manager, once the petitioner employs one, would report to the petitioner's president. The other positions contemplated are a warehouse supervisor and warehouse workers, which positions are also unfilled. In summation, although the petitioner claims to anticipate expansion, other than the petitioner's president and the beneficiary, only two people work for the petitioner.

Job descriptions provided show that the minimum requirements for both the petitioner's president and its general manager include a bachelor's degree in marketing, business, or a related field. This suggests that the beneficiary's duties might duplicate some of the duties of those other two workers.

The petitioner provided web content of job listings for market research analysts. One of those positions requires a master's degree in marketing; one requires a bachelor's degree in marketing, consumer research, or a related field; two require a bachelor's degree but do not state that it must be in any specific specialty; one requires a bachelor's degree and prefers that the degree be in mathematics, communications, or a social science. Those educational requirements, considered together, do not support the proposition that a minimum of a bachelor's degree, or the equivalent in a specific specialty, is required for entry into a market research analyst position.

The companies that placed those listings are a corporate research firm; a company which describes itself as a sales/marketing firm, although its name and other information in the announcement suggest it is in the freight business; a company that describes itself as a "Sales – Marketing Construction" firm; a company that describes itself as an "Entertainment Internet – ECommerce Advertising" firm; and a company that describes itself as providing "scientific, engineering, systems integration and technical services and solutions." None of those positions is in the petitioner's industry. The record contains no evidence that any are of the same size as the petitioner. Even if all of those job listings stated that the positions require a minimum of a bachelor's degree or the equivalent in a specific specialty, which they do not, they would be of very little evidentiary weight for the proposition that the proffered position in the instant case is a position in a specialty occupation by virtue of requiring such a degree.

In the decision of denial, the director referred to the Department of Labor's (DOL) *Occupational Outlook Handbook*² (the *Handbook*). The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.

The director stated that, according to the *Handbook*, most market research analyst positions require a bachelor's degree but that some do not.³ The director also noted that market research analysts are typically involved in determining the potential for sales of a product prior to its release, and that most companies do not employ in-house marketing research analysts, as contracting for their services is more cost-effective. The director also stated that employing an in-house marketing research analyst is an even more unlikely scenario for a firm of the petitioner's size. The director concluded that the petitioner is unlikely, therefore, to have specialty occupation employment for the beneficiary for the entire period of requested employment.

On appeal, counsel submitted additional job announcements. One of those announcements was placed by a company seeking a marketing and sales analyst with a minimum of a bachelor's degree in marketing or a related field. The interests of that company include aluminum recycling, but the position is within a manufacturing division of that company. The announcement notes that the company has "over 40 locations around the world." The position is not in the metal recycling industry, and is not with a company even remotely similar to the petitioner in size. That announcement is of little persuasive weight for the proposition that the proffered position requires a minimum of a bachelor's degree or the equivalent in business administration, marketing, or finance and is therefore a position in a specialty occupation.

Another job announcement is for a sales and supply chain analyst for the same company. That announcement states that the position requires experience "in a financial, risk, scrap metal procurement or sales analysis position," which suggests that the position may be in the company's recycling division; but it also states that the position requires prior experience in a manufacturing environment, which suggests that it may not be within the company's recycling division. That announcement states that the position requires a bachelor's degree in economics, finance, statistics, or a related degree, rather than in business administration, marketing, or finance. As was noted above, that company has 40 locations, and is obviously much larger than the petitioner. In summation, that position requires a degree in fields unrelated to those that the petitioner states the proffered position requires, is for a company considerably larger than the petitioner, and whether the position is in the same industry as the petitioner is unclear. That announcement is therefore of little persuasive weight for the proposition that the proffered position requires a minimum of a bachelor's degree or the equivalent in business administration, marketing, or finance and is therefore a position in a specialty occupation.

² The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2010 – 2011 edition available online, accessed August 13, 2010.

³ Market Research Analyst positions are covered in the *Handbook* section headed, "Marketing and Survey Researchers."

Another announcement is for a marketing product specialist for a manufacturer of fluid fittings. It states that the position requires a bachelor's degree, but does not state any specific specialty that the degree must be in. That company's size is unknown to the AAO. Because the announcement is for a position in a different industry, for a company of unknown size, and does not even state that the position requires a minimum of a bachelor's degree or the equivalent in any specific specialty, let alone in business administration, marketing, or finance, that job announcement is not persuasive evidence that the proffered position in the instant case requires a minimum of a bachelor's degree or the equivalent in business administration, marketing, or finance.

Another announcement is for a business systems analyst for a manufacturer of machinery. The job duties of that position as described in the announcement have little similarity to any of the various descriptions provided of the duties of the proffered position in the instant case. The size of that company is unknown. That announcement states that the position requires a bachelor's degree, but does not indicate that the degree must be in any specific field. Because that announcement is for a position with a company in an entirely different industry; with a company of unknown size; and does not state that the position requires a bachelor's degree in any specific specialty, let alone in business administration, marketing, or finance, it is of very little weight in persuading the AAO that the proffered position in the instant case requires a minimum of a bachelor's degree or the equivalent in business administration, marketing, or finance.

Another announcement is for a marketing analyst for a chemical manufacturing company of unknown size and states that the position requires a four-year degree in marketing. Because that announcement is for a position with a company in a different industry, and with a company of unknown size, it is of little weight in convincing the AAO that the proffered position in the instant case requires a minimum of a bachelor's degree or the equivalent in a specific specialty.

Another announcement is for a marketing research analyst for a marketing research company of unknown size and states that the position requires a bachelor's degree in marketing or consumer research. Because it is for a company in a different industry and of unknown size, it is of little evidentiary weight for the proposition that the proffered position in the instant case requires a minimum of a bachelor's degree or the equivalent in a specific specialty.

Another announcement is for a research analyst for a research consultancy of unknown size and states that the position requires a bachelor's or master's degree in statistics, economics, applied mathematics, or a social science/policy field. Because it is for a company in a different industry and of unknown size, and does not require a degree in a field closely related to business administration, marketing, or finance, it is of little evidentiary weight for the proposition that the proffered position is a position in a specialty occupation by virtue of requiring such a degree.

In the brief submitted on appeal counsel relied on the job announcements submitted and the description of market research analyst positions in the *Handbook* as support for the proposition that the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty.

However, none of the job announcements, either those submitted on appeal or those submitted previously, are for companies in the same field and of sizes similar to the petitioner and require a minimum of a bachelor's degree or the equivalent in a business administration, marketing, or finance. They are not persuasive evidence, therefore, that the proffered position is a position in a specialty occupation.

Further, even if those few vacancy announcements had each been for a company of the same size as the petitioner and in the same industry, and each was for a position substantially similar to the proffered position in the instant case, and each had required a minimum of a bachelor's degree or the equivalent in a specific specialty, that would not demonstrate that such a requirement is typical of the industry. While relevant to this proceeding, the job postings submitted by counsel are insufficient to establish the petitioner's degree requirement as an industry norm in parallel positions among similar organizations.

The remaining possible source of support for counsel's position is the *Handbook*. To determine whether a particular job qualifies as a specialty occupation position, however, 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 *Handbook*. 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.

As to the education required of a market research analyst, the *Handbook* states:

A bachelor's degree is the minimum educational requirement for many market and survey research jobs. However, a master's degree is usually required for more technical positions.

In addition to completing courses in business, marketing, and consumer behavior, prospective market and survey researchers should take social science courses, including economics, psychology 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 toward obtaining a full-time position in the field, because much of the 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.

Although that passage suggests that market research analyst positions normally require a minimum of a bachelor's degree, it, like the job announcements submitted, does not suggest that the requisite degree must be in any specific specialty. The *Handbook* does not, therefore, support either the proposition that marketing research analyst positions are necessarily positions in a specialty occupation, or that the particular position proffered in this visa petition is.

Further, the petitioner has stated that a bachelor's degree in business administration, but not in any particular specialty within that wide discipline, would qualify one for the proffered position. The requirement of a bachelor's degree in business administration is inadequate to establish that a position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close corollary between the required specialized studies and the position, the requirement of a degree of generalized title, such as business administration or liberal arts, without further specification, does not establish eligibility. The mere 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 eligibility. See *Matter of Michael Hertz, Assoc.*, 19 I&N Dec. 558, 560 (Comm. 1988).

Further still, the *Handbook* states:

Market research analysts help companies understand what types of products people want, determine who will buy them and at what price. 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.

The duties of the proffered position have been described very differently in various submissions, and those descriptions have been abstractly phrased. The duties described, further, are of no demonstrable use to the petitioner, a metal recycler with a president, the beneficiary, and two other employees.

In the appeal brief, counsel stated:

Established in 2006, Petitioner is specialized in supplying ferrous and non ferrous scrap metal to the [c]ompanies overseas. The Petitioner plays a significant role as a facilitator between the [c]ompanies overseas and the scrap metal industry in the [United States].

As nearly as can be gleaned from that description, the petitioner appears to be in the business of acquiring scrap metal in the United States and selling it to overseas purchasers. That business does not require the kind of statistical manipulation contemplated in the *Handbook* description of market research analyst positions. It appears, rather, to require the ability to determine the price offered by

various potential purchasers and the differing costs of shipping, both of which are a matter of public record, rather than data to be extracted from market research, to determine the profit available in transferring scrap metal to one or another purchaser. Rather than demonstrating that the proffered position requires Pearsonian regression and correlation, for instance, on complex data, the evidence does not indicate what skills performance of the duties of the proffered position would require other than the ability to utilize reference materials and to perform the operation of subtraction. How any more complex statistical manipulation would benefit a scrap metal dealer with only a president and three employees has not been made clear. If the position is more complicated than that, the petitioner has failed to adequately describe the duties and why the position would require any more complex data gathering and calculations.

The petitioner has not demonstrated that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

As was noted above, the vacancy announcements submitted are insufficient to establish an industry-wide standard. The petitioner has not, therefore, demonstrated that a requirement of a minimum of a bachelor's degree in a specific specialty or the equivalent is common to the petitioner's industry in parallel positions among similar companies, and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of the first clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner has stated that the beneficiary is the first person hired to perform the duties of the proffered position and has not, therefore, demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The duties of the proffered position were described in exclusively general terms of generic functions that do not convey uniqueness or relative complexity as aspects of the position requiring a person with at least a bachelor's degree, or the equivalent, in a specific specialty. The generalized statements to which the petitioner limited itself in describing the beneficiary's duties do not develop them with specificity sufficient to establish how their performance could require knowledge usually associated with at least a bachelor's degree or its equivalent in a specific specialty. The petitioner has not demonstrated that the proffered position or its duties are so complex, unique, or specialized that they can only be performed by a person with a minimum of a bachelor's degree in a specific specialty or the equivalent or that performance of the duties is usually associated with a minimum of a bachelor's degree in a specific specialty or the equivalent. The petitioner has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) or the criteria of the second clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO finds that the director was correct in his determination that the record before him failed to establish that the beneficiary would be employed in a specialty occupation, and it also finds that the evidence and argument submitted on appeal have not remedied that failure. Accordingly, the

director's decision to deny the petition shall not be disturbed. The appeal will be dismissed and the petition denied on that basis.

As this adverse determination of the specialty occupation issue is dispositive of the appeal, the AAO will not further address its affirmation of the director's denial of the petition for the petitioner's failure to establish that the beneficiary is qualified for the proffered position.

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.