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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
and Immigration
Services

[Redacted]

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FILE: [Redacted] Office: CALIFORNIA 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,

for *Michael T. Kelly*
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.

On the Form I-129 visa petition the petitioner stated that it is an international sales and manufacturing firm. To employ the beneficiary in what it designates as a marketing and sales manager position, 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 director denied the petition, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. On appeal, counsel asserted that the director's basis for denial was erroneous, and contended that the petitioner satisfied all evidentiary requirements.

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 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.

With the petition counsel submitted a letter, dated April 1, 2009, from the petitioner's general manager, who stated that the beneficiary would "analyze sales statistics and direct marketing activities for Eastern Europe." In a more detailed description, the general manager stated that the beneficiary's duties would include:

- Formulate, direct and coordinate marketing activities and policies to promote products and services, working with advertising and promotion managers.
- Identify, develop, and evaluate marketing strategy.
- Evaluate the financial aspects of product development, such as budgets, expenditures, research, and development appropriations.
- Develop pricing strategies, balancing firm objectives and customer satisfaction.
- Compile lists describing product or service offerings.
- Initiate market research studies and analyze finding.
- Use forecasting and strategic planning to ensure the sale and profitability of products, lines, or services, analyzing business developments and monitoring market trends.
- Coordinate and participate in promotional activities and trade shows, working with developers, advertisers, and production managers, to market products and services.
- Consult with buying personnel to gain advice regarding types of products or services expected to be in demand.
- Determine the demand for products and services offered by a firm and its competitors and identify potential customers.
- Develop pricing strategies with the goal of maximizing the firm's profits or share of the market while ensuring the firm's customers are satisfied.

That one of the duties described is "Determine the demand for products and services offered by a firm and its competitors and identify potential customers" suggests that the petitioner's general manager was providing a generic description of duties of marketing managers in general, rather than a list of the actual duties of the proffered position in this case. The AAO notes that, in fact, each of the duties the petitioner's general manager listed was taken, either verbatim or only slightly paraphrased, from a description of marketing manager duties on the U.S. Department of Labor's (DOL) *Occupational Information Network (O*Net OnLine)*. Providing a generalized and generic description taken from a DOL publication is not evidence of the substantive work and related educational requirements that would be involved in the actual performance of the duties of the proffered position.

Because the petitioner had failed to show that the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty and qualifies as a specialty occupation, the service center, on April 13, 2009, issued a request for evidence in this matter. The service center requested, *inter alia*, a more detailed description of the work the beneficiary would do.

In response, counsel submitted a letter, dated May 21, 2009, in which he reiterated the previous description of the duties of the proffered position, and asserted that *O*Net OnLine* supports the proposition that the proffered position is in a specialty occupation, in that *O*Net* includes it in Job Zone Four, which category it characterizes as requiring considerable preparation.

On November 15, 2010, the AAO accessed the pertinent section of the *O*Net Online* Internet site, which addresses Marketing Manager positions under the Department of Labor's Standard Occupational Classification code of 11-2021.00. *O*Net Online* does, as counsel noted, assign Marketing Managers a Job Zone Four rating, which groups them among occupations of which "most," but not all, "require a four-year bachelor's degree." Further, the *O*Net Online* does not indicate that four-year bachelor's degrees required by Job Zone Four occupations must be in a specific specialty closely related to the requirements of that occupation. Therefore, the *O*Net Online* information is not probative of the proffered position's being a specialty occupation.

The director denied the visa petition on June 2, 2009.

On appeal, counsel again provided the same description of the duties of the proffered position that is included above. Counsel asserted, with little explanation or analysis, that those duties require a minimum of a bachelor's degree. Counsel did not indicate that the requisite bachelor's degree must be in any specific specialty. Counsel's assertions carry no evidentiary weight, as they are not supported by documentary evidence. 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.

The AAO recognizes the DOL's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹ The *Handbook* addresses marketing manager positions in the section entitled Advertising, Marketing, Promotions, Public Relations, and Sales Managers. It describes the duties of marketing managers as follows:

Marketing managers work with advertising and promotion managers to promote the firm's or organization's products and services. With the help of lower level managers, including *product development managers* and *market research managers*, marketing managers estimate the demand for products and services offered by the firm and its competitors and identify potential markets for the firm's products. Marketing managers also develop pricing strategies to help firms maximize profits and market share while ensuring that the firms' customers are satisfied. In collaboration with sales, product development, and other managers, they monitor trends that indicate the need for new products and services and they oversee product development.

¹ 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 November 8, 2010.

As to the educational requirements of marketing manager positions, the *Handbook* states, “For marketing, sales, and promotions management positions, employers often prefer a bachelor’s or master’s degree in business administration with an emphasis on marketing.”

That employers **often prefer** a bachelor’s degree in business administration with an emphasis on marketing when hiring an applicant for, or promoting an employee to, a marketing manager position does not suggest that such a degree is normally a minimum requirement. Therefore, the *Handbook* does not support the proposition that the proffered position is one that normally requires a minimum of a bachelor’s degree or the equivalent in a specific specialty and does not, therefore, support the position that the proffered position qualifies as a specialty occupation. No other evidence in the record demonstrates that marketing manager positions categorically require a minimum of a bachelor’s degree or the equivalent in a specific specialty and are specialty occupation positions.

Further, the description of the duties of the proffered position is abstract. It does not describe the duties of the proffered position with specificity sufficient to demonstrate that their performance requires a bachelor’s degree.

The petitioner has not, therefore, 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).

The petitioner provided no evidence pertinent to the recruiting and hiring practices of similar organizations in the petitioner’s industry. The evidence does not show that such businesses typically employ a marketing manager or, if they do, that a minimum of a bachelor’s degree or the equivalent in a specific specialty is the educational requirement for such positions. 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 record contains no evidence that the petitioner has ever previously hired anyone to fill the proffered position, and the petitioner 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).

As reflected in this decision’s earlier discussion of the generic and generalized nature of the description of the proffered position’s duties, to the extent that they are described in the record the proposed duties do not distinguish the proffered position from marketing and sales manager positions that neither require nor are usually associated with the attainment of at least a bachelor’s degree in a specific specialty. In this regard, the AAO also finds that the evidence in the record of proceeding does not address or convey whatever levels of uniqueness, specialization, and complexity may reside in the proffered position.

Therefore, 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 her determination that the record before her failed to establish that the beneficiary would be employed in a specialty occupation position, and it also finds that the argument submitted on appeal has not remedied that failure. Accordingly, the appeal will be dismissed and the petition denied on this basis.

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.