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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

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **DEC 28 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:



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 director of the California Service Center revoked 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 revoked.

The petitioner is an IT consulting business, which claims to have 50 employees worldwide, seven of whom are in the U.S. It seeks to employ the beneficiary as a market research 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 revoked the petition concluding that the petitioner failed to establish that: (1) the proffered position is a specialty occupation; and (2) the beneficiary is qualified to perform services in a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's Notice of Intent to Revoke (NOIR) the petition; (3) counsel's response to the director's NOIR; (3) the director's revocation letter; and (4) Form I-290B with the petitioner's comments and supporting materials. The AAO reviewed the record in its entirety before reaching its decision.

First, the AAO will examine whether the proffered 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 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 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 petitioner states that it is seeking the beneficiary's services as a market research analyst. In the March 28, 2007 letter of support, the petitioner claimed that the beneficiary's duties would be as follows:

- Strategic market planning, research and analysis;
- Develop marketing tools, promotional materials, product marketing collateral and programs;
- Research market conditions to determine potential sales of the petitioner's product;
- Conduct research on consumer opinions and marketing strategies, collaborating with professionals;
- Perform public relations with media and coordinate events;
- Track projected advertising and circulation-based marketing programs; and
- Manage promotional campaigns.

The petitioner stated the proffered position requires someone with at least a bachelor's degree or the equivalent in marketing, business information systems, or business administration. The petitioner submitted copies of the beneficiary's education documents along with an educational evaluation finding that the beneficiary's education is equivalent to a Bachelor of Business Administration degree from an accredited institution of higher education in the United States.

The director initially approved the H-1B petition on April 14, 2007. Then, on June 6, 2008, the director issued an NOIR stating that USCIS received information that important details regarding the petitioner could

not be verified. The director gave the petitioner 30 days to submit additional documentation regarding the petitioner and its workers, including quarterly wage reports, Forms W-2, business license, company profile, lease, photographs of the premises, and bank statements. The petitioner submitted the documentation requested on July 7, 2008, except for the Forms W-2, which were submitted a few weeks later after a request for an additional extension of time in order to wait for the documentation to arrive from the Internal Revenue Service.

The documentation submitted by the petitioner indicates that the petitioner is doing business in the State of California. However, although the petitioner's address is listed as being in [REDACTED], according to a letter from the property operations manager dated June 23, 2008, the petitioner's actual offices are in [REDACTED] and [REDACTED] while the common areas, including the reception and visitor waiting area as well as the lounge and customer services areas, are shared with other businesses. The letter from the property operations manager also states that the office space of the petitioner's two offices combined is 228 square feet and that the space is part of a managed offices accommodation. The photographs provided are primarily of the common areas that the petitioner shares with other businesses. The photographs of the two individual offices show that they are small and are set up with two people to work in each. The petitioner claims to employ seven workers and now wants to hire the beneficiary as an eighth worker. However, it does not appear that the petitioner has sufficient work space at the location listed in the petition for eight people. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The director revoked the petition on January 12, 2009. The director noted that the petitioner has not demonstrated that the proffered position is actually that of a market research analyst. On appeal, the petitioner argues that the petitioner's business justifies the hiring of a market research analyst.

In the revocation, the director finds that the proffered position is not that of a market research analyst. The AAO agrees with the director that insufficient evidence was provided to demonstrate that the beneficiary would work as a market research analyst on a full-time basis as claimed on the Form I-129. Although the petitioner appears to be doing business in the State of California, the petitioner has not indicated that it has sufficient office space to employ the beneficiary at the location specified in the petition. On appeal, the petitioner has provided evidence of its sales summary in 2008; however, this information indicates that the petitioner's business has declined towards the end of 2008 and, moreover, this sales data was for time periods that occurred after the petition was filed. The petitioner also submitted copies of contracts and invoices on appeal as evidence that its business is large enough to support a full-time market research analyst. However, all of this documentation is dated after the petition was filed on April 3, 2007, and is therefore not relevant to these proceedings. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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). Therefore, the supporting documentation provided on appeal is not relevant to a review of whether the approval of the petition violated 8 C.F.R. § 214.2(h) or involved gross error. *See* 8 C.F.R. § 214.2(h)(11)(iii)(A)(5). The AAO affirms the director's finding that the petitioner has not submitted sufficient documentation to evidence that the proffered position is actually that of a market research analyst.

However, the director also implies in her decision that if the petitioner could demonstrate that the proffered position is that of a market research analyst, the position would then be a specialty occupation according to the Department of Labor's *Occupational Outlook Handbook (Handbook)*. The AAO notes that the 2010-2011 edition of the *Handbook* does not indicate that entry into positions in that occupation normally requires at least a bachelor's degree, or the equivalent, in a specific specialty. While the *Handbook* reports that a baccalaureate degree is the minimum educational requirement for many market and survey research jobs, it does not indicate that the degrees held by such workers must be in a specific specialty that is directly related to market research, as would be required for the occupational category to be recognized as a specialty occupation. This is evident in the range of qualifying degrees indicated in the Significant Points section that introduces the *Handbook's* chapter "Market and Survey Researchers," which states: "Market and survey researchers can enter the occupation with a bachelor's degree, but those with a master's or Ph.D. in marketing or a social science should enjoy the best opportunities."

That the *Handbook* does not indicate that market research analyst positions normally require at least a bachelor's degree in a specific specialty is also evident in the following discussion in the "Training, Other Qualifications, and Advancement" section of its chapter "Market and Survey Researchers," which does not specify a particular major or academic concentration:

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.

Therefore, because the *Handbook* indicates that entry into the market research analyst occupation does not normally require a degree in a specific specialty, even if the petitioner could demonstrate that the proffered position is that of a market research analyst, the *Handbook* does not support the proffered position as being a specialty occupation. As such, the AAO hereby withdraws the director's statements in the revocation decision to the extent they imply or conclude that a Market Research Analyst position qualifies as a specialty occupation.

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)).

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. Even if established by the evidence of record, which it is not, the petitioner's own claimed requirement of a bachelor's degree in marketing, business information systems, or 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 correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558. To prove that a job requires the theoretical and practical application of a body of 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. USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) to require a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 189, 2007 WL 1228792 (C.A. 1 (Puerto Rico) 2007).

The petitioner has also 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 petitioner and counsel did not submit any documentation to evidence that the proffered position requires a degree in a specific specialty. As such, the evidence of record does not refute the *Handbook's* information to the effect that there is a spectrum of degrees acceptable for market research analyst positions, including degrees not in a specific specialty related to market research analysis. Moreover, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than market research analyst positions that can be performed by persons without a specialty degree or its equivalent.

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

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than market-research-analyst positions that are not usually associated with a degree in a specific specialty.

Therefore, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). It is clear then that the initial decision finding otherwise involved gross error and must be revoked pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(5).

Next, the AAO will review the director's finding that the petitioner failed to establish that the beneficiary is qualified to perform services in a specialty occupation. As mentioned previously, the petitioner submitted an education evaluation finding that the beneficiary's foreign education is equivalent to a bachelor's degree in business administration. The director mentions in the denial that the beneficiary's foreign work experience could not be confirmed. However, as the education evaluation is based on the beneficiary's foreign education alone, the beneficiary's experience is not relevant to the question of whether she has the equivalent of a U.S. bachelor's degree in business administration. Therefore, the AAO finds no reason to doubt that the beneficiary has the equivalent of a U.S. bachelor's degree in business administration as claimed in the education evaluation.

Nevertheless, the AAO notes that a degree in business administration alone is insufficient to qualify the beneficiary to perform the services of a specialty occupation, unless the academic courses pursued and knowledge gained is a realistic prerequisite to a particular occupation in the field. The petitioner must demonstrate that the beneficiary obtained knowledge of the particular occupation in which he or she will be employed. *Matter of Ling*, 13 I&N Dec. 35 (Reg. Comm. 1968). However, the petitioner did not submit sufficient evidence regarding the proffered position for the AAO to make an assessment of whether the beneficiary obtained knowledge equivalent to at least a bachelor's degree in a specific specialty required by the particular occupation in which she will be employed. Indeed, it is not clear what the beneficiary will actually be doing given that there is not sufficient space for her to work in the petitioner's offices on a full-time basis. The petitioner makes no reference to nor draws a nexus between a concentration in the beneficiary's knowledge and the vague and generic duties of the proffered position. Therefore, the petitioner has not established that the beneficiary is qualified to perform services in a specialty occupation, and the petition must be revoked for this additional reason.

Accordingly, as the initial approval violated 8 C.F.R. § 214.2(h) and otherwise involved gross error, the AAO shall not disturb the director's revocation of the petition. *See* 8 C.F.R. § 214.2(h)(11)(iii)(A)(5).

Beyond the decision of the director, the AAO finds that the petitioner failed to establish that it had sufficient work for the beneficiary to be employed in a specialty occupation at the time the petition was filed. As mentioned above, the petitioner does not have the office space to employ the beneficiary on a full-time basis. Therefore, the AAO cannot determine whether the petitioner has made a bona fide offer of employment to the beneficiary such that it could be found that it will fully comply with the terms and conditions of employment as attested to in the instant petition. *See generally* 8 C.F.R. § 214.2(h)(4). The AAO thereby concludes that

the petitioner does not qualify as a United States employer as it has failed to establish that it has sufficient work and resources for the beneficiary such that it has demonstrated that it will have and maintain an employer-employee relationship on a full-time basis as claimed in the petition and as required by 8 C.F.R. § 214.2(h)(4)(ii).

The AAO conducts appellate review on a de novo basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The appeal will be dismissed and the petition revoked for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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 revoked.