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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



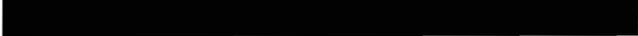
U.S. Citizenship
and Immigration
Services

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FILE: WAC 08 148 52078 Office: CALIFORNIA SERVICE CENTER Date: **FEB 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)

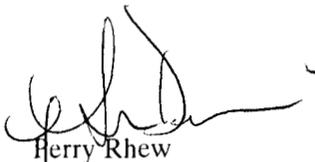
ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).



Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner states that it provides consumer services, that it was established in 1995, that it employs five persons, and that it has a gross annual income of \$550,000. It seeks to employ the beneficiary as a project editor from October 1, 2008 to September 15, 2011. Accordingly, the petitioner endeavors to classify the beneficiary 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).

On October 6, 2008, the director denied the petition, determining that the petitioner had failed to establish that the proffered position is a specialty occupation and that the proffered position was a *bona fide* position.

On appeal, counsel for the petitioner asserts that the director's decision was arbitrary and capricious and that the director committed gross error when describing the position. Counsel asserts that a bachelor's degree is normally required in the industry based on the complexity and uniqueness of the proffered position of "project editor."

The record includes: (1) the Form I-129 and supporting documentation filed with United States Citizenship and Immigration Services (USCIS) on April 14, 2008; (2) the director's request for evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's denial decision; and, (5) the Form I-290B and counsel's brief submitted in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

Although the director could have better articulated the reasons for denying the petition, the AAO affirms the director's ultimate decision. The AAO acknowledges that the director incorrectly referred to the proffered position as an interpreter/translator position in a portion of the decision. The AAO hereby withdraws the director's improper reference, but finds the error harmless in this matter as the petitioner was put on notice that United States Citizenship and Immigration Services (USCIS) had determined that the petitioner's description of the duties of the proffered position did not comprise the duties of a specialty occupation.

The AAO observes that for purposes of the H-1B adjudication, the issue of *bona fide* employment is viewed within the context of whether the petitioner has offered the beneficiary a position that is determined to be a specialty occupation. The AAO will review the evidence of record to determine whether the petitioner has provided sufficient information regarding the nature of the proffered position in conjunction with the nature of the petitioner's business to establish that the proffered position is a specialty occupation. In this matter, upon a *de novo* review, the AAO does not find the evidence of record persuasive in establishing the proffered position as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In its March 17, 2008 letter appended to the petition, the petitioner noted its "principle business activity involves sales of consumer products to hundreds of different retailers and private customers

and to distributors around the country.” The petitioner noted further that its growth required an individual to design its marketing products. The petitioner indicated that the beneficiary’s focus would “be primarily on the editing of our design and computerized graphic services” and that the “function inherently involves specialized knowledge of art and design.” The petitioner added:

The Project Editor will use a variety of print, electronic, and computerized programs to edit and review the materials used for our commercial graphic needs. Using computer software programs, she will ensure [sic] that the overall layout and design of banners, signs and other marketing publications. She also [will] review and edit all promotional displays and marketing brochures for products and services, design distinctive company logos for products and businesses, and develop signs and signage systems-called environmental graphics—for business and government.

The petitioner added further that the “Project Editor reviews and edits the more complex or critical designs for our company.” The petitioner stated: “this position requires a minimum of a Bachelor’s Degree or its equivalent experience.”

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on June 23 2008. In the RFE, the director requested, among other things, a more detailed description of the work to be performed by the beneficiary, including specific job duties, the percentage of time spent on each duty, the level of responsibility and the minimum education, training, and experience necessary to do the job. The director asked that the petitioner explain why the work to be performed required the services of a person who has a college degree in the occupational field. The director also asked for further information regarding the petitioner’s business organization, including company brochures, pamphlets or other printed work that details the products and services provided by the company as well as tax returns.

In a response dated July 29, 2008, counsel for the petitioner provided the same description of the duties of the proffered position. Counsel asserted the Department of Labor’s *Occupational Outlook Handbook (Handbook)* reported that a college degree is normally required for the position of “editor” and that many companies require a degree in English. Counsel provided an excerpt from the *Handbook* on writers and editors. The petitioner did not provide any information regarding the nature of its business. The record includes tax returns and wage and withholding statements issued by OIWA, Inc., a company the record does not show is related to the petitioner.

As observed above, the director denied the petition on October 6, 2008.

On appeal, counsel for the petitioner asserts that the beneficiary’s duties rise to the level of a project editor, that the director committed gross error when using boilerplate language as evidenced by the director’s reference to an interpreter/translator position, and that the *Handbook* and the “Occupational Information Network” (*O*NET*) state that a bachelor’s degree is the minimum formal education required for occupations such as project editors. Counsel contends that the great weight of evidence demonstrates that the beneficiary is fully qualified to perform services in a specialty occupation.

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.

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.

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), 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. To determine whether a particular job qualifies as a specialty occupation, U.S. Citizenship and Immigration Services (USCIS) does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, to determine whether the position qualifies as a specialty occupation. *Defensor v. Meissner*, 201 F. 3d 384.

Preliminarily, the AAO observes that it is not the education of a beneficiary that satisfies the criteria necessary to establish that a position is a specialty occupation. The petitioner in this matter has provided a broad overview of the duties of the petition. Although counsel indicates that the proffered position is an editing position, the duties of the position also include elements of the duties of an individual involved in graphic design. The lack of detail regarding the beneficiary’s actual daily duties, however, precludes a determination that the beneficiary’s actual duties comprise the duties of an editor, an individual involved in graphic design, or some other occupation. General statements and vague descriptions of an occupation do not establish that a specific proffered position is a specialty occupation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190

(Reg. Comm. 1972)). Upon review of the evidence in the record the AAO does not find the evidence of record persuasive in establishing the proffered position is a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO routinely consults the *Handbook* for information about the duties and educational requirements of particular occupations as one method to determine whether a baccalaureate or higher degree or its equivalent in a specific discipline is normally the minimum requirement for entry into a particular position. The 2010-2011 edition of the *Handbook* discusses the occupation of a graphic designer as follows:

Graphic designers—or *graphic artists*—plan, analyze, and create visual solutions to communications problems. They find the most effective way to get messages across in print and electronic media using color, type, illustration, photography, animation, and various print and layout techniques. Graphic designers develop the overall layout and production design of magazines, newspapers, journals, corporate reports, and other publications. They also produce promotional displays, packaging, and marketing brochures for products and services, design distinctive logos for products and businesses, and develop signs and signage systems—called environmental graphics—for business and government. An increasing number of graphic designers also develop material for Internet Web pages, interactive media, and multimedia projects. Graphic designers also may produce the credits that appear before and after television programs and movies.

The petitioner has borrowed liberally from the phraseology used in the *Handbook* to discuss the proffered position. For example, when discussing the occupation of graphic designer, the *Handbook* indicates that graphic designers produce promotional displays, packaging, and marketing brochures for products and services, design distinctive logos for products and businesses, and develop signs and signage systems—called environmental graphics—for business and government. The petitioner uses this same phrase when describing the duties of the proffered position. However, a petitioner may not repeat portions of the generalized descriptions found in the *Handbook* to describe the duties of a specialty occupation position. Such a generalized description is necessary when defining the range of duties that may be performed within an occupation, but cannot be relied upon by a petitioner when discussing the duties attached to specific employment. In establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in relation to its particular business interests. In the instant matter, the petitioner has offered no description of the duties of its proffered position beyond the generalized outline it provided at the time of filing. It has not detailed the actual work to be performed for this position rather than describing the occupation.

Of further note, regarding the education and training of graphic designers, the *Handbook* reports:

Education and training. A bachelor's degree in graphic design is usually required for most entry-level and advanced graphic design positions. Bachelor's degree programs in fine arts or graphic design are offered at many colleges, universities, and private design schools. Most curriculums include studio art, principles of design,

computerized design, commercial graphics production, printing techniques, and Web site design. In addition to design courses, a liberal arts education that includes courses in art history, writing, psychology, sociology, foreign languages and cultural studies, marketing, and business are useful in helping designers work effectively.

Associate degrees and certificates in graphic design also are available from 2-year and 3-year professional schools, and graduates of these programs normally qualify as assistants to graphic designers or for positions requiring technical skills only. Creative individuals who wish to pursue a career in graphic design—and who already possess a bachelor's degree in another field—can complete a 2-year or 3-year program in graphic design to learn the technical requirements.

In this matter, there is nothing in the description of duties that directly relate the duties to specific tasks for the petitioner. It appears from the petitioner's general description that the extent of the beneficiary's work would be a review or editing of promotional materials, not designing the promotional materials. Thus, the proffered position does not include the elements of a graphic designer's occupation that necessitate a bachelor's or higher degree in a specific field, such as graphic design; rather the duties require at most some technical oversight skills, skills that may be attained through a variety of paths other than a four-year university-level education in a specific discipline.

The AAO, for the sake of thoroughness, has also reviewed the *Handbook's* discussion of writers and editors. The *Handbook* reports:

Editors review, rewrite, and edit the work of writers. They also may do original writing. An editor's responsibilities vary with the employer and type and level of editorial position held. Editorial duties may include planning the content of books, journals, magazines, and other general-interest publications. Editors also review story ideas proposed by staff and freelance writers then decide what material will appeal to readers. They review and edit drafts of books and articles, offer comments to improve the work, and suggest possible titles. In addition, they may oversee the production of publications. In the book-publishing industry, an editor's primary responsibility is to review proposals for books and decide whether to buy the publication rights from the author.

The petitioner's general description of duties does not correspond and is not even as detailed as the overview of an "editing" occupation set out in the *Handbook*. Neither the petitioner nor counsel has described how the proposed duties of the proffered position correspond to an editor's occupation that would require a bachelor's degree in a specific discipline. The description at most indicates that the beneficiary would review general promotional materials. However, reviewing and correcting errors on promotional materials, while requiring an understanding of grammar and the recognition of typographical errors, is insufficient to establish the proffered position as a specialty occupation. Moreover, the AAO observes that the *Handbook* does not indicate that a degree held by an editor must be in a specific specialty that is directly related to editing, as would be required for the occupational category to be recognized as a specialty occupation. Rather the *Handbook* reports that

although a bachelor's degree or higher is typically needed for a job as an author, writer, or editor, the degree may be in a variety of fields for those individuals who demonstrate good writing skills. It is the variety of fields dependent upon the nature of the specific position that precludes a determination that an "editor's" occupation is a specialty occupation.

The AAO acknowledges counsel's reference to the *O*NET*; however, the AAO does not consider the *O*NET* to be a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. The *O*NET* provides only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. An SVP or Job Zone rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. Again, the record does not demonstrate that the proffered position would require the beneficiary to have attained a bachelor's degree or its equivalent in a specific specialty.

In sum, the petitioner in this matter has provided a broad description of the duties of the proffered position borrowing liberally from the phraseology employed in the *Handbook* regarding the occupation of a graphic designer and indicating that the beneficiary will review or edit the designed product. Although the petitioner has labeled the proffered position a project editor, the petitioner has not explained or substantiated that the actual duties of the position are the duties of an editor as detailed in the *Handbook*. The AAO is unable to determine from the general description of the duties whether the position would require a bachelor's degree in graphic art, an associate's degree in design, a technical degree in drafting, a degree in business, or some other general degree. As the description provides only an overview of the expected duties of the beneficiary, the petitioner has not established that the position meets any of the requirements for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In that the record offers no meaningful job description, the petitioner may not establish the position's duties as parallel to any degreed positions within similar organizations in its industry or distinguish the position as more complex or unique than similar, but non-degreed, employment, as required by alternate prongs of the second criterion. The AAO also observes that the petitioner did not provide any evidence of an industry standard, such as whether the industry's professional association has made a degree in a specific discipline 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)). Similarly, the record includes no documentation that distinguishes the proffered position from similar but non-degreed employment. The petitioner has failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO acknowledges counsel's statement that the petitioner has not employed an individual in the proffered position. As such, the AAO is unable to review the petitioner's past employment practices to determine that the petitioner normally requires a degree or its equivalent for the position.

Moreover, the petitioner's desire to employ an individual with a bachelor's degree does not establish that the position is a specialty occupation. As referenced above, the critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results. If USCIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. Accordingly, the AAO finds that proffered position cannot be established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The AAO now turns to the fourth criterion and whether the petitioner has established that the duties of the proffered position are sufficiently specialized and complex to require knowledge usually associated with the attainment of a baccalaureate degree in a specific field of study and, therefore, establish the proffered position as a specialty occupation under the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner has not provided a comprehensive description of duties of the position that demonstrates that the position is one that requires a bachelor's degree or its equivalent in a specific discipline. The duties described are general and fail to include sufficient information to determine that such a position requires specialized and complex knowledge usually associated with the attainment of a baccalaureate degree in a specific discipline. The petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petitioner has not established that the proffered position is a specialty occupation.

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

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