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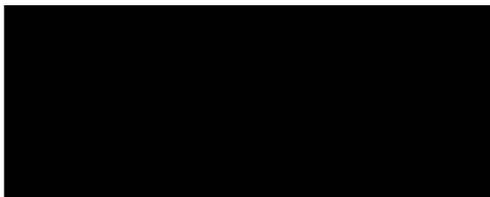
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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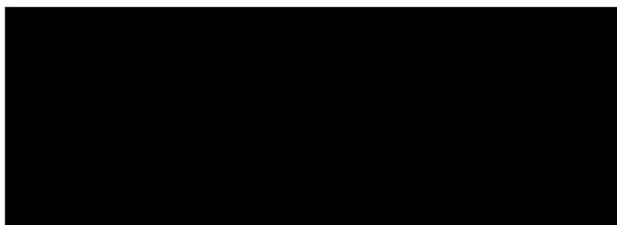
FILE: WAC 08 149 52726 Office: CALIFORNIA SERVICE CENTER Date: **FEB 24 2010**

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.

The petitioner describes itself as a distributor of dental supplies and indicates that it currently employs four persons. It seeks to employ the beneficiary as a web designer. The petitioner, therefore, 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).

The director denied the petition because the petitioner failed to establish that the proffered position qualifies as a specialty occupation.

On appeal, counsel states, in part, that the petitioner has satisfied three criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). Counsel states that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position, that the degree requirement is common to the industry in parallel positions among similar organizations, and that 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. Counsel states further that the proposed duties “are far beyond the duties of the web designer described in the [Department of Labor’s (DOL) *Occupational Outlook Handbook (Handbook)*].”

On the I-129 petition filed on April 14, 2008, the petitioner described its business as “Marketing of Dental Supplies.”

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a request for evidence (RFE) on May 12, 2008. In the request, the director asked the petitioner to submit additional evidence to show that the proffered position meets one or more of the four criteria described in 8 C.F.R. § 214.2(h)(4)(iii)(A).

In a letter dated August 1, 2008 from counsel submitted in response to the director’s RFE, counsel stated that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position, that the degree requirement is common to the industry in parallel positions among similar organizations, and that 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 supporting documentation, counsel submitted an expert opinion evaluation regarding the beneficiary’s educational and work background, a letter from the petitioner, two letters from similar companies, and job advertisements.

On August 26, 2008, the director denied the petition. The director found that the petitioner had failed to establish that the proffered position qualifies as a specialty occupation.

Section 214(i)(1) of the Immigration and Nationality Act (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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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 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 are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201

F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

In the March 24, 2008 letter submitted in support of the petition, the petitioner described the beneficiary’s responsibility as designing and building the petitioner’s website for marketing dental supplies worldwide. The proposed duties are paraphrased as follows: analyze the petitioner’s needs to determine technical requirements; design and build the petitioner’s website; develop and document style guidelines for website content; develop databases that support web applications; design and implement website security measures such as firewalls or message encryption; create searchable indices for web page content; develop website maps, application models, image templates, or page templates that meet project goals and user needs; establish appropriate server directory trees; identify and correct problems uncovered by testing or customer feedback; incorporate technical and/or legal considerations into web design plans, such as budgets, equipment, performance requirements, accessibility, and privacy; perform and/or direct website updates; and provide clear, detailed descriptions of the website specifications.

According to counsel, the petitioner has satisfied three criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). Counsel states that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position, that the degree requirement is common to the industry in parallel positions among similar organizations, and that 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. Counsel states further that the proposed duties are more complex than the duties of the web designer described in the *Handbook*. Accordingly, the AAO will address these three criteria only.

Upon review of the record, the petitioner has not established these three criteria. Therefore, the proffered position is not a specialty occupation.

The AAO turns first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. A review of the Computer Network, Systems, and Database Administrators occupation category in the *Handbook*, 2010-11 edition, finds a discussion of various

computer positions including security specialists and web developer positions. Regarding the training requirements for these positions, the DOL states, in part: “Applicants for security specialist and Web developer positions generally need a bachelor’s degree in a computer-related field, but for some positions, related experience and certification may be adequate.”

In this matter, the petitioner has not provided a definitive statement of duties associated with the proposed position that substantiates that the incumbent in the position must possess a bachelor’s degree in a specific discipline. As referenced above, a web designer/developer may or may not require a bachelor’s degree in a specific discipline, depending in large part upon the nature of the company’s business and its projects. Information on the petition that was signed on March 25, 2008, reflects that the petitioner is in the business of marketing dental supplies, was established in 1986, and has four employees and a gross annual income of \$1.6 million. The record, however, contains no evidence, such as federal income tax returns, to support the petitioner’s claims on the petition. Going on record without supporting documentary evidence is not sufficient for the purpose 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)). Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(I).

Regarding parallel positions in the petitioner’s industry, the record contains Internet job postings for web designers/developers. The listings provided either fail to offer meaningful descriptions of the positions advertised or rely on duties unlike the duties listed by the petitioner. The businesses described in the advertisements are not similar to the petitioner’s dental supplies distributor/marketing business. Neither do these listings indicate that the businesses publishing the advertisements are similar to the petitioner in size, number of employees, or level of revenue. Accordingly the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations.

The record also contains two letters, the first of which is from [REDACTED], the “Network Systems Administrator at a very large company,” who asserts that he is familiar with the hiring practices “for computer and industry related individuals.” [REDACTED] states, in part, as follows: “This [Web Designer] position requires both a theoretical and practical application of a body of higher specialized knowledge, which would require that a qualified candidate possess a bachelor’s degree or the equivalent.” The second letter is from [REDACTED], the director of a business that designs and develops web designs for a number of major corporate and business clients, who asserts that, based upon his more than ten years of experience in the field and years of education, “a web designer is a highly professional position, one that requires a standard both in our industry in specific and by occupation in general of at least baccalaureate level of university ‘educational’ or equivalent for the successful performance and practice of this specialty occupation.” The writers, however, do not provide any evidence in support of their assertions or rely on industry surveys, data or other documentation to reach the conclusion that the proffered position requires a computer-related bachelor’s degree. Again, 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)). The *Handbook*, which is a compilation of results of nationwide industry questionnaires, surveys and personal interviews by the DOL, does not indicate that a specific degree is normally the *minimum requirement for entry into the field*. The AAO may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

The record does not include sufficient evidence from firms, individuals, or professional associations regarding an industry standard. In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. In the instant petition, the petitioner has submitted insufficient documentation to distinguish the proffered position from similar *but non-degreed employment* as a web designer/developer. Moreover, the evidence of record about the particular position that is the subject of this petition does not establish how aspects of the position, alone or in combination, make it so unique or complex that it can be performed only by a person with a degree in a specific specialty. 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).

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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.

Counsel states on appeal that the proposed duties “are far beyond the duties of the web designer described in the [*Handbook*].” The petitioner, however, has not established that the proposed duties exceed in scope, specialization, or complexity from those usually performed by a web designer/developer, an occupational category that does not normally require a baccalaureate or higher degree in a specific specialty. As noted in the *Handbook*, for some security specialist and web developer positions, related experience and certification may be adequate. To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation or that the beneficiary is coming to the United States to perform services in a specialty occupation as required by the statute at section 101(a)(15)(H)(i)(b) of the Act; 8 U.S.C. § 1101(a)(15)(H)(i)(b). For these reasons, the petition may not be approved.

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.