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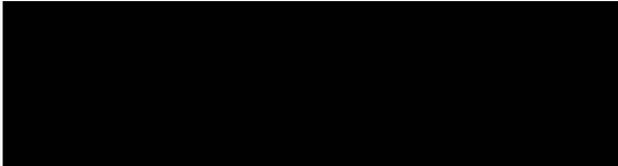
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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FILE: WAC 08 007 50146 Office: CALIFORNIA SERVICE CENTER Date: **JAN 05 2010**

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, as required by 8 C.F.R. 103.5(a)(1)(i).

for 
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 is engaged in the retail and wholesale of Nishikigoi (Koi) fish and seeks to employ the beneficiary as its assistant manager of sales/marketing. Therefore, the petitioner endeavors to extend the classification of 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).

In denying the petition, the director determined that the proffered position did not meet any of the criteria for classification as a specialty occupation.

On appeal, counsel contends that, contrary to the director's decision, the proffered position is a specialty occupation position within the meaning of section 101(a)(15)(H)(i)(b) of the Act, and contends that the director's findings to the contrary were erroneous. No new or additional evidence is submitted in support of the appeal.

As will be discussed below, the AAO finds that the petitioner has not established that the proffered position is a specialty occupation. Accordingly, the director's decision to deny the petition shall not be disturbed. Counsel's assertions on appeal about the proffered position satisfying specialty-occupation criteria are noted; but they merit no weight, as they are not supported by documentary evidence in the record. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO bases its decision upon its consideration of the entire record of proceeding before it, 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 matters submitted in 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.

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 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 a letter of support dated September 27, 2007, counsel for the petitioner indicated that the beneficiary would be employed in the position of Assistant Manager of Sales/Marketing for the petitioner’s company, which was established in 2001. Counsel described the position offered to the beneficiary as follows:

The Minimum requirements and the Duties and Responsibilities of the position are as follows:

- A Bachelors degree in Management/Business Administration
- Previous Business administration duties
- Sales/Marketing Expertise
- Good interpersonal skills
- Excellent oral and written communications skills
- Bilingual: Japanese and English

The duties and responsibilities of the Assistant Manager of Sales/Marketing include but are not limited to the following:

- Provide administrative support for upper-level management and the president
- Conduct market research for effective promotion in the United States
- Produce sales reports and prepare company budget
- Analyze sales reports to prepare purchase planning reports
- Plan and conduct KOI exhibitions
- Analyze financial reports

Regarding the beneficiary's qualifications, counsel stated that she holds a bachelor's degree in English Literature and completed an International Management Program, the combination of which have been deemed to be equivalent to a United States bachelor's degree in business administration.

The director found the initial evidence insufficient to establish eligibility in this matter, and issued an RFE on November 30, 2007. The director requested additional evidence demonstrating that the position was a specialty occupation, and further requested additional details regarding the petitioner's business. In a response dated February 21, 2008, the petitioner responded to the director's requests. The petitioner provided the following detailed account of a typical day for the beneficiary:

7:30 to 8:00 a.m. Prepare for daily sales meeting: summarize auction results and customer behavior.

8:00 to 8:30 a.m. Management Sales Meeting (the president, Chairman, Office Manager and [the beneficiary] attend the meetings). 1) The management team discusses the results of the Koi auction and the theme for the following auction; 2) Discuss how to promote better and timely sales – this is very important given the difficulty in controlling an inventory of live fish. [Footnote omitted]

8:30 to 15:00: Event planning and coordination. [The beneficiary] is in charge of the employer's first Koi exhibit/show/competition, e.g., planning, organizing, preparing press releases and marketing materials to promote Koi in the U.S., etc.

15:00 to 17:00: Set up auction. [The beneficiary] sets up the online auction using the company's system, creates banners and/or advertises in newsletter.

The AAO notes that the February 21, 2008 letter neither explains nor is accompanied by documentary evidence showing the particular methodologies and analytical tools that the beneficiary will employ require or are usually associated with at least a bachelor's degree in a specific specialty. The AAO also finds that the beneficiary's duties are so abstractly stated in the letter and supporting documents that they do not convey the specific nature of the work that he would actually perform and, therefore, do not indicate the nature and level of education that the work requires.

As evident in the descriptions of the beneficiary's proposed work above, the petitioner describes the proffered position exclusively by generalized statements of broad functions. These statements do not convey whatever applications of highly specialized knowledge in a specific specialty the functions might entail when performed in the context of the petitioner's business.

To make its determination whether the employment just described qualifies as a specialty occupation, the AAO first turns to the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into

the particular position; and a degree requirement is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors considered by USCIS when determining these criteria include: whether the Department of Labor's (DOL) *Occupational Outlook Handbook (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 AAO notes that the positions of both sales and marketing managers is included under the general heading of "Advertising, Marketing, Promotions, Public Relations, and Sales Managers." The 2006-07 edition of the *Handbook* describes the position of sales manager and marketing manager in relevant part as follows:

The objective of any firm is to market and sell its products or services profitably. In small firms, the owner or chief executive officer might assume all advertising, promotions, marketing, sales, and public relations responsibilities. In large firms, which may offer numerous products and services nationally or even worldwide, an executive vice president directs overall advertising, promotions, marketing, sales, and public relations policies. (Executive vice presidents are included in the *Handbook* statement on top executives.) Advertising, marketing, promotions, public relations, and sales managers coordinate the market research, marketing strategy, sales, advertising, promotion, pricing, product development, and public relations activities.

* * *

Marketing managers develop the firm's marketing strategy in detail. With the help of subordinates, including *product development managers* and *market research managers*, they estimate the demand for products and services offered by the firm and its competitors. In addition, they identify potential markets—for example, business firms, wholesalers, retailers, government, or the general public. Marketing managers develop pricing strategy to help firms maximize profits and market share while ensuring that the firm's 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. Marketing managers work with advertising and promotion managers to promote the firm's products and services and to attract potential users.

* * *

Sales managers direct the firm's sales program. They assign sales territories, set goals, and establish training programs for the sales representatives. (See the *Handbook* statement

on sales representatives, wholesale and manufacturing.) Sales managers advise the sales representatives on ways to improve their sales performance. In large, multiproduct firms, they oversee regional and local sales managers and their staffs. Sales managers maintain contact with dealers and distributors. They analyze sales statistics gathered by their staffs to determine sales potential and inventory requirements and to monitor customers' preferences. Such information is vital in the development of products and the maximization of profits.

Even if the generic statements that comprise the information about the proffered position and its duties were sufficient to perfectly align the position with the broad occupational category of Advertising, Marketing, Promotions, Public Relations, and Sales Managers, the proffered position of sales/marketing manager has not been established as a specialty occupation.

Regarding the education requirements for entry into the position of a sales/marketing manager, the 2006-2007 edition of the *Handbook* does not indicate that sales or marketing managers normally require at least a bachelor's degree in a specific specialty. The discussion in the "Training, Other Qualifications, and Advancement" section of this chapter provides:

A wide range of educational backgrounds is suitable for entry into advertising, marketing, promotions, public relations, and sales managerial jobs, but many employers prefer those with experience in related occupations plus a broad liberal arts background. A bachelor's degree in sociology, psychology, literature, journalism, or philosophy, among other subjects, is acceptable. However, requirements vary, depending upon the particular job.

For marketing, sales, and promotions management positions, some employers prefer a bachelor's or master's degree in business administration with an emphasis on marketing. Courses in business law, economics, accounting, finance, mathematics, and statistics are advantageous. In highly technical industries, such as computer and electronics manufacturing, a bachelor's degree in engineering or science, combined with a master's degree in business administration, is preferred.

Based on this discussion, it is apparent that employers of sales managers, or even marketing managers, do not normally require at least a bachelor's degree, or its equivalent, in a specific specialty. The fact that a degree in business administration is preferred does not equate to "required" for purposes of this analysis.

As the *Handbook* indicates that entry into the sales manager or marketing manager occupation may occur with a degree with coursework in the listed subjects but without a specific course of study leading to a specific degree in the field, sales or marketing manager positions do not categorically qualify under the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) as read in the context of the statutory and regulatory definitions of specialty occupation. This information from the *Handbook* does not by itself preclude a particular sales or marketing manager position from qualifying as a

specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I). However, it is incumbent on the petitioner to establish that its particular position 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. This the petitioner has failed to do.

The AAO finds that the evidence of record does not indicate that the particular position before it is one that normally requires at least a bachelor's degree, or the equivalent, in a specific specialty. In this regard, the AAO notes that, as reflected in its earlier discussions about the examples of the petitioner's generalized descriptions of the duties of the proffered position, the record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires a specialty occupation's level of knowledge in a specific specialty. The record's evidence is not sufficiently specific and concrete to distinguish the proffered position from positions in the sales or marketing manager occupational category that do not normally require at least a bachelor's degree, or its equivalent, in a specific specialty.

As the evidence of record does not establish that the particular position proffered here 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)(I).

The AAO now turns to a consideration of whether the petitioner may qualify its position under the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) -- a specific degree requirement is common to the industry in parallel positions among similar organizations, or the proffered position is so complex or unique that it can be performed only by an individual with a degree in the specific specialty.

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)).

As already discussed, 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. Also, there are no submissions from professional associations, individuals, or firms in the petitioner's industry. It is noted, however, the counsel submitted copies of job advertisements from www.monster.com in support of the contention that the degree requirement for an assistant manager at retail or wholesale stores is not uncommon in the industry.

The first job posting is for the position of [REDACTED] the nation's leading pet retailer. This position requires a bachelor's degree from a four year college or university, but does not state that a degree in a specific specialty is required. The second posting is for the position [REDACTED] a prepaid wireless distributor.

This posting requires a bachelor's degree or equivalent work experience, but does not require a degree in a specific specialty. Finally, the petitioner submits a posting for the position of [REDACTED] a women's retail boutique. The posting requires a bachelor's degree in the heading, but in the body of the advertisement states that a college degree is preferred. Again, this is not equivalent to requiring a bachelor's degree in a specific specialty.

Moreover, as noted by the director, the three postings submitted above are not for parallel positions from firms in the petitioner's industry. A women's retail boutique and a wireless provider are not akin to the retail and wholesale of Koi fish. Moreover, while PetSmart is a pet store specializing in the retail sale of pet products, including live fish, PetSmart is a national chain retailer whereas the petitioner is an individual wholesale business which operates by way of auction more than traditional retail sale. Nevertheless, none of these postings requires a degree in a specific specialty. Therefore, the petitioner cannot establish its position as a specialty occupation under the criterion's first prong.

With regard to the requirements of the second prong, the AAO finds nothing in the record to establish that the position is either so complex or unique that it can be performed only by a degreed individual. The evidence of record does not refute the *Handbook's* information to the effect that there is a spectrum of degrees acceptable for sales/marketing manager positions, including degrees not in a specific specialty related to sales and marketing. As evident in the earlier discussion about the generalized descriptions of the proffered position and its duties, 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.

Additionally, the petitioner 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. Therefore, 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. As reflected in the earlier discussion of the limited information about the proffered duties, they 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.

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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