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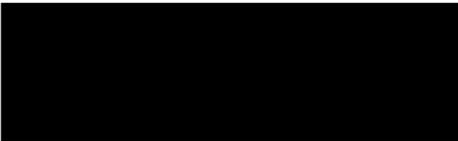
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U.S. Department of Homeland Security  
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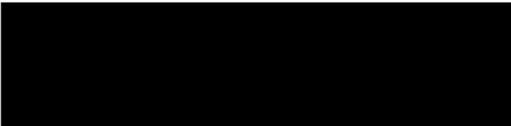


FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JUN 01 2010

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 \$585. 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 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 an insurance agency. To employ the beneficiary in a position it designates as a promotions manager, the petitioner endeavors to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that the petitioner would employ the beneficiary in a specialty occupation position. On appeal, counsel asserted that the director's basis for denial was erroneous, and contended that the petitioner satisfied all evidentiary requirements. In support of these contentions, counsel submitted a brief and additional evidence.

The AAO bases its decision upon its review of the entire record of proceedings, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief and attached exhibits in support of the appeal.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation. The issue before the AAO is whether the petitioner has provided evidence sufficient to establish that it would be employing the beneficiary in a specialty occupation position.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which (1) requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which (2) requires the

attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.”

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in a particular position meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5<sup>th</sup> 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.

To determine whether a particular job qualifies as a specialty occupation position, the AAO does not solely rely on the job title or the extent to which the petitioner's descriptions of the position and its underlying duties correspond to occupational descriptions in the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*). Critical factors for consideration are the extent of the evidence about specific duties of the proffered position and about the particular business matters upon which the duties are to be performed. In this pursuit, the AAO must examine the evidence about the substantive work that the alien will likely perform for the entity or entities ultimately determining the work's content.

In a letter, dated March 20, 2008, submitted with the visa petition, the petitioner's owner<sup>1</sup> stated that the petitioner ". . . requires extensive research into the effectiveness of various marketing techniques and ways to creatively reach target audiences" in order to ". . . extend its marketing and promotional efforts as well as seek alternative business ventures," and that the petitioner ". . . requires that these efforts be the responsibility of the Promotions Manager." That letter also stated that the petitioner anticipated establishing a telemarketing center in Peru. That letter indicates that the beneficiary has a bachelor's degree in business administration, but did not indicate that the proffered position requires a bachelor's degree in any specific specialty, nor even any bachelor's degree at all.

In an RFE dated April 25, 2008 the service center requested a more detailed description of the duties of the proffered position and requested that the petitioner explain why the position requires a bachelor's degree or the equivalent.

In response, counsel submitted a letter, dated July 15, 2008, in which she made various assertions pertinent to the proffered position. The AAO notes, initially, that assertions of counsel are not, in themselves, evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Unsupported assertions of counsel are, therefore, insufficient to sustain the petitioner's burden of proof. Counsel's assertions will be considered to the extent that they may be arguments based on the evidence and/or the law, and disregarded otherwise.

Counsel asserted that the beneficiary would familiarize herself with the petitioner's product line and be responsible for marketing to various types of clients, which would entail communicating with the clients via mailers, promotional materials, telephone calls, client meetings, and potentially through community outreach activities in the Latino community.

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<sup>1</sup> Some confusion may result from the fact that the petitioner is an insurance agency. The company name is [REDACTED] Tax returns submitted show that it is owned [REDACTED] In this decision the AAO will use the name [REDACTED] to mean the individual, and [REDACTED] to indicate the sole proprietorship. [REDACTED] signed the letter described above.

Counsel also stated that 70% of the beneficiary's time would be spent ". . . further implementing the telemarketing and call center in Lima, Peru." Counsel stated that her duties pertinent to the call center would be locating office space, hiring employees, establishing the necessary network, and monitoring the results of her efforts. The AAO notes that no such duties were included in the description of the beneficiary's anticipated duties provided in the petitioner's owner's March 20, 2008 letter.

Counsel asserted that performing those duties requires knowledge of marketing techniques and the effectiveness of promotions, knowledge of budget and cost control, and knowledge of international business and communications. Counsel stated that the minimum education that would impart the knowledge necessary to acquit the duties of the proffered position is a bachelor's degree. Although counsel mentioned business and marketing classes, she did not state any specific specialty that the requisite degree must be in.

Even if counsel's assertions were evidence, or supported by corroborating evidence, they would not demonstrate that the proffered position requires a minimum of a bachelor's degree in a specific specialty or the equivalent, and would be insufficient to show that the proffered position qualifies as a position in a specialty occupation. The decision of denial, issued July 25, 2008, noted that insufficiency and denied the visa petition.

On appeal, counsel provided a letter, dated September 10, 2008, from the petitioner's owner. The petitioner's owner stated that the employee in the proffered position must (1) understand the intricacies of State Farm [Insurance Company] products, (2) understand the marketing of State Farm agencies, (3) understand business in general, (4) be capable of forming a corporation in compliance with Peruvian law, (5) understand the cultural differences between the United States Latino market and Peru, (6) be capable of training others in technology, language differences, and insurance products, (7) be capable of managing a company budget independently, (8) be capable of supervising others at a distance using technology, and (9) be capable of "Maintaining accountability of production."

Again, the petitioner's owner did not state that the proffered position requires a minimum of a bachelor's degree in a specific specialty or the equivalent, nor even that it has any educational requirements at all, beyond the ability to acquit the responsibilities listed above.

Counsel also provided two vacancy announcements. One is for an "Inside Sales Manager/Call Center Manager/Telemarketing Manager for AmeriFile of Saint Louis, Missouri."<sup>2</sup> That announcement lists the duties of the position and various personal qualities a successful applicant must possess. As to the requisite education, it states, "Bachelor's degree required," but does not indicate that the requisite degree must be in any specific specialty. Even if AmeriFile were found to be a company similar to the petitioner, and even if the duties of the position at AmeriFile were

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<sup>2</sup> Although the heading of that vacancy announcement stated that the company that placed the announcement wished to remain anonymous, the company is named three times in the announcement.

identical to those of the proffered position, that announcement would provide no support for the proposition that the proffered position requires a bachelor's degree in a specific specialty or the equivalent.

The identity of the company that placed the second announcement was not revealed. As such, whether it is similar to the petitioner, in size or otherwise, is unknown to the AAO. That announcement is for a Project Manager, Implementation. The heading of that vacancy announcement states that the position requires a Bachelor of Science degree in information technology. The body of the announcement states that the position requires a bachelor's degree in computer science, business, or a related field.

If that position described in that announcement requires a bachelor's degree in information technology, then the announcement does not support the petitioner's case. The beneficiary's degree is in "Administration." The record contains an educational evaluation that asserts that her degree is equivalent to a bachelor's in business administration degree from an accredited college or university in the United States. The record contains no evidence, nor even an allegation, that it is equivalent to a degree in information technology or a closely-related field. If the proffered position requires an information technology degree, then the beneficiary is apparently unqualified to hold the proffered position.

If, in the alternative, that announcement is taken to mean that the position announced requires a degree either in computer science, or business management, or in some other field related to one or the other, then the position announced does not require a degree in a specific specialty, but rather a degree from among a disparate range of possibilities. In that event, the position announced does not qualify as a specialty occupation. In that event, the announcement still does not support the proposition that the proffered position, which counsel appears to assert is similar to the position described in the announcement provided, is itself a position in a specialty occupation.

In the appeal brief, counsel stated that the petitioner has never previously employed anyone in the proffered position or in a similar position. Counsel stated that establishing and managing a telemarketing center in Peru requires (1) the ability to create a business plan, (2) an understanding of the regulations governing international communications, foreign labor, and customs; (3) the ability to create a budget; (4) the ability to hire and manage personnel, (5) and the ability to facilitate the flow of information from Peru to the United States. Counsel stated that only an individual with a bachelor's degree would have this foundation of background knowledge. Again, the AAO notes that counsel's assertions are of no evidentiary weight in themselves, but will only be considered to the extent that they constitute argument based on the law or evidence in the record.

Counsel did not even allege, however, that the proffered position requires a bachelor's degree or the equivalent **in a specific specialty** or, if it does, what that specific specialty might be. The AAO notes again that the beneficiary's degree is alleged to be equivalent to a degree in business administration.

A degree in business administration is not required in order to prepare a budget for a small company. The ability to hire and supervise personnel may be learned in a business administration curriculum, or it may be learned elsewhere. The record contains no indication that an understanding of international communications, foreign labor, and customs may only be obtained by studies in business administration leading to a U.S. bachelor's degree or its equivalent or through education, training, and/or experience equivalent to such a degree. The record fails to establish that the ability to facilitate the flow of information from Peru to the United States is manifestly related to a degree in business administration. The duties described by counsel do not demonstrate that the proffered position requires a bachelor's degree or the equivalent in any specific specialty, and do not even suggest that it requires a bachelor's degree or the equivalent in business administration.<sup>3</sup>

In summation, the petitioner is obliged to show that the position qualifies as a position in a specialty occupation pursuant to one of the subsections of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is set out above.

The petitioner has not demonstrated that a minimum of a bachelor's degree in a specific specialty is a requirement for entry into the particular position.<sup>4</sup> The petitioner has not demonstrated that the proffered position qualifies as a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The petitioner has not shown that a requirement of a minimum of a bachelor's degree in a specific specialty is common to the insurance industry, or to the telemarketing industry, in parallel positions. The petitioner has not demonstrated that the proffered position qualifies as a specialty occupation pursuant to the first clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Counsel conceded that the petitioner has never previously employed anyone in the proffered position or in a similar position. The petitioner is unable, therefore, to demonstrate that it normally requires a minimum of a bachelor's degree or the equivalent in a specific specialty for the position. The petitioner has not demonstrated that the proffered position qualifies as a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The petitioner has not demonstrated that the position or its duties are so complex or unique that they can only be performed by an individual with a minimum of a bachelor's degree in a specific specialty or the

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<sup>3</sup> It is noted that, even if a bachelor's degree or its equivalent in business administration were established as being required for entry into the proffered position, such a requirement is insufficient to establish eligibility for the benefit sought in this matter. As there must be a close corollary 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*, 19 I&N Dec. 588 (Comm. 1988).

<sup>4</sup> It is further noted that the *Handbook* only indicates in its chapter on "Advertising, Marketing, Promotions, Public Relations, and Sales Managers" that employees only "prefer" a bachelor's degree in business administration for promotions management positions. As such, it is clear that the industry does not normally require such a degree for the proffered position.

equivalent or that the knowledge to perform them is usually associated with the attainment of a minimum of a bachelor's degree in a specific specialty or the equivalent. The petitioner has not demonstrated that the proffered position qualifies as a specialty occupation pursuant to the second clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) or 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO finds that the director was correct in his determination that the record before him failed to establish that the beneficiary would be employed in a specialty occupation position, and it also finds that the argument and additional evidence submitted on appeal have not remedied that failure. Accordingly, the director's decision to deny the petition shall not be disturbed.

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

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