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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**

D2

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 for
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. 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 manufacture and sale of plastic containers. It seeks to employ the beneficiary as a marketing and business development specialist. 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 he determined that the proffered position is not a specialty occupation. On appeal, counsel states that the director erred in his findings, and submits a brief in support of this contention.

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.

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 evidence submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and its attachments.

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.

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 fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 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.

The petitioner is seeking the beneficiary’s services as a marketing and business development specialist. The record indicates that the beneficiary holds a master’s degree in business administration with a concentration in marketing. According to the job description submitted by the petitioner in its letter of support dated March 2, 2009, the beneficiary will be required to perform the following duties:

- 1) Plan, devise, coordinate marketing and sourcing of the Company’s cosmetic container and case products, interact regularly with the manufacture plants, parent company’s Research and Development division for new products release and mass production and supply capacity, assist the Company management in business planning, forecasting and

new product lines development.

- 2) Survey data on industry and corporate buyers' demands, demands on custom made cosmetic containers and cases, new technology and materials used, and environmental protection requirement by the Government regulations and health standards, prepare research reports for the Company's management review and planning on redesign, production and procurement according to the changing market.
- 3) Prepare and coordinate marketing projects, prepare budget for marketing campaigns including advertising in multimedia and printed publications. Compile marketing materials; perform desktop publishing of product catalogs and brochures. Write, edit online marketing information; update the Company's extensive Website for new product releases, market trends and consumer product review. Coordinate participation in trade shows and prepare the Company's product presentation to the potential buyers.
- 4) Analyze business operations including marketing, sales, procurement, import, calculate and compile business development plans and funding requests; recommend allocation of funding according to business priority and business policy set by the management. Analyze business plans proposed by department management and compute budgeting for the top management to consider approval or revision.

The director found the initial evidence insufficient, and consequently issued an RFE on June 17, 2009. The director requested additional evidence demonstrating that the position was a specialty occupation, and further requested additional details regarding the duties of the proffered position. The director also requested additional information pertaining to the petitioner's business. In a response dated July 24, 2009, counsel for the petitioner responded to the director's requests. Counsel essentially restated the four duties listed in the petitioner's letter of support, with a brief explanation as to the beneficiary's role in each task. Counsel stated as follows:

- 1) **Plan, devise, coordinate marketing of the Company's cosmetic container and case products. Prepare and coordinate marketing projects, prepare budget for marketing campaigns including advertising in multimedia and printed publication.** In performing this job duty, the person in the position will interact regularly with the manufacture plants, the parent company's Research and Development division for new products releases and obtain data of mass production and supply capacity, assist the Company management in business planning, forecasting and new product lines development. She will apply knowledge and skills in Marketing Management, Analysis of Business Operations and Business Management in devising and planning the Company's marketing operation. The knowledge and skills are usually gained in college or graduate school education.
- 2) **Survey data on industry and corporate buyers' demands, demands on custom made cosmetic containers and cases, new technology and materials used, and**

environmental protection requirement by the Government regulations and health standards, prepare research reports for the Company's management review and planning on redesign, production and procurement according to the changing market. In performing this job duty, the incumbent will collect market information, data and statistics on sales, consumer demands, trend in consumer use of plastic containers and packing materials, taking into consideration of Government regulations on anti-toxin material development and use in manufacture, environment consideration such as recyclable containers use, and prepare research reports which serve as basis for the Company's business planning, regulatory compliance, and product improvement or new products development. The person in the position is required to use knowledge and skills of Market Research, Statistical Analysis and Marketing Intelligence, such is usually learned in college education or graduate school program.

- 3) **Prepare and coordinate marketing projects, prepare budget for marketing campaigns including advertising in multimedia and printed publications.** In performing this job duty, the person on the position will compile marketing materials; perform desktop publishing of product catalogs and brochures; write, edit online marketing information; update the company's extensive Website for new product releases, market trends and consumer product review. She will also coordinate the Company's participation in trade shows and prepare the Company's product presentation to the potential buyers. In performing this duty, the incumbent will apply knowledge and skills in marketing management, information technology and desktop publishing tools in preparing the marketing materials and edit and update the Company's e-business Website.
- 4) **Analyze business operations including marketing, sales, procurement, import, calculate and compile business development plans and funding requests; recommend allocation of funding according to business priority and business policy set by the management.** In performing this job duty, the incumbent will analyze business plans proposed by department management and compute budgeting for the top management to consider approval or revision. She will use knowledge and skills in business management and financial management. The knowledge and skills in this regard are usually learned in a formal college degree program.

Counsel for the petitioner also provided the estimated amount of time the beneficiary would devote to each duty. Specifically, counsel stated that "approximately 35% of work time is spent on job duty Item # 1 above; 25% is spent on job duty # 2 above; 25% of time is spent on job duty Item # 3 above; and 15% of time is spent on job duty Item # 4 above." Furthermore, counsel indicated that as demonstrated on the petitioner's organizational chart, the beneficiary would work under the supervision of the marketing/sales manager. It is noted that no employees were listed as subordinate to the beneficiary.

On September 20, 2009, the director denied the petition. The director found that the proffered position, though described as a "marketing and business development specialist," was more akin to that of a market

research analyst. However, the director concluded that an examination of the proffered position in context with the petitioner's business operations did not warrant a finding that the beneficiary would exclusively be performing the duties of a market research analyst. In conclusion, the director found that the proffered position was not a specialty occupation. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel for the petitioner states that the director's decision was erroneous, and argues that the director abused her discretion by discounting evidence pertaining to the business of the petitioner and its need for a marketing and business development specialist. Counsel further argues that the proffered position need not be limited solely to large marketing companies or firms, and provides evidence pertaining to the hiring practices of other similar companies in the industry.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO turns first 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; 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.

The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook (Handbook)* for information about the duties and educational requirements of particular occupations. Factors often considered by USCIS when determining the above four criteria 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.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)). The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations.

The petitioner has stated that the proffered position is that of a marketing and business development specialist. The critical element in examining whether the proffered position is a specialty occupation 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 bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act. With regard to the instant petition, the record does not clearly establish that the proffered position is a specialty occupation position.

The *Handbook* does not contain a position description for "marketing and business development specialist." It appears, therefore, that the director logically consulted the *Handbook's* description of the position of market research analyst, which is described as follows:

Market and survey researchers gather information about what people think. Market research analysts help companies understand what types of products people want, determine who will buy them and at what price. Gathering statistical data on competitors and examining prices, sales, and methods of marketing and distribution, they analyze data on past sales to predict future sales.

Market research analysts devise methods and procedures for obtaining the data they need by designing surveys to assess consumer preferences. While a majority of surveys are conducted through the Internet and telephone, other methods may include focus group discussions, mail responses, or setting up booths in public places, such as shopping malls, for example. Trained interviewers usually conduct the surveys under a market research analyst's direction.

Market opinion research has contributed greatly to a higher standard of living as most products and services consumers purchase are available with the aid of market research. By making recommendations to their client or employer, market research analysts provide companies with vital information to help them make decisions on the promotion, distribution, and design of products or services. For example, child proof closures on medicine bottles exist because research helped define the most workable design; and the growing variety of ready to cook meals, such as microwaveable soups and prepackaged meat products, exist because of increasing public demand for fast and convenient meals. The information also may be used to determine whether the company should add new lines of merchandise, open new branches, or otherwise diversify the company's operations. Market research analysts also help develop advertising brochures and commercials, sales plans, and product promotions such as rebates and giveaways based on their knowledge of the consumer being targeted.

The Handbook states the following with regard to academic credentials for market research analyst positions:

A bachelor's degree is the minimum educational requirement for many market and survey research jobs. However, a master's degree is usually required for more technical positions.

In addition to completing courses in business, marketing, and consumer behavior, prospective market and survey researchers should take social science courses, including economics, psychology and sociology. Because of the importance of quantitative skills to market and survey researchers, courses in mathematics, statistics, sampling theory and survey design, and computer science are extremely helpful. Market and survey researchers often earn advanced degrees in business administration, marketing, statistics, communications, or other closely related disciplines.

While in college, aspiring market and survey researchers should gain experience gathering and analyzing data, conducting interviews or surveys, and writing reports on their findings. This experience can prove invaluable toward obtaining a full-time position in the field, because much of the work may center on these duties. Some schools help graduate students find internships or part-time employment in government agencies, consulting firms, financial institutions, or marketing research firms prior to graduation.

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which assigns specialty-occupation status to a position 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 *Handbook* reports that while a bachelor's degree is the minimum educational requirement for many market and survey research jobs, a degree in a *specific specialty* is not required. Instead, the *Handbook* indicates that in addition to completing courses in business, marketing, and consumer behavior, prospective market and survey researchers should take social science courses, including economics, psychology and sociology. Accordingly, the petitioner has not established that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the proffered position.

The director based his decision partly on the conclusion that the petitioner did not have the organizational complexity to warrant such a position. While the size of a petitioner's business may not necessarily be a factor in determining the nature of a proffered position, both level of income and organizational structure are appropriately reviewed, especially when a petitioner seeks to employ an H-1B worker as a marketing and business development specialist, or, more specifically, a market research analyst. In matters where a petitioner's business is relatively small, the AAO reviews the record for evidence that its operations are, nevertheless, of sufficient complexity to indicate that it would employ the beneficiary in a position requiring a level of marketing knowledge that may be obtained only through a baccalaureate degree in a specific specialty.

The actual proffered position in this matter is akin to a market research analyst for a manufacturer and retailer of plastic containers. At the time of filing, the petitioner claimed to employ seventeen employees and to have a gross annual income of \$928,090 and a net annual income of \$50,250. In the July 24, 2009 response to the RFE, counsel indicated that the petitioner's purpose was to serve as the marketing and new product development center for its four member companies located in the United States, Germany, Taiwan, and China. Counsel referred to a supplemental document outlining the future plans of the petitioner, which claimed that among the petitioner's projects were the introduction of a new green bottle using PLA and ultimate involvement in the pharmaceutical container market. The AAO acknowledges that the process of expanding a petitioner's business operations could potentially establish marketing and expansion complexities that would require the duties of a market research analyst as described by the *Handbook*. However, a petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The petitioner provides no documentation related to its intended expansion plans that would shed light on the complexity of the research and analysis to be performed by the beneficiary. While it submits copies of its most recent tax returns, as well as a document outlining future plans for the company, it has not provided any evidence that would indicate how the petitioner's plans for expansion are sufficiently complex to require the services of a market research analyst. Therefore, even if the proffered position had been deemed a specialty occupation under the regulatory definitions, the evidence of record would be insufficient to demonstrate the petitioner's need for such a position. Accordingly, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

With regard to parallel positions in similar manufacturing companies, the petitioner has failed to submit any evidence in support of this premise. The record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. Again, factors considered by the AAO when determining this criterion include 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 at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102). In the instant matter, the petitioner has not submitted evidence that responds to either prong of the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

While the petitioner submitted a document entitled "A Survey of Other Companies' Job Requirement" in response to the RFE, this document is of little probative value. The document lists 6 companies, along with the number of persons they employ, their annual income, and the degree required for the position of marketing and business development specialist. This document, however, is not accompanied by supporting documentation which verifies or corroborates the information claimed. In addition, there is no information regarding the nature of the business dealings of each of the six companies. Going on the 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. at 158.

Moreover, the petitioner submitted no evidence, such as job postings, to establish its degree requirement as the norm within its industry under the first prong of the criterion. 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. The petitioner's scant overview of its intended business expansion plans precludes it from establishing that the position's complexity or unique nature distinguish it from market research analyst employment that is performed with less than a four-year degree in a specific specialty or its equivalent. As previously stated, simply going on the record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Id.* Therefore, the petitioner has failed to establish the second prong of the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. The petitioner indicates that it was incorporated in 1990, and claimed that it currently employed seventeen persons. It did not, however, identify any educational degrees for these employees. The initial petition appears to establish that the petitioner has not previously employed any in-house marketing or business development specialists or analysts. Therefore, the petitioner has not met this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(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. To the extent that they are depicted in the record, the duties of the position appear generic, with the use of such terms as "coordinate marketing projects" or "analyze business operations." While the petitioner states that its marketing efforts and marketing research are complex and specialized, the petitioner provides no explanation of why the implementation of such services would be viewed as either complex or specialized, especially relative to market research analyst work that is performed by individuals without at least a bachelor's degree in a specific specialty or its equivalent. The petitioner provided

no further detail as to any specialized or complex duties that the beneficiary would perform as a marketing and business development specialist, or market research analyst, for a plastics manufacturer. Without more persuasive evidence, the petitioner has not established the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

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.