

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

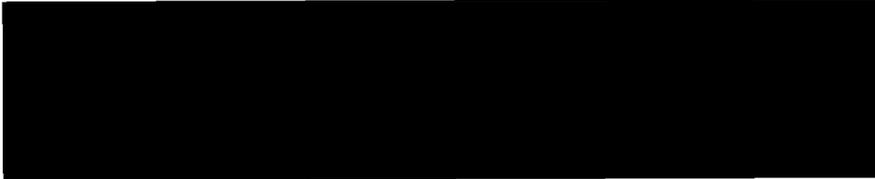
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals, MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

52



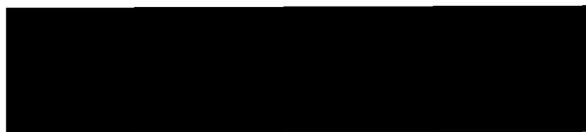
FILE: WAC 08 145 54122 Office: CALIFORNIA SERVICE CENTER Date: **MAR 02 2010**

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 of the 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 is a travel services business with 15 employees. It seeks to employ the beneficiary as an Executive Vice President 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 concluding that the petitioner failed to establish that the beneficiary is qualified to perform services in a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) previous counsel's response to the director's RFE; (3) the director's denial letter; and (4) Form I-290B with current counsel's brief. The AAO reviewed the record in its entirety before reaching its decision.

U.S. Citizenship and Immigration Services (USCIS) is required to follow long-standing legal standards and determine first, whether the proffered position is a specialty occupation, and second, whether an alien beneficiary is qualified for the position at the time the nonimmigrant visa petition is filed. *See Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm. 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation]."). Therefore, before discussing the director's basis for the denial, the AAO will first examine whether the proffered position qualifies as a specialty occupation. Beyond the decision of the director, the AAO finds that the petitioner's proffered position does not qualify as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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

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

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

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

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 (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), 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 states that it is seeking the beneficiary's services as an Executive Vice President. In the March 20, 2008, letter of support, the petitioner claimed that the beneficiary's job description is as follows:

[The beneficiary's] duties will consists [sic] of supervising staff that performs various support services. Supervise mid-level managers, on the other hand, develop departmental plans, set goals and deadlines, implement procedures to improve productivity and customer service, and define the responsibilities of supervisory-level managers. The hiring and dismissal of employees. Oversees the preparation, analysis, negotiation, and review of contracts related to the purchase or sale of equipment, material, supplies, products or services. A bachelor degree in Business Administration is required.

The petitioner submitted a copy of the beneficiary's foreign degree, but not the translation into English, along with a copy of an educational evaluation finding that the beneficiary's four year foreign degree is equivalent to a U.S. bachelor's degree in business administration awarded by a regionally accredited university in the United States.

The director's RFE asked for documentation to support a finding that the proffered position is a specialty occupation as well as additional evidence to demonstrate the beneficiary is qualified to perform in a specialty occupation. Specifically, the RFE stated that the petitioner must:

Provide a more detailed description of the work to be performed by the beneficiary for the entire requested period of validity. Include specific job duties, the percentage of time to be spent on each duty, level of responsibility, hours per week of work, and the minimum education, training, and experience necessary to do the job. Also, explain why the work to be performed requires the services of a person who has a college degree or its equivalent in the occupational field.

Additionally, if the beneficiary will supervise or direct others submit a copy of a line-and-block organizational chart showing the petitioner's hierarchy and staffing levels. List all divisions in the company. Clearly identify the proffered position in the chart. Also, show the names and job titles for those persons, if any, whose work will come under the control of the proposed position. . . .

The petitioner did not provide any of the evidence requested in the RFE as described above. Instead, the petitioner provided a letter, dated August 27, 2008, which provides a vague and generic job description as follows:

[The beneficiary] will be assisting the president of the corporation in setting up and managing various branches which the company is currently in negotiation to acquire locations to set up branch offices.

[The beneficiary] will be the Vice President for the corporation. In his capacity, he will be involved in the negotiation process, develop departmental plans for the company, setting goals and deadlines and implementing procedures to improve productivity and customer services. Acquiring the necessary staffing for each location and negotiating with various merchants for rates and percentages. Reviewing and signing of contracts between company and merchants. . . .

No other supporting documentation was provided to demonstrate that the proffered position is a specialty occupation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Moreover, the non-existence or unavailability of evidence material to an eligibility determination creates a presumption of ineligibility. See 8 C.F.R. § 103.2(b)(2)(i).

Despite the petitioner's statement in its initial support letter that it requires the beneficiary to assist the petitioner as it expands its operations, the copies of the petitioner's 2006 and 2007 tax returns provided in response to the RFE indicate that the petitioner's revenue decreased by \$3 million in 2007. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In response to the RFE, the petitioner also provided a copy of the beneficiary's foreign degree certificate, including transcripts, translated into English. The transcripts indicate that the majority of the beneficiary's coursework towards his degree was in accounting with some additional courses in finance, management and law. It is not clear from the position description provided by the petitioner how the coursework taken by the beneficiary directly relates to the duties of the proffered position.

Additionally, the petitioner provided copies of the beneficiary's certificates in airline reservations/ticketing and his experience letters, demonstrating that, since the earning of the beneficiary's foreign degree in 1992, he worked as a travel consultant and a business analyst manager for travel agencies abroad, although no details of the duties performed in these positions was provided. The beneficiary also received certification for completing a three-week course in corporate management.

The LCA provided by the petitioner is for an Executive Vice President to work in Dearborn, Michigan. The salary offered is \$40,000 per year and the prevailing wage listed is \$35,000 per year.

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 in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty 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 in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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)).

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. See generally *Defensor v. Meissner*, 201 F.3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The description provided by the petitioner for the proffered position is so vague and generic that it is not clear under which section of the *Handbook*, 2010-11 edition, the position falls. However, even if the proffered position were to come under the *Handbook's* section on Top Executives, this in and of itself would not be sufficient evidence that the proffered position is a specialty occupation. Under the section on Training, Other Qualifications, and Advancement, the *Handbook* states that "*The formal education and experience required by top executives vary as extensively as their responsibilities do, but many of these workers have at least a bachelor's degree and considerable experience.*" (Emphasis added.) The *Handbook* then goes on to state as follows:

*Many top executives have a bachelor's or master's degree in business administration, liberal arts, or a more specialized discipline. The specific type and level of education required often depends on the type of organization for which top executives work. College presidents and school superintendents, for example, typically have a doctoral degree in the field in which they originally taught or in education administration. (For information on lower level managers in educational services, see the Handbook statement on education administrators.)*

*Some top executives in the public sector have a degree in public administration or liberal arts. Others might have a more specific educational background related to their jobs. (For information on lower level managers in health services, see the Handbook statement on medical and health services managers.)*

*Many top executive positions are filled from within the organization by promoting experienced lower level managers when an opening arises. In industries such as retail trade or transportation, for example, individuals without a college degree may work their way up within the company and become executives or general managers. When hiring top executives from outside the organization, those doing the hiring often prefer managers with extensive managerial experience.*

Because the *Handbook* indicates that working as a top executive does not normally require a degree *in a specific specialty* and as the evidence of record does not distinguish the proffered position from the type of position that requires no more than a bachelor's degree without particular specialization, the *Handbook* does not support the proffered position as being a specialty occupation.

As the evidence of record does not establish that the particular position here proffered 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)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong assigns specialty occupation status to a proffered position with a requirement for at least a bachelor's degree, in a specific specialty, that is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

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. On appeal, counsel provides an Advisory Opinion Report from [REDACTED] Global Education Group, Inc., dated May 18, 2009. Upon review, however, the opinion rendered by the evaluator is not probative. Despite her experience in preparing credential evaluation reports, neither her advisory opinion report nor any other evidence of record substantiates that she is qualified as an expert on the hiring practices and recruitment of company executives. The record does not indicate that the evaluator has adequate knowledge of the particular issue here. She does not address or demonstrate knowledge of the petitioner's particular business operations other than the basic and vague description provided by the petitioner in the support letter. She does not relate any personal observations of those operations or of the work that the beneficiary would perform, nor does she state that she has reviewed any projects or work products related to the proffered position. 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 petitioner does not provide any job-vacancy advertisements evidencing a common degree-in-a-specific-specialty requirement in positions that are both: (1) parallel to the proffered position; and (2) located in organizations similar to the petitioner.

The petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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." The evidence of record does not refute the *Handbook's* information to the effect that there is a spectrum of degrees acceptable for executive positions. Moreover, as mentioned previously, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than executive positions that can be performed by persons without a specialty degree or its equivalent, particularly in parallel positions in organizations similar to the petitioner.

Next, as the record 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, 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 mentioned earlier, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than executive positions that are not usually associated with a degree in a

specific specialty.

Therefore, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). For this reason also, the petition will be denied.

Even if established by the evidence of record, which it is not, the requirement of a bachelor's degree in business administration is inadequate to establish that a position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since 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 Associates*, 19 I&N Dec. 558. For this reason also, the petition must be denied.

Although the finding that the proffered position is not a specialty occupation negates the necessity of examining the beneficiary's credentials, the AAO will nevertheless address this issue because it is the primary basis of the director's decision. The AAO affirms the director's finding that the petitioner did not submit sufficient evidence to demonstrate that the beneficiary is qualified to perform services in a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C). However, as the director erred in her determination that the credential evaluation provided by the petitioner assesses the beneficiary's education in combination with experience, instead of education alone, this aspect of the director's decision will be withdrawn. The credential evaluation demonstrates that the beneficiary has the U.S. equivalent of a bachelor's degree in business administration through the beneficiary's foreign education alone.

Nevertheless, a degree in business administration alone is insufficient to qualify the beneficiary to perform the services of a specialty occupation, unless the academic courses pursued and knowledge gained is a realistic prerequisite to a particular occupation in the field. The beneficiary's coursework must indicate that he or she obtained knowledge of the particular occupation in which he or she will be employed. *Matter of Ling*, 13 I&N Dec. 35 (Reg. Comm. 1968). However, as discussed above, the petitioner's description of the proffered position was too vague to determine the focus of the beneficiary's duties and thereby make an assessment of whether the beneficiary's coursework indicates that he obtained knowledge of the particular occupation in which he will be employed. Moreover, the credential evaluation provided does not indicate whether the beneficiary's degree in business administration had a particular focus or specialization that is relevant to the proffered position. The petitioner makes no reference to nor draws a nexus between a concentration in the beneficiary's realm of study and the duties of the proffered position.

Upon review, therefore, it does not appear that the petitioner has demonstrated that the beneficiary satisfies any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(C). While the beneficiary does, in fact, possess the equivalent of a baccalaureate degree from an accredited U.S. college or university in business administration, no evidence was provided to demonstrate that the beneficiary holds a United States baccalaureate or higher degree, or its equivalent, in a specific specialty required for entry into a specialty occupation being proffered to the beneficiary, as required by 8 C.F.R. §§ 214.2(h)(4)(iii)(C)(1)(2) and (4). Moreover, as the position description is vague and generic, it is not clear what specific specialty the proffered position requires. The beneficiary does not possess a

U.S. degree, nor does the beneficiary hold an unrestricted state license, registration or certification which authorizes him to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment. Therefore, the requirements set forth in 8 C.F.R. § 214.2(h)(4)(iii)(C)(3) are not applicable to these proceedings.

Therefore, the AAO affirms the director's finding that the petitioner did not demonstrate that the beneficiary is qualified to perform services in a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C).

Beyond the decision of the director, the AAO also finds that the petitioner failed to submit requested evidence that precludes a material line of inquiry. The petitioner and counsel did not provide additional documentation and details about the proffered position that were specifically requested by the director to provide further information that clarifies whether the proffered position is a specialty occupation. As stated earlier, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Therefore, the petition will be denied for this additional reason.

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). The AAO also affirms the director's decision that the beneficiary is not qualified to perform the duties of a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.