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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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U.S. Citizenship  
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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: NOV 02 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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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,

*for Michael T. Kelly*  
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.

On the Form I-129 visa petition the petitioner stated that it is a television broadcasting firm. To employ the beneficiary in a position designated as a Multi Media Specialist, the petitioner endeavors to classify him 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 it 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 requests for additional evidence (RFEs); (3) the responses to the RFEs; (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.

Evidence in the record demonstrates that the beneficiary has a master of corporate media degree awarded by Marietta College on May 17, 2008. On the Form I-129 visa petition the petitioner stated that it was established in 2007 and that it had no employees. In spaces provided for the petitioner to state its gross annual income and net annual income the petitioner entered, "Invested \$2,272,500." The petitioner provided its 2007 and 2008 Form 1120 Corporation Income Tax Returns. The 2007 return shows that the petitioner was incorporated on October 30, 2007, and that it was inactive during that year, with no income. The 2008 return shows various expenses, but that the petitioner had no income other than \$41 of interest income from a California bank.

As was noted above, the proffered position is designated a Multi Media Specialist position. As a nontechnical description of the duties of the proffered position, the petitioner stated, "Design & develop marketing visual images." On the visa petition, the petitioner did not reveal the wages it would pay the beneficiary. It stated, however that the beneficiary would work 30 hours per week and the approved labor condition application (LCA) submitted to support the visa petition stated that the prevailing wage is \$14.70.

With the visa petition, counsel provided a letter from the petitioner's president. That letter states that the petitioner will pay the beneficiary \$15 per hour for his 30 hours of work per week. The petitioner's president described the duties of the proffered position as follows:

- Design and develop marketing graphics, brochures, multimedia presentations, web pages, promotional products, technical illustrations, and computer artwork for use on the web, TV broadcasting and print media using multi media tools;
- Update all graphics and manage graphic modifications or enhancements to web site and related applications;
- Design, maintained [sic] and update all websites and database, information and software coding;
- Work with the marketing team to conduct research, design, develop, manage, and implement multiple media production for unique/targeted audiences;
- Produce effective and compelling design solutions;
- Work proficiently on multiple projects simultaneously.

The president's letter also states:

[T]he qualified candidate should have working knowledge of HTML, DIV+CSS, JavaScript and other applicable web-standards; should be proficient in Adobe Photoshop, Illustrator and Flash, etc. The [proffered position also requires] strong project management capabilities, extensive marketing knowledge, and strong communications skills.

The petitioner's president stated that the position requires, "at least a bachelor's degree in media arts." He also stated, "As with any position as a Multi Media Specialist in the media industry, a baccalaureate or higher degree or its equivalent is normally the minimum formal educational preparation." He did not, however, indicate that such positions normally require a degree in any specific specialty. He stated, yet further, that the petitioner is, "[i]n a landmark partnership with the China Intercontinental Communication Center (CICC) . . . ." The record contains no other evidence pertinent to the nature or effect of that "partnership."

Because the evidence submitted was insufficient to show that the proffered position qualifies as a specialty occupation, the service center issued a request for evidence in this matter on April 20, 2009. The service center requested that the petitioner provide additional evidence that the proffered position qualifies as a specialty occupation. In response, counsel submitted printouts of four vacancy announcements from the web and counsel's own letter, dated April 30, 2009.

The AAO notes, initially, that there is no documentary evidence establishing how representative the advertisements are of recruiting and hiring practices for the advertised positions in the employers' industries.

One of the vacancy announcements is for a Multimedia Production Specialist position [REDACTED], an electronics company in Hyde Park, New York. That announcement states that the position requires a bachelor's degree, but does not state that the degree must be in any specific specialty.

Another vacancy announcement is for a Multimedia Specialist position at Laureate Education, Inc., a company in Baltimore, Maryland that develops and supports distance-learning universities and businesses. That announcement states that the position requires a bachelor's degree, but does not state that the degree must be in any specific specialty.

Another vacancy announcement is for a Graphic/Multimedia Designer at SkillStorm in Fort Lauderdale, Florida, which describes itself as a "government contracting, outsourcing professional services firm." That announcement states that the position requires a bachelor's degree, "preferably in Graphic or Multimedia Design."

The fourth vacancy announcement is for a Creative Media Specialist for Financial Independence Group, an insurance marketing office in Cornelius, North Carolina. That announcement states that the position requires a four-year degree in art/graphic design.

None of the companies that announced those vacancies appear to be in the same industry as the petitioner. There is no indication that any are of approximately the same size as the petitioner. Two require a bachelor's degree in no particular field. One prefers, but does not require, a degree in graphic or multimedia design. One requires a bachelor's degree in art or graphic design, neither of which appears to be synonymous with media arts. Those vacancy announcements are insufficient to establish that a minimum of a bachelor's degree or the equivalent in corporate media is a common

requirement for positions similar to the proffered position within companies of the petitioner's size in the petitioner's industry.

In his April 30, 2009 letter responding to the first RFE, counsel provided a description of the duties of the proffered position which included the following additional duties beyond those described in the petitioner's president's March 27, 2009 letter:

Work with the marketing team to conduct research, brainstorm and develop multiple media production for unique/targeted audiences;

\* \* \*

Interview important transnational events and produce web[-]based video news by using Final Cut Pro and Flash Video Encoder;

\* \* \*

Refine 2D/3D graphics, animated images, special effects and other multi media productions using multi media tools/computer programs in producing effective and compelling design solutions for our clients.

Although those duties appear to be consistent with the proffered position's job title, the AAO notes that the petitioner's president did not include them in his description of the duties of the proffered position. Counsel's basis in stating that they are included in the duties of the proffered position is unclear.

On May 6, 2009, the service center issued another RFE in this matter. The service center requested, *inter alia*, a list of the petitioner's employees, to include names, titles, start dates, wages/salaries, and job descriptions. In response, counsel provided a chart showing that the beneficiary was then the petitioner's only employee.

In a decision dated June 10, 2009, the director denied the visa petition. The director observed that given that the beneficiary is the petitioner's only employee the beneficiary would apparently be responsible for answering telephone calls, public relations, advertising, and other duties that either are not normally considered specialty occupation duties or are not closely related to the beneficiary's Master of Corporate Media degree. In that decision the director stated that the duties of the proffered position appear to be consistent with those of a marketing manager.

On appeal, counsel submitted a brief and an organizational chart. In the brief, counsel took exception to the director's conclusion that the proffered position is a marketing manager position. The AAO agrees with counsel that the proffered position is not a marketing manager position.

Counsel also stated that the petitioner has “key members working without pay at this time because the company just recently established and funded,” [sic] and “The beneficiary has never been responsible for . . . answering phone calls, public relations, [and] advertising . . . .”

The organizational chart shows that the petitioner now has eleven people working for it, including the beneficiary, as well as 13 positions not yet filled. The positions the petitioner has allegedly filled, in addition to the position held by the beneficiary, are president/chairman, executive president, CEO, vice president of accounting and funding, vice president of operations, vice president of sales and marketing, vice president of technology, corporate lawyer, program director, and production director. Counsel did not indicate who routinely answers the telephone.

The AAO recognizes the Department of Labor’s (DOL) *Occupational Outlook Handbook*<sup>1</sup> (the *Handbook*) as an authoritative source on the duties and educational requirements of a wide variety of occupations. The *Handbook* does not have a section specifically covering the position proffered in this case.

The duties of the proffered position, as described by the petitioner’s president, have elements of web design and graphic design, as well as “updating databases.” Updating databases, depending on whether “updating” is used to mean data entry or database administration, may be the job of a database administrator or a data entry worker.

The *Handbook* states that many data entry and information processing workers are hired right out of high school and trained on the job.<sup>2</sup> Such a position would not qualify as a specialty occupation.

The *Handbook* states that database administrator positions generally require a bachelor’s degree in a computer-related field.<sup>3</sup> The beneficiary’s degree is only peripherally related to computers.

The beneficiary’s web design duties could be the duties of a web developer. Web developers, according to the *Handbook*, generally need a bachelor’s degree in a computer-related field, but for some positions, related experience and certification may be adequate.<sup>4</sup> In any event, as was noted above, the beneficiary does not have a degree in a computer-related field.

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<sup>1</sup> The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO’s references to the *Handbook* are to the 2010 – 2011 edition available online, accessed September 23, 2010.

<sup>2</sup> See *Handbook* section on data entry and information processing workers.

<sup>3</sup> See *Handbook* section on computer networks, systems, and database administrators.

<sup>4</sup> See *Handbook* section on computer network, systems, and database administrators.

A bachelor's degree in graphic design is usually required for most entry-level and advanced graphic design positions.<sup>5</sup> The record contains no evidence that the beneficiary's Master of Corporate Media degree is equivalent to a degree in graphic design, and no evidence that the instant position is equivalent to a graphic design position.

The *Handbook* does not support the petitioner's position that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position, and the petitioner has submitted no other competent evidence pertinent to that point. The petitioner has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

As was noted above, the vacancy announcements provided are poor evidence for the proposition that the positions similar to the proffered position require a minimum of a bachelor's degree or the equivalent in corporate media, nor have they demonstrated that the proffered position requires a degree in any other specific specialty. The petitioner presented no other evidence pertinent to that point. The petitioner has not demonstrated that a requirement of a minimum of a bachelor's degree in a specific specialty or the equivalent is common to the petitioner's industry in parallel positions among similar companies, and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of the first clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The record contains no evidence that the petitioner has ever previously hired anyone to fill the proffered position, and the petitioner has not, therefore demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The petitioner has not demonstrated that the proffered position or its duties are so complex, unique, or specialized that they can only be performed by a person with a minimum of a bachelor's degree in a specific specialty or the equivalent or that performance of the duties is usually associated with a minimum of a bachelor's degree in a specific specialty or the equivalent. The petitioner has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) or the criteria of the second clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO finds that the director was correct in her determination that the record before her failed to establish that the beneficiary would be employed in a specialty occupation position, and it also finds that the evidence and argument submitted on appeal have not remedied that failure. Accordingly, the appeal will be dismissed and the petition denied on this basis.

The record suggests an additional issue that was not addressed in the decision of denial. The duties of the proffered position as described by the petitioner's president are largely computer-related duties. If those duties require a bachelor's degree in a specific specialty, that specific specialty

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<sup>5</sup> See *Handbook* section on graphic design positions.

would necessarily be directly related to computers (computer science, information technology, systems analysis, etc.). If the proffered position were shown to require such a degree, and the specific specialty required had been demonstrated, then the beneficiary, who has no such degree, would not be qualified for the proffered position.

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.