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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

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[REDACTED]

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **NOV 08 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:

[REDACTED]

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,

Michael T. Kelly
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 provider of private postsecondary bilingual educational programs in business administration with seven employees and eleven contracting professors. It seeks to employ the beneficiary as a marketing manager 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 proffered position is 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) the petitioner's response to the director's RFE; (3) the director's denial letter; and (4) Form I-290B with counsel's brief and supporting materials. The AAO reviewed the record in its entirety before reaching its decision.

The primary issue in this case is whether the proffered position qualifies 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 (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 states that it is seeking the beneficiary's services as a marketing manager. In the support letter submitted with the petition on September 29, 2008, the petitioner claimed that the beneficiary would work on a part-time basis and that his duties would be as follows:

Will assist the President of marketing in coordinating domestic and foreign marketing and overall business development of the school of area [sic] of recruiting new students. Responsible for bilingual in English, Korean and

Spanish news letter. Assist in planning and formulating marketing methodologies to constantly increase the level of business gathering data on competing schools. Assist in preparation of business plans, management reports and other data compilation to support these marketing programs.

The petitioner did not provide the minimum requirements for the proffered position at the time the petition was filed.

It should be noted that the petitioner also submitted a Labor Condition Application (LCA) indicating a prevailing wage of \$24.22 per hour based on a Prevailing Wage Request from the Employment Development Department (EDD) for the State of California, which classified the above-mentioned position as a Market Research Analyst for prevailing wage purposes. The petitioner's proffered salary is \$25 per hour. The petitioner also submitted a copy of its U.S. 2007 Federal Income Tax Return, which states that the petitioner had a gross income of \$467,528 for that year.

Additionally, the petitioner submitted copies of the beneficiary's credentials, along with an education evaluation that finds the beneficiary's foreign degree to be equivalent to a Bachelor of Arts with a major in Spanish and a minor in Communications and Information from an accredited U.S. university.

The director's RFE asked for documentation to support a finding that the proffered position is a specialty occupation.

In response to the RFE, the petitioner changed the proffered position title from Marketing Manager to Marketing Director and stated that this position was newly created so that the petitioner can aggressively recruit students. The petitioner also stated that the Marketing Director will:

[a]ssist in designing, analyzing and developing unique marketing and outreach strategies that will help [the petitioner] further penetrate existing demographics and expand internationally through our online-programs. The Los Angeles area boasts one of the largest Hispanic and Asian populations and [the beneficiary] is multi-lingual in Spanish, Korean, English, Chinese and Japanese. He has majored in Spanish and Communication. . . . Thus, [the beneficiary] will be highly effective in outreaching to a broad and international market. He will do so by publishing newsletters, coordinating recruiting events and working closely with the website technicians. Since online-programs are vital segments of our university, [the beneficiary's] background in communication and computers will provide a monumental edge to our university in such a computer savvy world. Further, [the beneficiary] will be gathering data on other comparable learning institutions and assist in preparation of business plans, management reports and other data compilation to support these marketing programs. . . .

Despite the petitioner's claim that the beneficiary majored in Communication as well as Spanish, as discussed previously, the credential evaluation submitted states that the beneficiary has only a minor in

Communication. 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)).

The petitioner also stated that the beneficiary's time would be equally divided between research, marketing strategy meetings with high-level staff, recruiting and outreach, overseeing the newsletter and web development, and public relations. The beneficiary would be directly supervised by the Secretary.

Additionally, the petitioner stated that other comparable schools commonly require degrees for their marketing managers, but the petitioner did not submit any documentation to support this claim. Again, 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

The organization chart submitted by the petitioner indicates that the beneficiary will be directly supervised by the petitioner's Secretary, who in turn reports directly to the President. The petitioner describes the job duties of the Secretary as follows: "assist President in carrying out his executive decisions and orders. Responsible for day-to-day functions of school and report to President daily. Supervise staff directly, including Marketing Director. Step in when President is unavailable."

The petitioner also indicates that even though the proffered position is newly created, another employee previously held a position close to the one proffered. A description of that previously held position was not provided, but the petitioner submitted a copy of the degree held by the other employee, which is a Master of Arts in Organizational Management.

The petitioner submitted copies of recent pay stubs and a 2007 Form W-2 for the beneficiary to demonstrate that the beneficiary was in valid H-1B status at the time the petition was filed. However, the name of the employer as well as the employer's address on the beneficiary's H-1B approval notice is different than the name and address of the employer on the copies of the pay stubs and Form W-2. The petitioner did not explain the discrepancy. Therefore, the petitioner failed to demonstrate that the beneficiary was in valid status at the time the petition was filed.

The petition was denied on November 26, 2008.

On appeal, counsel for the petitioner argues that the proffered position is that of a Marketing Director/Manager, which requires at least a Bachelor's degree. In support of this assertion, counsel submits a copy of the *O*Net Online* Summary Report for Marketing Managers along with an Occupational Profile of Marketing Managers in California and copies of advertisements for Marketing Directors and Marketing Managers. Additionally, counsel states that the beneficiary will report directly to the President, even though the petitioner previously indicated that the beneficiary would report to the Secretary.

Counsel also provides a description for a Marketing Director. To summarize, the proffered duties

provided on appeal include the following:

- Drive the strategic development of marketing campaigns;
- Facilitate effective and innovative approaches to marketing;
- Lead a student recruitment strategy;
- Advise the university of external market conditions likely to impact student recruitment and business development projects;
- Provide strong leadership, direction and management;
- Manage the budget;
- Evaluate success of marketing programs and make recommendations to achieve desired results; and
- Develop and recommend programs.

The job description provided on appeal also states that “[t]he petitioner has made it a point to recruit only individuals with a bachelor’s degree or its equivalent for the position.” However, counsel does not provide any documentation regarding the petitioner’s recruiting activities with respect to the proffered position. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

It is apparent that counsel is attempting to change the nature and title of the proffered position as stated in the petition. The initial petition described the proffered position as a marketing manager who would assist the President of Marketing (which is a different job title than the President of American States University) in overall business development. In response to the RFE, the petitioner gave the proffered position the title of Marketing Director and stated that this position would report directly to the Secretary. Now, on appeal, counsel states that the proffered position is a Marketing Director who would report directly to the President of American States University and who will drive and lead the petitioner’s marketing programs, rather than assist others. As the duties presented on appeal materially change the scope and nature of the position for which the petition was filed, they will not be considered on appeal. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position’s title, its level of authority within the organizational hierarchy, or the associated job responsibilities. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition and in response to the RFE.

To make its determination whether the employment just described qualifies as a specialty occupation, the AAO 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)).

The *Handbook* does not indicate that entry into positions in the occupation of market research analysts normally requires at least a bachelor's degree, or the equivalent, in a specific specialty. While the 2010-11 online edition of the *Handbook* reports that a baccalaureate degree is the minimum educational requirement for many market and survey research jobs, it does not indicate that the degrees held by such workers must be in a specific specialty that is directly related to market research, as would be required for the occupational category to be recognized as a specialty occupation. This is evident in the range of qualifying degrees indicated in the Significant Points that introduces the *Handbook's* chapter "Market and Survey Researchers," which states:

- Market and survey researchers can enter the occupation with at least a bachelor's degree

That the 2010-11 edition of the *Handbook* does not indicate that market research analyst positions normally require at least a bachelor's degree in a specific specialty is also evident in the following discussion in the "Training, Other Qualifications, and Advancement" section of its chapter "Market and Survey Researchers," which does not specify a particular major or academic concentration:

A bachelor's degree is the minimum educational requirement for many market and survey research jobs. However, a master's degree may be required, especially for 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.

Because the *Handbook* indicates that entry into the market research analyst occupation does not normally require a degree in a specific specialty and as the evidence of record does not distinguish the proffered position from the general level of market research analysts requiring no more than a bachelor's degree without particular specialization, the *Handbook's* discussion of the market research analyst occupation does not support the proffered position as being a specialty occupation.

Likewise, the 2010-11 edition of the *Handbook* indicates that marketing manager positions – the type designated in the Form I-129 and the LCA – also do not constitute an occupational group that categorically requires at least a bachelor's degree, or the equivalent, in a specific specialty closely related to the duties of the position. The marketing manager occupational group is addressed in the *Handbook's* chapter "Advertising, Marketing, Promotions, and Public Relations Managers." The chapter's "Training, Other Qualifications, and Advancement" includes the following section that clearly indicates that a baccalaureate or higher degree, or the equivalent, is not normally a requirement for employment as a marketing manager:

A wide range of educational backgrounds is suitable for entry into advertising, marketing, promotions, public relations, and sales manager jobs, but many employers prefer college graduates with experience in related occupations.

Education and training. For marketing, sales, and promotions management positions, employers often prefer a bachelor's or master's degree in business administration with an emphasis on marketing. Courses in business law, management, economics, accounting, finance, mathematics, and statistics are advantageous. In addition, the completion of an internship while the candidate is in school is highly recommended. In highly technical industries, such as computer and electronics manufacturing, a bachelor's degree in engineering or science, combined with a master's degree in business administration, is preferred.

For advertising management positions, some employers prefer a bachelor's degree in advertising or journalism. A relevant course of study might include classes in marketing, consumer behavior, market research, sales, communication methods and technology, visual arts, art history, and photography.

For public relations management positions, some employers prefer a bachelor's or master's degree in public relations or journalism. The applicant's curriculum should include courses in advertising, business administration, public affairs, public speaking, political science, and creative and technical writing.

Most advertising, marketing, promotions, public relations, and sales management positions are filled through promotions of experienced staff or related professional personnel. For example, many managers are former sales representatives; purchasing agents; buyers; or product, advertising, promotions, or public relations specialists. In small firms, in which the number of positions is limited, advancement to a management position usually comes slowly. In large firms, promotion may occur more quickly.

The AAO further finds that, to the extent that they are described in the record of proceeding – which is in generalized terms of generic functions – the duties to be performed by the beneficiary do not convey that they would require the practical and theoretical application of at least a bachelor's degree level of highly specialized knowledge in a specific specialty, as would be required for a

specialty occupation as defined in the H-1B statutes and regulations. Further, the petitioner has not submitted documentary evidence establishing that the performance of those generalized duties would require the application of such a type and level of knowledge.

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. Also, there are no submissions from professional associations, individuals, or firms in the petitioner's industry.

Additionally, the job-vacancy advertisements provided on appeal are not evidence of 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. Most of the advertisements state only a bachelor's degree requirement, without specifying that the degree be in a particular specialty. Further, the record of proceeding does not contain documentary evidence establishing the advertisements as representative of the usual recruiting and hiring practice of either the advertising firms or the petitioner's industry. In short, the advertisements are not probative evidence of the educational, or education-equivalent, attainments required to perform the proffered position.

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 market research analyst and market managing positions, including degrees not in a specific specialty related to those types of positions. Moreover, as mentioned previously, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than market research analyst or marketing manager positions that can be performed by persons without at least a

baccalaureate, or its equivalent, in a specific specialty.

As the record has not established a prior history of recruiting and 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). The petitioner stated that the proffered position is newly created and, moreover, the person who allegedly worked in a closely-related position had a Master's Degree in Organizational Management while the beneficiary has the equivalent of a U.S. Bachelor's Degree in Spanish. As the two degrees are not related, the petitioner has not demonstrated that it hires only people with at least a bachelor's degree or the equivalent in a specific specialty for the proffered position. Furthermore, the evidence of record does not demonstrate that the petitioner's requirement for a specialty degree is compelled by the performance requirements of the position, rather than by a preference for qualities that are usually characteristic of a person with a higher education. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of 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. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388. Further, one previous hire is not sufficiently numerous to be probative of an employer's normal recruiting and hiring practices.

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. As reflected in this decision's earlier comments about the generalized and generic nature of the duty descriptions, the proposed duties have not been described with sufficient specificity to show the degree of specialization and complexity required to satisfy this criterion.

In sum, 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). Accordingly, the AAO shall not disturb the director's denial of the petition.

As the petitioner did not submit sufficient evidence regarding the proffered position to establish it as a specialty occupation, the beneficiary's qualifications have no bearing on the outcome of this petition. Accordingly, the AAO need not and will not address the beneficiary's qualifications further.

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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.