

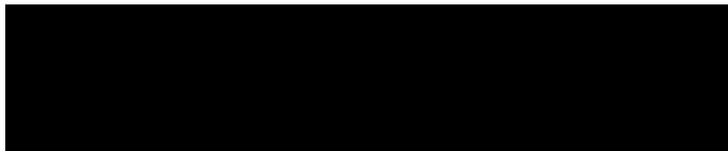
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



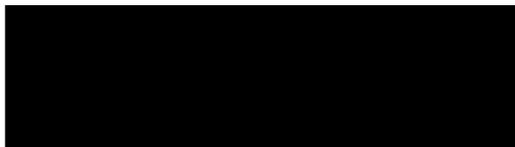
D2

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: APR 04 2011

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)

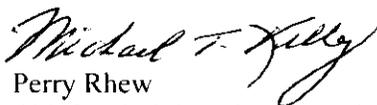
ON BEHALF OF PETITIONER:



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 \$630. 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 
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 an online apparel retailer that seeks to employ the beneficiary as an apparel design and merchandising specialist. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant 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 position was not a specialty occupation. On appeal, counsel contends that the proffered position is in fact a specialty occupation because of the complexity of the duties.

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. The AAO reviewed the record in its entirety before reaching its decision.

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 Immigration and Nationality Act (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 [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.

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.

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 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 (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 occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

The petitioner seeks the beneficiary's services as an apparel design and merchandising specialist. In the petitioner's March 26, 2009 letter of support, it discussed the beneficiary's potential duties as follows:

Beneficiary is being offered apparel design & merchandising specialist. Her primary responsibilities will include coordinating online marketing, making catalog for products, overseeing product analysis and data, and maintaining company website content.

The petitioner concluded by stating that the candidate chosen for the proffered position must possess at least a bachelor's degree in apparel merchandising.

The director found this initial evidence insufficient to establish eligibility, and consequently issued an RFE on May 28, 2009. In his request, the director asked the petitioner to submit a more detailed description of the duties of the proffered position, as well as additional evidence establishing that the proffered position satisfied the criteria for a specialty occupation set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A). The director also requested information pertaining to the nature of the petitioner's business.

In a response dated July 30, 2009, the petitioner addressed the director's queries. In an updated statement, the petitioner indicated that the proffered position was newly created, and provided the following updated description of the position:

The apparel design and merchandising specialist will use the standard principles of design, marketing and merchandising to identify costumers, develop pricing strategies, oversee marketing strategies, and monitor trends in order to maximize our profit and share of the market. The apparel merchandising specialist will perform complex tasks that require substantial analytical skills and professional knowledge of fashion and marketing principles and practices that are normally associated with a baccalaureate degree in apparel design and merchandising.

(1) Develop and Implement Marketing Plans – 50% of time

In depth analysis and interpretation of all marketing data in order to better forecast customer needs. Develop tactics in order to drive sales through customer acquisition via online advertising, targeted promotions or other brand merchandising. Monitor and analyze customer behavior utilizing knowledge in apparel design.

(2) Coordinating Design and Merchandising Functions – 50 of time

Prepare the technical data and content for the website to ensure accuracy and clear communication. Utilize knowledge in apparel merchandising to drive sales and the usability of the website. Translate design concepts to the customers and vendors in order to improve sales.

The petitioner reiterated that a four-year bachelor's degree level of study in the field of apparel design and merchandising was required to perform the duties of the proffered position. In addition, the petitioner submitted copies of job postings for positions in companies the petitioner claimed were similar to its organization.

On July 30, 2009, the director denied the petition, finding that the duties of the proffered position are akin to that of a marketing manager as set forth in the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*. The director noted that, according to the *Handbook*, the profession of marketing

manager is not a specialty occupation. On appeal, however, counsel contends that the director discounted the other duties of the proffered position, including merchandising, and claims that the complexity of the duties render it a specialty occupation.

To make its determination whether the employment described above qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. Factors considered by the AAO when determining these criteria include: whether the *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, reports 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)).

The AAO has reviewed the discussion of marketing managers. As discussed within the occupation of advertising, marketing, promotions, public relations and sales managers in the *Handbook*:

Marketing managers. Marketing managers work with advertising and promotion managers to promote the firm's or organization's products and services. With the help of lower level managers, including *product development managers* and *market research managers*, marketing managers estimate the demand for products and services offered by the firm and its competitors and identify potential markets for the firm's products. Marketing managers also develop pricing strategies to help firms maximize profits and market share while ensuring that the firms' customers are satisfied. In collaboration with sales, product development, and other managers, they monitor trends that indicate the need for new products and services and they oversee product development.

The AAO has considered counsel's assertions on appeal, wherein he claims that the proffered position is not identical to that of a marketing manager. Counsel points out that the proffered position requires other duties not typically associated with marketing managers, including coordinating design, generating technical data, and maintaining content for the website. However, a review of the petitioner's letter of support dated March 26, 2009 describes these duties collectively as "coordinating online marketing." While the beneficiary may be responsible for maintaining the content of the petitioner's website, there is no evidence, and no claim by the petitioner, that the performance of such duties requires a degree in a computer-based specialty. Moreover, the petitioner's statements submitted in response to the RFE indicate that these duties are intended to "improve sales." Since the petitioner is an online apparel retailer, it is clear that the presentation of its merchandise on its website is crucial for its business. However, since it does not claim to operate physical stores, it is evident that all of its marketing and promotions are done via the Internet. The AAO, therefore, is not persuaded that the beneficiary's duties are more complex or specialized than a marketing manager assigned to promote goods for a physical store.

Therefore, having found the duties of the proffered position are those of a marketing manager, the AAO now turns to the *Handbook* for its discussion of the educational requirements imposed on individuals who seek employment within this profession:

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.

* * *

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.

As correctly noted by the director, the *Handbook* indicates no specific degree requirement for employment as a marketing manager, the AAO concludes that the performance of the proffered position's duties does not require the beneficiary to hold a baccalaureate or higher degree in a related field. Accordingly, the AAO finds that the petitioner is unable to establish its proffered position as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, 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. To establish its degree requirement as an industry norm, the petitioner has submitted four Internet job advertisements from [REDACTED] for employment related to merchandising /marketing managers. None of this evidence, however, establishes the petitioner's degree requirement as the norm within its industry.

The petitioner is an online apparel retailer with one employee. The job postings submitted, however, are from nationally-known companies, including [REDACTED] none of which are businesses similar to the petitioner. While [REDACTED] are apparel retailers, their size and scope far surpasses that of the petitioner's business which only employs one person. Although [REDACTED] requires a college degree in apparel design and/or engineering for its position, the proffered position is also that of a "technical designer" and not an apparel design and merchandising specialist like the proffered position.

On appeal, counsel refers to *Tapis Int'l v. INS*, 94 F. Supp. 2d 172 (D. Mass. 2000) in support of the contention that the proffered position is professional in nature. Counsel implies that the petitioner satisfies this criterion because it requires a bachelor's degree or its equivalent for entry into the proffered position. This contention lacks substance. First, the petitioner has failed to establish how the facts of the instant case are analogous to the facts in *Tapis Int'l v. INS*. In the present matter, neither the director nor the AAO has failed to recognize that a requirement for the equivalent of a bachelor's degree in a specific specialty is sufficient to establish a proffered position as being a specialty occupation. Second, as discussed above, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its position's specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree.

As earlier discussed in this decision, based upon its review of the duties of the proffered position, the AAO has concluded that the position is closely aligned to that of a marketing manager. As also noted earlier in this decision, the *Handbook* indicates that marketing managers do not constitute an occupational classification that categorically requires at least a baccalaureate degree, or the equivalent, in a specific specialty. Likewise, the *Handbook's* chapter on marketing managers also indicates that inclusion in this occupational classification does not indicate that a particular position is usually associated with the attainment of at least a baccalaureate degree, or the equivalent, in a specific specialty. Accordingly, to satisfy the fourth criterion, it is incumbent on the petitioner to so develop the proffered position's duties as to manifest their degrees of specialization and complexity as requiring the application of a body of highly specialized knowledge usually associated with at least a bachelor's degree in a specific specialty. This the petitioner has failed to do.

The AAO finds that the duties of the proffered position are described in terms of generic and generalized functions – such as “analysis and interpretation of all marketing data,” “monitor[ing] and analyz[ing] customer behavior utilizing knowledge in apparel design,” and “[u]tiliz[ing] knowledge in apparel merchandising to drive sales and the usability of the website” – that do not convey any particular level of specialization and complexity, let alone such a level as would require knowledge usually associated with at least a bachelor's degree in a specific specialty.

The AAO notes that the petitioner's reliance on the decisions in *Matter of Shin*, 11 I&N Dec. 686 (DD 1966) and *American Biotech, Inc. v. INS*, No. Civ-2-88-262 (E.D. Tenn. Mar. 27, 1989, reprinted in 66 No. 23 *Interpreter Release* 653-55 (June 19, 1989) is misplaced, not only because the petitioner has failed to establish how the facts of these cases are analogous to the facts of the instant petition, but also because those cases had been adjudicated under regulations that predated the adoption of the specialty occupation standard into the H-1B program.

Thus, the AAO concludes that the proffered position has not been established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As discussed above, the AAO finds that, contrary to the assertions of the petitioner and its counsel, the record of proceeding does not establish the proffered position as 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)). 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 Obaigbena*, 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).

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A), 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.