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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

Dr

FILE: WAC 09 094 52633 Office: CALIFORNIA SERVICE CENTER Date: **APR 05 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)

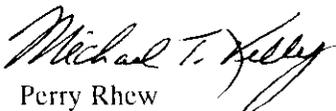
ON BEHALF OF PETITIONER:

[REDACTED]

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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 a transportation company that seeks to employ the beneficiary as its office 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).

In denying the petition, the director determined that the proffered position was not a specialty occupation. On appeal, counsel for the petitioner contends that the director's findings were erroneous, and submits a brief and additional evidence in support of these contentions.

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 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.

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 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 office manager. Evidence of the beneficiary's duties includes: the Form I-129; the petitioner's February 2, 2009 letter, and the petitioner's April 12, 2009 response to the director's RFE.

In the petitioner's February 2, 2009 letter of support, it stated that the beneficiary will perform the following duties:

Direct activities related to dispatching, routing and tracking trucks. Organize brokers to delegate work. Resolve customer's complaints. Implement schedule and policy changes. Monitor operations to ensure that staff members comply with administration policies and procedures, safety rules, and government regulations.

The director found this initial evidence insufficient to establish eligibility, and consequently issued an RFE on March 4, 2009. 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 April 12, 2009, the petitioner addressed the director's queries. In an unsigned statement, the petitioner provided an updated description of the duties of the proffered position, additional information regarding the petitioner's industry, tax records for the petitioner's organization, and Internet job postings for similarly-titled positions.

The petitioner provided the following updated description of duties of the proffered position in response to the RFE:

1. The Company's financial statements must be regularly analyzed to ascertain that the expenses and revenues of the corporation are in a proper ratio and supportive of long term growth. In these demanding economic times, this function and purpose is essential to maintaining the health of the corporation. [The beneficiary] must evaluate the costs of the company balanced with the services charged which requires an understanding of the transportation market, competitor pricing, and general and specific economic trends that will impact on the business. [The beneficiary] must be updated on new regulations. The ultimate purpose is to ensure forward direction and maintenance of corporate profitability.
2. [The beneficiary] must be able to analyze and guide the business with future investment and acquisition decisions. The budget, along with cost and credit information must be analyzed. The options in the financial markets must be evaluation and funds from the business allocated in accordance with market conditions. Strategies and recommendations must be presented to the managers of [the petitioner] as to how best to employ corporate resources. [The beneficiary] must have the ability to study and

research the relevant and pertinent economic and financial developments that have the potential to effect and impact the transportation industry.

On May 4, 2009, the director denied the petition, finding that the proffered position is not a specialty occupation. Specifically, the director noted that the proffered position was akin to the description of Administrative Services Manager found in the Department of Labor's (DOL) *Occupational Outlook Handbook*. On appeal, counsel contends that the director's classification of the proffered position as that of administrative services manager was incorrect, and contends that the duties of the proffered position as set forth in the record demonstrate that it is 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) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree. 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 will first review the *Handbook's* discussion of administrative services managers, which was relied upon by the director in rendering the denial. According to the *Handbook*:

Administrative services managers plan, coordinate, and direct a broad range of services that allow organizations to operate efficiently. They might, for example, coordinate space allocation, facilities maintenance and operations, and major property and equipment procurement. They also may oversee centralized operations that meet the needs of multiple departments, such as information and data processing, mail, materials scheduling and distribution, printing and reproduction, records management, telecommunications management, security, recycling, wellness, and transportation services. Administrative services managers also ensure that contracts, insurance requirements, and government regulations and safety standards are followed and up to date. They may examine energy consumption patterns, technology usage, and personal property needs to plan for their long-term maintenance, modernization, and replacement.

Specific duties for these managers vary by size of company or office and degree of responsibility and authority. In small organizations, a single administrative services manager, sometimes called an *office manager*, may oversee all support services. (See the statement on office and administrative support worker supervisors and managers elsewhere in the *Handbook*.) In larger ones, however, there may be several layers of administrative services managers that may specialize in different areas and report to directors of administration, or vice presidents of administration who oversee all administrative services.

The nature of these managerial jobs varies as significantly as the range of administrative services required by organizations. For example, administrative services managers who work as *contract administrators* oversee the preparation, analysis, negotiation, and review of contracts related to the purchase or sale of equipment, materials, supplies, products, or services. Other administrative services managers handle the acquisition, distribution, and storage of equipment and supplies, while others oversee the disposal of surplus or unclaimed property.

Based on a review of the *Handbook's* section above in relation to the proffered duties of the position, the AAO finds that the occupation of administrative services manager appears akin to that of the proffered position of office manager as described by the petitioner in its letter of support dated February 2, 2009. Specifically, this description of duties indicated that the beneficiary would be responsible for such tasks as resolving complaints, directing the dispatching, routing and tracking of trucks, implementing schedule and policy changes, and ensuring that staff members complied with administration policies, safety rules, and government regulations. These duties encompass a broad range of services as contemplated by the *Handbook's* description of administrative services managers, and the AAO concurs with the director's conclusion that this occupation is most akin to that described by the petitioner.

It must be noted, however, that in response to the RFE and on appeal, counsel contends that the proffered position is much more complex than that of an administrative services manager, and claims that the beneficiary is required to make financial forecasts, analyzing financial statements and budgets, and research and study economic and financial developments in the transportation industry. The AAO notes that these additional duties were included in the response to the RFE, which requested the petitioner to provide additional information and details pertaining to the proffered position. However, the newly-stated duties in the RFE, again reiterated on appeal, go beyond the scope of the position initially described in the petitioner's letter of support dated February 2, 2009. In sum, the initial description appeared to have the beneficiary directing and managing the administrative functions of the petitioner's business, while the second iteration of the job has the beneficiary engaging in financial analysis and forecasting, as well as accounting duties.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, 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 its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits the visa classification sought. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make an otherwise deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). If significant changes to the content of a petition changed, a petitioner must file a new petition, with fee, that incorporates these changes. If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather materially expanded the nature and scope of the duties beyond those comprising the position for which the petition was filed, by

adding new and more complex duties to the job description. Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition.

Having found the duties of the proffered position to be those of an administrative services manager, the AAO now turns to the *Handbook* for its discussion of the educational requirements imposed on individuals who seek employment within this profession:

Education and experience requirements for these managers vary widely, depending on the size and complexity of the organization. In small organizations, experience may be the only requirement. In large organizations, however, administrative services managers may need a bachelor's degree and appropriate experience.

Education and training. Specific education and training requirements vary by job responsibility. Office managers in smaller operations or lower-level administrative services managers with fewer responsibilities may only need a high school diploma combined with appropriate experience, but an associate degree is increasingly preferred.

As the *Handbook* indicates no specific degree requirement for employment as an administrative services 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 has not established 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 submitted one Internet job advertisement for employment related to office managers in transportation companies. This evidence, however, fails to establish the petitioner's degree requirement as the norm within its industry.

The job announcement provided is for the position of Manager (Manager/Supervisor of Staff) for The Apt. Movers, a privately-owned moving company. The job posting, however, simply states under its requirements section that a degree is preferred, and furthermore does not specifically require a degree in a specific specialty. Moreover, specific details regarding the position differ greatly from the description of the proffered position in this matter. Accordingly, this job posting fails to satisfy the second criterion's condition that a petitioner establish that its degree requirement is common in parallel positions among similar organizations.

Furthermore, the AAO also concludes that the record does not establish that the proposed position is a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires a demonstration that the position is so complex or unique that it can only be performed by an individual with a degree. The record does not include documentation to support the requisite complexity or uniqueness of the proffered position other than the assertions of counsel on appeal. 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). Further, there is nothing in the descriptions of the proffered position and its duties that indicate that the position is more complex or unique than administrative service manager positions that can be performed by persons without at least a bachelor's degree, or its equivalent, in a specific specialty.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires at least a bachelor's degree, or its equivalent, in a specific specialty; and the nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

To determine a petitioner's ability to meet the third criterion, USCIS often reviews the position's employment history, including the names and dates of employment of those employees with degrees who previously held the position, as well as the petitioner's hiring practices with regard to similar positions. In response to the director's RFE, the petitioner indicated that the beneficiary would be the petitioner's sole office employee, with the remaining staff retained as independent contractors. The petitioner made no claim, and presents no evidence, that it previously recruited and hired for the proffered position only persons with at least a bachelor's degree, or its equivalent, in a specific specialty. Therefore, the petitioner has failed to establish that the petitioner's normal hiring practice is to require the minimum of a baccalaureate degree for the proffered position.

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 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 in a specific specialty.

As already discussed, the AAO has concluded that the proffered position is closely aligned to that of an administrative services manager, and, that the *Handbook* indicates that there is no usual association between administrative services manager positions and the attainment of a baccalaureate or higher degree in a specific specialty. Further, the AAO finds that to the extent that they are developed in the record of proceeding - which is in broad terms of generalized functions such as directing activities related to dispatching, routing and tracking trucks; organizing brokers to delegate work; and resolving customer complaints - the duties of the proffered position do not establish a level of specialization and complexity that would require knowledge usually associated with the attainment of at least a bachelor's degree in a specific specialty. The AAO, therefore, concludes that the petitioner has not established the proffered position as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, 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). Accordingly, the AAO shall not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.