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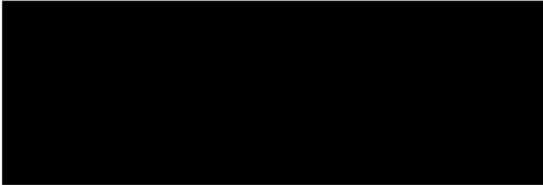
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

D2



Date: **APR 29 2011** Office: VERMONT SERVICE CENTER FILE: EAC 10 127 51980

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the Vermont 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 investment and management services/research and publishing firm with 12 employees.¹ It seeks to employ the beneficiary as a Publication 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 additional evidence (RFE) and the petitioner's response to the 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 that the AAO will consider is whether the 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 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 [1] 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 [2] 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.

¹ It is noted that the petitioner's actual name is Reston Investments, Inc. D/B/A Reston Management Group, a for-profit Virginia corporation. In addition, although it claims to be an agent for IIIT, it is apparent from its support letter that it is filing the instant petition as the United States employer of the beneficiary and not as an agent for the beneficiary's employer.

(Emphasis added.)

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 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 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.

In this matter, the petitioner seeks to continue to employ the beneficiary as a Publication Manager. The initial letter from the petitioner submitted with the petition stated that the beneficiary would:

- Solicit manuscripts in English and Arabic;
- Negotiate and conclude contracts with authors, printers, and publishers;
- Assess marketing potentials for each title and develop business plans, formats, quality, and scheduling;
- Manage production and distribution; and
- Serve as a member of the petitioner's Publications Committee.

The petitioner stated that it requires its Publication Manager to have a bachelor's degree in English, Communications, Journalism, or a related field.

The petitioner submitted copies of the beneficiary's credentials indicating that he has a U.S. Master's degree in Business Administration. The petitioner also submitted copies of the beneficiary's foreign degree, which has been evaluated as equivalent to a U.S. Bachelor of Arts degree in Communications. Additionally, the beneficiary took some courses in publishing in the U.S.

On June 30, 2010, the director issued an RFE requesting additional evidence that the proffered position is a specialty occupation.

In response to the RFE, counsel stated that the petitioner employs another Publications Manager in addition to the beneficiary who holds a Bachelor's degree in Education with a concentration in English.

The petitioner also submitted four opinion letters from the following people: 1) [REDACTED] 2) [REDACTED] News Editor Washington Report; 3) [REDACTED] Clarity Press, Inc.; and 4) [REDACTED] Departments of Law and Sociology, Carleton University in Ontario, Canada.

[REDACTED] states that "[a] Bachelor's Degree in Journalism, Communications, Liberal Arts, Business Administration, or similar field of study would certainly be the minimum requirement to be considered for the position in question."

[REDACTED] states that her employees who perform similar duties require at least a bachelor's degree, but does not indicate that at least a bachelor's degree in a *specific specialty* is required to perform the proffered duties. When discussing the coursework that is relevant to perform the proffered duties, she states "[s]tudents are exposed to such courses when engaged in a Bachelor's degree program in Communications, Journalism, and even Business Administration or Marketing."

Ms. Collier asserts that the proffered position is similar to her own and states that the duties “cannot be performed without at least a Bachelor’s Degree in Communications, Writing, linguistics, or related field of study.”

Dr. Dakroury states that the proffered position requires at least a bachelor’s degree, but does not indicate that the bachelor’s degree must be in a *specific specialty*.

The petitioner also submitted its own expert opinion letter written by its Regional Director. Regarding the position’s duties (including soliciting and inspecting manuscripts, working with authors, editors and publishers, developing a business plan, and transferring an edited and final manuscript into a book format), the Regional Director states:

The descriptions above clearly shows [sic] that the complex job of Publications Manager requires theoretical and practical knowledge in [a] variety of human sciences that cannot be delivered without a coursework of a bachelor[’s] degree in Communication or closely related field. Any typical bachelor[’s] degree in Communication, here in the States or elsewhere, will include courses that cover the aforementioned topics and courses.

The Regional Director’s statement that at least a bachelor’s degree in communication or a closely related field is required for the proffered position contradicts the statements made by the other letter writers mentioned above, who state that the position requires either a bachelor’s degree generally or a bachelor’s degree in journalism, communications, a liberal arts field, business administration, marketing, writing, or linguistics. It should be noted that not all of the fields listed by the letter writers, such as business administration, marketing, or a liberal arts field generally, are closely related to communications.²

Additionally, the petitioner submitted copies of advertisements placed by other businesses. Three of the advertisements state that a bachelor’s degree generally is required without

² It is further noted that a requirement of a bachelor’s degree in business administration or liberal arts is inadequate to establish that a position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration or liberal arts, without further specification, does not establish the position as a specialty occupation. *See Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988).

In addition to proving that a job requires the theoretical and practical application of a body of specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must also establish that the position requires the attainment of a bachelor’s or higher degree in a specialized field of study. As explained above, USCIS interprets the supplemental degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) as requiring a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor’s degree, such as a degree in business administration or liberal arts, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

specifying that the degree be obtained in a specific specialty; one of the advertisements states that a bachelor's degree in communications, journalism or a related field is required; another advertisement states that a bachelor's degree in English, journalism, graphic arts, science or a related field is required; another advertisement requires a bachelor's degree but merely prefers that the degree be in English, journalism or the equivalent; and another advertisement requires a Bachelor's degree in English, journalism or a related field. Additionally, none of the advertisements were placed by small publications businesses that are parallel to the petitioner's business.

The petitioner provided documentation regarding other employees it states perform similar duties to those proffered in this petition. The petitioner submitted copies of the foreign degrees for two of the employees, which indicate that one has a bachelor's degree in education with a major in English while the other has a bachelor's degree in English. The petitioner did not provide a credential evaluation for these foreign degrees. For three former employees, the petitioner did not provide copies of their degrees, but merely stated that one has a bachelor's degree, one has a master's degree, and one has a Ph.D. It is not clear in which fields these degrees were obtained.

The director denied the petition on October 14, 2010.

On appeal, counsel for the petitioner argues that the proffered position is a specialty occupation and that USCIS has failed to use the preponderance of the evidence standard in reviewing the materials submitted by the petitioner. Counsel states that the proffered position falls under the section on Authors, Writers, and Editors in the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*. Counsel further notes that USCIS has approved an H-1B petition in the past for the beneficiary to perform the duties of the same occupation.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. § 291 of the Act, 8 U.S.C. § 1361; *see Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

To make its determination whether the employment 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 *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 AAO agrees with counsel that the proffered position is closest to that of an Editor as described in the section on Authors, Writers, and Editors in the *Handbook*. However, this in and of itself does not demonstrate that the position qualifies as a specialty occupation as defined at 8 C.F.R. § 214.2(h)(4)(ii). The training and qualifications required for Editors are described as follows in the DOL *Handbook*, 2010-11 online edition:

A bachelor's degree or higher is typically needed for a job as an author, writer, or editor. Because writing skills are essential in this occupation, many employers like to hire people with degrees in communications, journalism, or English, but those with other backgrounds and who can demonstrate good writing skills may also find jobs as writers. . . .

Therefore, although a bachelor's degree is a typical requirement for editing positions, the *Handbook* does not indicate that the degree must be in a *specific specialty*, as is required under 8 C.F.R. § 214.2(h)(4)(ii) .

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

As the *Handbook* does not indicate that editing positions normally require at least a bachelor's degree in a *specific specialty*, and as it is not self-evident that, as described in the record of proceeding, the proposed duties comprise a position for which the normal entry requirement would be at least a bachelor's degree, or its equivalent, in a *specific specialty*, 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 specific specialty. 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.

Again, 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 at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

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. As already discussed, in response to the RFE, the petitioner submitted copies of advertisements. However, these advertisements were not placed by businesses parallel to the petitioner and also do not refute the statistics-based finding in the *Handbook* that a degree in a wide variety of fields is acceptable for editing positions. The petitioner has not provided any documentation evidencing a common degree-in-a-specific-specialty requirement in positions that are both: (1) parallel to the proffered position; and (2) located in organizations similar to the petitioner.

Further, upon careful review of the four opinion letters discussed previously, the AAO concludes that these letters also do not refute the statement in the *Handbook* that a degree in a wide variety of fields is acceptable for editing positions as, together, they state that the proffered position requires either a bachelor's degree generally or a bachelor's degree in journalism, communications, a liberal arts field, business administration, marketing, writing, or linguistics.

The petitioner also failed to satisfy 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 letter from the petitioner's Regional Director states that the proffered position's duties are sufficiently complex as to require a theoretical and practical knowledge that is obtained through a bachelor's degree in communications or a closely related field. However, this assertion contradicts the four opinion letters previously described, which state that the proffered position requires either a bachelor's degree generally or a bachelor's degree in journalism, communications, a liberal arts field, business administration, marketing, writing, or linguistics, which undermines the credibility of the regional director's opinion.

For this reason, the AAO finds that the Regional Director's letter has no significant evidentiary weight, and that it is not probative evidence on the specialty occupation issue. The AAO may, in its discretion, use advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Therefore, the AAO finds that the letter from the Regional Director does not establish that the proffered position is a specialty occupation.

Regarding its other publication managers, as discussed previously, 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*. Therefore, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).³

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. The AAO does not find that the proposed duties reflect a higher degree of knowledge and skill than would normally be required of editors not equipped with at least a bachelor's degree, or its equivalent, in a *specific specialty*. Further, as discussed previously, the letter from the petitioner's Regional Director regarding the minimum degree requirements contradicts the cumulative findings of the other four opinion letters provided by the petitioner and is therefore not probative. The AAO, therefore, 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).

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).

Finally, the AAO notes that the record indicates that prior H-1B petitions have been approved for the beneficiary. The AAO is not required to approve applications or petitions where eligibility has

³ Even if the record had established a prior history of recruiting and hiring only specialty occupation degreed individuals for the position, the analysis of this issue would be further complicated by the fact that it is not clear who in fact will be the beneficiary's United States employer. As indicated above, although the petitioner claims to be an agent for IIIT, it nevertheless appears that the petitioner views itself as the beneficiary's employer based in part on its payroll and employee benefit functions for IIIT. This relationship appears to indicate, however, that IIIT may in fact be the true employer of the beneficiary and, as such, it is really the job requirements of IIIT that need to have been documented by the petitioner as opposed to its own. In support of this analysis, USCIS cites to *Defensor v. Meissner*, 201 F.3d 384, in which an examination of the ultimate employment of the beneficiary was deemed necessary to determine whether the position constitutes a specialty occupation. The petitioner in *Defensor*, Vintage Health Resources (Vintage), was a medical contract service agency that brought foreign nurses into the United States and located jobs for them at hospitals as registered nurses. The court in *Defensor* found that Vintage had "token degree requirements," to "mask the fact that nursing in general is not a specialty occupation." *Id.* at 387.

The court in *Defensor* held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." *Id.* at 388. The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. The *Defensor* court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* In *Defensor*, the court found that that evidence of the client companies' job requirements is critical if the work is to be performed for entities other than the petitioner. *Id.* As the instant petition lacks this required evidence from IIIT, it cannot be found that the petitioner met the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) for this additional reason.

not been demonstrated, merely because of prior approvals that may have been erroneous. If any of the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, they would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The petition will be denied and the appeal dismissed. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. § 291 of the Act. Here, that burden has not been met.

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