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U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship
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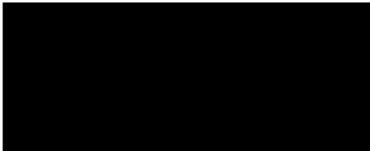
Date: **DEC 06 2011** Office: VERMONT SERVICE CENTER

File:

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,

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner described itself as a distributor of consumer goods with five employees. To employ the beneficiary in what it designates a marketing manager position, the petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition because he determined that the petitioner had not established that it would employ the beneficiary in a specialty occupation as that term is defined by section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and the implementing regulations at 8 C.F.R. § 214.2(h)(4).

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief and attached exhibits in support of the appeal.

In deciding whether the proffered position qualifies as a specialty occupation position, the AAO analyzes the evidence of record according to the statutory and regulatory framework below.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health,

education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.”

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in 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) (hereinafter referred to as *Defensor*.) 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.

The Form I-129 and the LCA submitted with it assert that the beneficiary will work and be compensated as a marketing manager.

The AAO recognizes the U.S. Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. The *Handbook's* observations about the marketing manager occupational category appear in its "Advertising, Marketing, Promotions, Public Relations, and Sales Managers" chapter (hereinafter referred to as "the *Handbook* chapter"). As will now be discussed, however, that chapter indicates that marketing managers do not constitute an occupational group that categorically requires either a bachelor's or higher degree, or the equivalent, in a specific specialty, or knowledge usually associated with the attainment of such a degree. The Significant Points section at the opening of the chapter includes the following "bullet" indicating that a college degree, regardless of major or academic concentration, should greatly enhance a candidate's chances for hire, if he or she also has related experience, is very creative, and possesses strong communication and computer skills:

- College graduates with related experience, a high level of creativity, and strong communication and computer skills should have the best job opportunities.

In pertinent part, the Training, Qualifications, and Advancement section of the *Handbook* chapter states:

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 evident in the above excerpt, the *Handbook* indicates that a bachelor's degree or higher, or its equivalent, in a specific specialty is not normally a minimum hiring requirement for marketing manager positions. As the proffered position's inclusion in the marketing manager occupational category would not be sufficient in itself to establish that the proffered position qualifies as a position in a specialty occupation, the petitioner is obliged to provide sufficient evidence to establish not only that the beneficiary would perform the services of a marketing manager, but also that he would do so at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a computer related specialty.

With the visa petition, the petitioner submitted a description of the duties of the proffered position. In response to an RFE, the petitioner reiterated that description of duties and added percentages of work time accorded to each individual duty. The description of duties with percentages is as follows.

- 40% Develop the [petitioner's] detailed marketing strategy.
- 15% Determine the demand for products and services offered by [the petitioner] and its competitors.
- 20% Identify potential markets and develop relationship with potential customers.
- 02% Develop pricing strategy to maximize profitability as well as increase market share.
- 02% Monitor market trends and develop strategies to capture opportunities available in the market.
- 03% Develop sales and promotions campaigns. Work with advertising and promotion managers to promote [the petitioner's] products and services and to attract potential users.
- 02% Analyze sales data , generate reports for senior management consideration[.]
- 02% Gather market statistics concerning products available, pricing offered for competitor's products, special promotions run and their impact on the marketability of products.
- 02% Conduct regular meetings with sales representatives, manufacturer's representatives and client representatives.
- 02% Constantly monitor market conditions, devise strategies to combat challenges and capitalize on any opportunities presented.
- 02% Monitor sales figures on a daily basis.

- 04% Monitor competitors[‘] advertising and promotion campaigns and respond to that [sic] accordingly.
- 02% Maximize sales potential of the products being offered.
- 02% Develop [the petitioner’s] image to achieve gain in market share.

The AAO finds that, to the extent that the proposed duties are described – which the AAO finds to be exclusively in generalized terms of functions generic to marketing management in general – those duties fail to convey any particular level of specialization, complexity, or uniqueness that would distinguish them from marketing manager positions performed by persons without at least a bachelor’s degree, or the equivalent, in a specific specialty.

With the visa petition, the petitioner also provided an evaluation of the beneficiary’s foreign education and copies of two vacancy announcements taken from popular job search websites. The evaluation of the beneficiary’s foreign education indicates that the beneficiary’s bachelor of commerce degree from the University of Pune in India is equivalent to a U.S. associates degree, and his master of commerce degree, also from the University of Pune, is equivalent to a bachelor’s degree.

One of the vacancy announcements submitted is for a marketing manager to work in Las Colinas, Texas and was placed by Hadango, an online retailer. It states that the position requires a bachelor’s degree in marketing, advertising, communications, or a related area.

The other vacancy announcement provided is for a “Manager, Marketing Analytics” to work in Plano, Texas and was placed by Schroepfer, Wessels & Jolesch, an advertising agency. It states that the position requires a bachelor’s degree, but does not specify any subject the requisite bachelor’s degree must be in.

On July 24, 2008 the service center issued the RFE in this matter. The service center requested evidence that the petitioner would employ the beneficiary in a specialty occupation position and evidence that the beneficiary is qualified to work in a specialty occupation position.

In response, in addition to the description of duties described above, the petitioner submitted another educational evaluation. That second evaluation states that the beneficiary’s foreign education is equivalent to a bachelor’s degree in business administration and one additional year of study toward a master’s degree in business administration.

In a letter dated October 13, 2008, the petitioner’s president stated that the beneficiary is qualified to work in a specialty occupation because he has the equivalent of a bachelor’s degree. He also cited the job description provided, the *Handbook*, and the vacancy announcements submitted as evidence that the proffered position is so complex or unique that it can be performed only by an individual with a degree and therefore meets the alternative requirement of the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The petitioner’s president correctly noted that this requirement is in the

alternative, rather than in addition to any of the other alternative requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The director denied the petition on April 3, 2009, finding that the petitioner had not demonstrated that it would employ the beneficiary in a specialty occupation. On appeal, counsel asserted that, to the contrary, the evidence demonstrates that the petitioner would employ the beneficiary in a specialty occupation.

The AAO will address the alternative criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). The AAO will first identify the alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(I). That criterion is satisfied if the petitioner demonstrates that the particular marketing manager position proffered here is one that normally requires a bachelor's or higher degree or its equivalent in a specific specialty.¹

The evidence relied upon by counsel to show that marketing manager positions require a minimum of a bachelor's degree or the equivalent in a specific specialty includes the *Handbook* and the vacancy announcements submitted.

One of the vacancy announcements states that the particular marketing manager position announced requires a bachelor's degree in marketing, advertising, communications, or a related area. The other vacancy announcement states that the position announced requires a bachelor's degree, but does not state any specific specialty the degree should be in. Clearly, that announcement does not indicate that the position requires a degree in any specific specialty. As such, the combination of the two announcements is not indicative of a bachelor's degree in a specific specialty being normally required for marketing manager positions generally, let alone for the particular marketing manager position proffered in this petition.

The *Handbook*, similarly, does not indicate that marketing manager positions normally require a minimum of a bachelor's degree or the equivalent in a specific specialty. It states, "A wide range of educational backgrounds is suitable for entry into . . . marketing . . . manager jobs, but many employers prefer college graduates with experience in related occupations." It further states, "For marketing . . . management positions, employers often prefer a bachelor's or master's degree in business administration with an emphasis on marketing."

The AAO reads the *Handbook* as stating that employers often prefer a bachelor's or master's degree in business administration with an emphasis on marketing for their marketing manager positions, but that a college degree is not essential. Thus, the AAO does not concur with counsel's reading of that language as indicating that all marketing manager positions require a minimum of a bachelor's degree, and that employers often prefer that their marketing managers' degrees be in business

¹ As was noted above, 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.

administration with an emphasis on marketing. However, even counsel's interpretation does not assert a requirement for at least a bachelor's degree, or the equivalent, in a specific specialty.

In any event, the *Handbook* does not support the proposition that marketing manager positions normally require a minimum of a bachelor's degree or the equivalent *in a specific specialty*.

The petitioner has not demonstrated that a baccalaureate or higher degree or its equivalent in a specific specialty is normally the minimum requirement for entry into the particular position and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO will consider 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.

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 was noted above, the *Handbook*, does not support that marketing manager positions in any industry normally require a minimum of a bachelor's degree or the equivalent in a specific specialty. The instant record contains no evidence that a professional association of marketing managers requires a minimum of a bachelor's degree or the equivalent in a specific specialty as a condition of entry. The record contains no letters or affidavits from others in the petitioner's industry.

Precisely what specific industry the petitioner is in is not revealed in the record. A "distributor of consumer goods" may be any retail or wholesale business. Whether the petitioner is a shoe store, a jeweler, or a fabric wholesaler is unknown to the AAO. As such, the petitioner's burden of demonstrating that marketing manager positions in its particular industry require a minimum of a bachelor's degree or the equivalent in a specific specialty is rendered more exacting.

The two vacancy announcements submitted are the only evidence in the record that might arguably pertain to whether the petitioner's industry requires a minimum of a bachelor's degree or the equivalent in a specific specialty for its parallel marketing manager positions. Those announcements, as was noted above, contain no indication that the positions they announced require a minimum of a bachelor's degree or the equivalent *in a specific specialty*. Also, the companies that placed those announcements have not been shown to be in the petitioner's industry. For both reasons, they offer no support for the proposition that a requirement of a minimum of a bachelor's degree or the equivalent in a specific specialty is common to the petitioner's industry in parallel positions among similar organizations. The petitioner has not demonstrated that the proffered

position qualifies as a specialty occupation pursuant to the criterion of the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) would be satisfied if the petitioner demonstrated that, notwithstanding that other marketing manager positions might not require a minimum of a bachelor's degree or the equivalent in a specific specialty, the particular position proffered is so complex or unique that it can be performed only by a person with such a degree.

The only evidence in the record pertinent to the demands of the proffered position is the description of its duties. The description of those duties is so generalized and generic, however, that it offers no indication of complexity or uniqueness. Developing the petitioner's marketing strategy, determining the demand for products and services, and identifying potential markets, for instance, contain no indication of a level of complexity or uniqueness that would require the services of a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

The petitioner has not demonstrated that the particular position proffered is so complex or unique that it can be performed only by an individual with a degree; and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

Finally, the AAO will address the alternative requirement of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which is satisfied if the petitioner demonstrates that 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 was noted above, the descriptions of the duties of the proffered position provided by the petitioner are exclusively general and generic. As such, they provide no indication that the knowledge required to perform those duties is usually associated with the attainment of a minimum of a bachelor's degree or the equivalent in a specific specialty. The petitioner has not, therefore, demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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

The record contains an additional issue that was not included as a basis for the decision of denial.

The beneficiary has a foreign bachelor's degree and a foreign master's degree in commerce. The first educational evaluation submitted states that those degrees are equivalent to a U.S. associates degree and a U.S. bachelor's degree, respectively, but did not state that they are equivalent to degrees in any specific specialty. Obviously, that evaluation does not suggest that the beneficiary has the equivalent of a U.S. bachelor's degree in any specific specialty.

The second evaluation states that the two degrees, taken together, are equivalent to a U.S. bachelor's degree in business administration and an additional year of study toward a U.S. master's of business administration degree.

A degree with a generalized title, such as business administration, without further specification, is not a degree in a specific specialty. *See Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). Although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, it is not a minimum of a bachelor's degree or the equivalent in a specific specialty. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

Neither of the educational evaluations submitted indicates that the beneficiary is qualified to work in a specialty occupation by virtue of possessing a minimum of a bachelor's degree or the equivalent in a specific specialty.

The AAO observes that if the petitioner had demonstrated that the proffered position required a minimum of a bachelor's degree or the equivalent in a specific specialty, the petitioner would be obliged, in order for the visa petition to be approvable, to demonstrate, not only that the beneficiary has a bachelor's degree or the equivalent, but that the beneficiary has a minimum of a bachelor's degree or the equivalent *in that specific specialty*. *See Matter of Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968).

Pursuant to the instant visa category, however, a beneficiary's credentials to perform a particular job are relevant only when the job is found to qualify as a specialty occupation. As discussed in this decision, the proffered position has not been shown to require a baccalaureate or higher degree, or its equivalent, in a specific specialty and has not, therefore, been shown to qualify as a position in a specialty occupation. Because the finding that the petitioner failed to demonstrate that the proffered position qualifies as a specialty occupation position is dispositive, the AAO need not further analyze the issue of the beneficiary's qualifications.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. The appeal will be dismissed and the petition denied.

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