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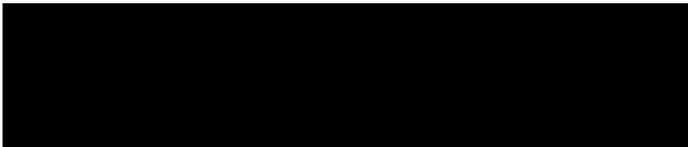
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

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Date: DEC 09 2011 Office: CALIFORNIA 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,

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 remain denied.

The petitioner claims to be a provider of distribution, warehousing and transportation services with seven employees and a gross annual income of \$1,248,000. It seeks to employ the beneficiary as a Business Analyst 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. The AAO reviewed the record in its entirety before reaching its decision.

The central issue in this case 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.

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 (5<sup>th</sup> 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 the beneficiary’s services as a Business Analyst. The duties of the proffered position, as described in the petitioner's initial letter in support of the petition and its employment offer, include:

- Perform analysis of market conditions, operating procedures, and organizational controls for logistic services, such as distribution, warehousing, and transportation services, and devise most efficient methods of accomplishing work and management;

- Collect and organize data, and conduct analytical studies of business outlook, trends, and business procedures for streamline logistic services, in such areas as communications, customer trends, trade figures, currency rates, integrated distribution methods, manning, warehousing, political issues, source of sales, tariff and custom regulations, and inventory control;
- Develop information and consider all available solutions or alternate methods of proceeding and prepare recommendations for implementation of new systems, procedures or organizational changes; and
- Review operational effectiveness of service policies and management systems and confer with personnel concerned to assure smooth functioning of newly implemented systems or procedures.

The petitioner submitted a copy of the beneficiary's diploma establishing that she has a U.S. bachelor's degree in Business Administration with a concentration in Marketing.

On May 1, 2009, the director issued an RFE requesting additional evidence that the proffered position is a specialty occupation, including a more detailed job description. The RFE also requested additional information regarding the petitioner's business.

In response to the RFE, the petitioner provided, in relevant part, an extended description of the proposed duties of the proffered position. The petitioner broke down the proffered duties as follows:

- Confer with clients and customers and obtain information to determine consumer trends and estimate trade figures (10%);
- Research and gather information in the areas of cost, consumer trends, trade figures, currency rates, political issues, business demands, source of products, tariff and custom regulations (10%);
- Collect and organize data, and conduct analytical studies of business outlook, trends and business procedures (35%);
- Review management information systems to comply with business policies and provide suggestions to management (15%);
- Develop information and consider all available solutions or alternate methods of proceeding (20%); and
- Review operational effectiveness of service policies and management systems and confer with personnel concerned (10%).

The petitioner stated that it required someone with at least a bachelor's degree in business administration with a concentration on marketing or a related field for the proffered position.

The petitioner's response to the RFE was also accompanied by information relating to the petitioner's business, an opinion letter relating to the proffered position, position announcements from Monster.com for business analyst or related occupations, and the petitioner's business analyst position announcement. Additionally, the petitioner included a copy of the master's

degree in business held by the individual who previously was employed as the petitioner's business analyst and is now its general manager.

The AAO notes that the opinion letter of ██████████ Assistant Professor at Montana State University, stops short of stating that at least a bachelor's degree in a specific specialty is required for the proffered position. Indeed, ██████████ states that "it is usual and customary in the industry . . . to require a minimum bachelor's degree in a business administration discipline such as marketing (or a closely related field)." ██████████ opinion thus does not indicate that at least a bachelor's degree or the equivalent in a specific specialty is required for the proffered position. The AAO may, in its discretion, use as 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).

The AAO further notes that although the Monster.com advertisements submitted state that a bachelor's degree is required for the advertised positions of business analyst, market research analyst, business systems support analyst, search marketing analyst and management consultant, they do not require at least a bachelor's degree or the equivalent in a *specific specialty*. Instead, most advertisements require "a bachelor's degree" without specifying any field of study or state that a bachelor's degree in business, economics, or a related field is required.

The RFE response is accompanied by a letter from counsel stating that the proffered position is in a specialty occupation. The unsupported statements of counsel are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

The director denied the petition on September 30, 2009.

On appeal, counsel for the petitioner argues that the duties of the proffered position are those of a business analyst and not those of a marketing manager and that the position of business analyst is a specialty occupation requiring at least a bachelor's degree in business administration.

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO first turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO notes that the petitioner has seven employees, including a general manager who was previously its business analyst. Although the petitioner's gross annual income exceeds \$1.2 million, its net income is \$39,982. The proffered compensation for the position of business analyst is \$15/hour. The petitioner did not provide a description of the petitioner's other employees and their duties. The AAO therefore cannot determine in the first place whether the petitioner has sufficient work for the beneficiary to perform the proffered duties on a full-time basis. In any event, contrary to counsel's claims, the proffered duties of a business analyst within the petitioner's organization closely resemble those of the *Handbook's* description of a marketing manager, and such a position would not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the AAO notes that the *Handbook* states that:

Marketing managers work . . . to promote the firm's or organization's products and services. [M]arketing 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 *Handbook* further states that employers seeking marketing managers "often prefer a bachelor's or master's degree in business administration with an emphasis on marketing." See Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-11 ed., available at <http://www.bls.gov/oco/ocos020.htm> (last accessed November 15, 2011) (emphasis added). The *Handbook* thus does not indicate that a bachelor's degree in a specific field is the minimum entry level requirement for the position. Thus, the position of marketing manager does not qualify as a specialty occupation as defined at 8 C.F.R. § 214.2(h)(4)(ii).

Even if there was sufficient evidence to demonstrate that the proffered position falls under the *Handbook* section describing management analysts, the position still would not qualify as a specialty occupation as defined at 8 C.F.R. § 214.2(h)(4)(ii). The training and qualifications required for management analysts are described as follows in the DOL *Handbook*, 2010-11 online edition:

Educational requirements for entry-level jobs in this field vary between private industry and government. Many employers in private industry generally seek individuals with a master's degree in business administration or a related discipline. Some employers also require additional years of experience in the field or industry in which the worker plans to consult. Other firms hire workers with a bachelor's degree as research analysts or associates and promote them to consultants after several years. Some government agencies require experience, graduate education, or both, but many also hire people with a bachelor's degree and little work experience for entry-level management analyst positions.

Few universities or colleges offer formal programs in management consulting; however, many fields of study provide a suitable educational background for this occupation because of the wide range of areas addressed by management analysts. Common fields of study include business, management, accounting, marketing, economics, statistics, computer and information science, or engineering. Most analysts also have years of experience in management, human resources, information technology, or other specialties.

Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-11 ed., available at <http://www.bls.gov/oco/ocos020.htm> (last accessed November 15, 2011). Therefore, although a degree in business administration may be preferred, the *Handbook* does not indicate that at least a bachelor's degree in a specific specialty is required for management analysts.

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* indicates no specific degree requirement for employment as a management analyst, 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.

As stated earlier, 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).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. As discussed *supra*, the advertisements submitted as well as [REDACTED] opinion letter at best establish that a bachelor's degree generally is required, but not at least a bachelor's degree or the equivalent in a *specific specialty*. As a result, the petitioner has not established that parallel firms routinely require at least a bachelor's degree in a specific specialty.

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 evidence of record does not refute the *Handbook's* information to the effect that there is a spectrum of degrees acceptable for management analyst positions, including degrees not in a specific specialty. As discussed previously, the petitioner failed to demonstrate that it has sufficient work and resources for the beneficiary to perform any complex duties on a full-time basis. Therefore, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than marketing management or other positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

The record also 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 and, therefore, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). The fact that the petitioner's current general manager holds a master's degree in business administration and used to perform the duties of business analyst does not indicate that a bachelor's degree was the minimum requirement for the position of business analyst and, as previously noted, in fact brings into question the need for a business analyst where the petitioner employs only seven individuals including a general manager who previously performed the duties of business analyst.

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 here augments its earlier comments regarding the petitioner's failure to establish this criterion given its small size and low income. The petitioner failed to establish that it has sufficient work and resources for the beneficiary to perform specialized and complex duties usually associated with the attainment of a baccalaureate or higher degree in a specific specialty on a full-time basis. Therefore, the AAO does not find that there is enough evidence to document that the proffered position is that of a full-time business analyst. Further, the AAO finds that, to the extent that they are described in the record of proceeding, the duties of the proffered position do not appear more specialized and complex than business analyst positions not associated with the attainment of at least a bachelor's degree in a specific specialty. 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).

Even if established by the evidence of record, which it is not, the requirement of a bachelor's degree in business administration 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 corollary between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *See Matter of Michael Hertz Associates*, 19 I&N Dec. 558.

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).

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, 8 U.S.C. § 1361. Here, that burden has not been met.

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