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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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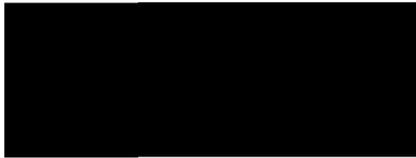


Date: DEC 09 2011 Office: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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:



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, 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 is a 213-bed skilled nursing and rehabilitation facility that was established in 1993, and employed 95 personnel and claimed \$7,000,000 in gross annual income when the petition was filed. It seeks to employ the beneficiary as a marketing 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, Petition for Nonimmigrant Worker, 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, Notice of Appeal or Motion, with counsel's brief and previously submitted documentation. The AAO reviewed the record in its entirety before reaching its decision.

The central issue 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 (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 the beneficiary’s services as a marketing manager. The petitioner noted on the Form I-129 that it wished to employ the beneficiary on a temporary basis from January 1, 2010 until January 1, 2013. The petitioner’s October 23, 2009 letter in support of the petition provided the following description of the position’s duties:

- Developing sound relationships with clients and prospective ones;

- Communicate and coordinate with other healthcare providers regarding service and financial agreements to ensure appropriate services;
- Develop pricing strategies – balancing firm objectives and customer satisfaction;
- Identify, develop and evaluate marketing strategy based on knowledge of established objectives, market characteristics, and cost and mark-up factors;
- Formulate, direct and coordinate marketing activities and policies to promote Petitioner's products and services;
- Direct the hiring, training, and performance evaluations of marketing staff and oversee their daily activities; and
- Meet and exceed the short and long term sales goals as outlined in the Marketing Plan.

The petitioner stated that the performance of the above tasks could not be expected from candidates who had “not undergone an in-depth preparation obtainable only through formal education leading to a baccalaureate degree.” The petitioner also noted its preference that the successful candidate has a degree relating to healthcare. The Labor Condition Application (LCA) appended to the petition listed the validity of the term of employment as October 1, 2009 until September 2012.

On November 20, 2009, the director issued an RFE requesting additional evidence that the proffered position is a specialty occupation, including a more detailed job description and any evidence that an industry standard existed for parallel positions in similar organizations requiring a baccalaureate degree in a specific discipline, among other items.

In response to the RFE, the petitioner referenced the Department of Labor's *Occupational Information Network O*NET* Online Summary Report for marketing managers which indicates the position usually requires a four-year degree course. The petitioner also expanded upon the initially stated duties by indicating that the beneficiary's functions would also include: market research and customer, company, and competitor analysis; marketing strategy including optimizing short-term unit margins, revenue growth, market share, long-term profitability, or other goals; and implementation planning including conceptualizing/designing company presentations.

The petitioner also submitted copies of five advertisements for positions such as healthcare marketing manager, marketing manager, territory manager-clinical sales marketing, director of sales and marketing, and regional marketing and admissions director. The companies advertising the positions included: a home care organization; an organization comprised of hospitals, a long term facility, and home health services, outpatient centers and physician offices; a medical practice; an assisted and independent living community; and a nursing and rehabilitation center. Two of the five advertisements listed bachelor's degree but did not specify the degree must be in a specific discipline and did not indicate if the degree was preferred or required. Of the remaining three advertisements, one advertisement noted the ideal candidate would have a general bachelor's degree and experience, the second advertisement indicated that a bachelor's degree in advertising, marketing, business, communications, or public relations or an associate degree with seven years of experience would be suitable for the advertised position, and the third

advertisement indicated a bachelor's degree in business, marketing, or health care was required. It is not clear from the general information provided in the advertisements that the duties of the advertised positions are parallel to the petitioner's proffered position.

The director denied the petition on December 14, 2009.

On appeal, counsel for the petitioner notes the petitioner's belief that a bachelor's degree in marketing is required to perform the duties of the proffered position and that this is an industry-wide standard. Counsel asserts that the tasks of the proffered position are highly complex requiring the application of a highly specialized body of knowledge based on marketing, business, and management principles found in the normal coursework associated with baccalaureate courses in "Management, Accounting, Business Administration, etc." Counsel re-submits the petitioner's response to the RFE and references the Department of Labor's *Occupational Outlook Handbook's (Handbook)* chapter on Advertising, Marketing, Promotions, Public Relations and Sale Managers occupations. Counsel acknowledges the petitioner has not previously hired anyone for the proffered position but claims that the petitioner has satisfied three of the four requirements establishing the proffered position as a specialty occupation.

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 U.S. Department of Labor's (DOL'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)).

Upon review of the duties of the position, the duties most closely resemble the duties outlined in the *Handbook's* chapter on advertising, marketing, promotions, public relations, and sales managers found in the *DOL Handbook*, 2010-11 online edition:

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.

For advertising management positions, some employers prefer a bachelor's degree in advertising or journalism. A relevant course of study might include classes in marketing, consumer behavior, market research, sales, communication methods and technology, visual arts, art history, and photography.

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.

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

As the *Handbook* indicates no specific degree requirement for employment as an advertising, promotions, or marketing manager, 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.

The AAO acknowledges the petitioner's reference to the Department of Labor's Online (*O*NET*) summary report for the occupation of marketing manager. However, the AAO does not consider the *O*NET* to be a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. The *O*NET* provides only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. Its rating does not describe how the years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require.

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. The advertisements submitted demonstrate at best that a bachelor's degree generally is required, but not at least a bachelor's degree or the equivalent in a *specific specialty*. The two advertisements that list a preference for a degree include a variety of possible disciplines suitable to perform the duties of their proffered positions and one of those advertisements notes that experience and a lesser degree may be sufficient to obtain the position. In addition, as noted above, the general descriptions of the advertised positions do not allow an adequate comparison to the proffered position to determine if the positions are indeed parallel. Upon review of the advertisements submitted the petitioner has not established that similar organizations routinely require at least a bachelor's degree in a *specific specialty* for parallel positions.

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 marketing manager positions, including degrees not in a specific specialty. Although counsel on appeal asserts that the duties of the proffered position are highly complex, the record does not support the assertion. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record in this matter lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than a marketing manager or other positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

As 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, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 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 marketing manager 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).

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.