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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

[REDACTED]

Date: **DEC 16 2011** Office: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

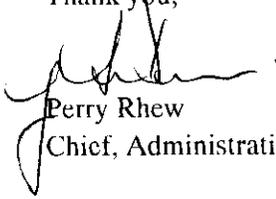
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:
[REDACTED]

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 in the business of photo album import and sales. It employs six individuals and has a net annual income of \$38,216. It seeks to employ the beneficiary as a business development specialist 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 proffered position is not a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the director's RFE; (3) the director's denial letter; and (4) Form I-290B with the petitioner's appeal brief. The AAO reviewed the record in its entirety before reaching its decision.

The primary issue for consideration is whether the petitioner's proffered 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 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.

The petitioner states that it is seeking the beneficiary's services, part time, as a business development specialist. In a March 20, 2009 letter, the petitioner's counsel states that the duties of a business development specialist within the petitioner's organization are:

- Research market conditions to develop business;
- Gather data on competitors and analyze prices, sales, and marketing programs;

- Establish relationships with clients; and
- Make recommendations to develop sales including sales plans, advertising, diversifying product lines, and developing methods of marketing.

Counsel does not state the minimum requirements for the proffered position. The petitioner did not submit a letter in support of the petition.

Counsel further states that the beneficiary holds a bachelor of science degree from California State University. The beneficiary's diploma indicates that her degree is in business administration, with a focus on marketing.

On June 26, 2009, the director issued an RFE requesting additional evidence that the proffered position is a specialty occupation. The director specifically requested a more detailed description of the work to be performed, including the specific job duties, the percentage of time to be spent on each duty, the level of responsibility, hours per week of work and the minimum education, training, and experience necessary to do the job.

The petitioner, through counsel, responded to the RFE on August 4, 2009 stating that the proffered position is equivalent to the market and survey researcher position described in the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*. Counsel states that the position requires at least a bachelor's degree. Counsel further explains that the beneficiary will spend 50% of her time on market research and analysis of competitor's data, 25% of her time on business development with respect to the petitioner's clients and 25% of the time on preparing forecast and recommendations. The response was accompanied, in part, by the petitioner's lease agreement, photographs, and organizational chart.

The director denied the petition on September 29, 2009.

On appeal, the petitioner, through counsel, states again that position of business development specialist within the petitioner's organization is akin to the *Handbook's* market and survey research analyst position and that a bachelor's degree is the minimum requirement for entry into the proffered position. Counsel further states that the petitioner has a legitimate need for a part time business development specialist. 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 appeal is accompanied by a letter signed by a business professor at the University of Maryland stating that the proffered position is so specialized and complex that knowledge to perform the duties is usually associated with the attainment of a bachelor's degree or higher.

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 22, 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 the petitioner could demonstrate that the proffered position is that of a market and survey research analyst as described in the *Handbook*, the *Handbook's* 2010-2011 edition does not indicate that entry into positions in that occupation normally requires at least a bachelor's degree, or the equivalent, in a specific specialty. *Id.*

While the *Handbook* reports that a baccalaureate degree is the minimum educational requirement for many market and survey research jobs, it does not indicate that the degrees held by such workers must be in a specific specialty that is directly related to market research, as would be required for the occupational category to be recognized as a specialty occupation. See *id.* This is evident in the range of qualifying degrees indicated in the Significant Points section that introduces the *Handbook's* chapter "Market and Survey Researchers," which states: "Market and survey researchers can enter the occupation with a bachelor's degree, but those with a master's or Ph.D. in marketing or a social science should enjoy the best opportunities." *Id.*

That the *Handbook* does not indicate that market research analyst positions normally require at least a bachelor's degree in a specific specialty is also evident in the following discussion in the "Training, Other Qualifications, and Advancement" section of its chapter "Market and Survey Researchers," which does not specify a particular major or academic concentration:

A bachelor's degree is the minimum educational requirement for many market and survey research jobs. However, a master's degree is usually required for more technical positions.

In addition to completing courses in business, marketing, and consumer behavior, prospective market and survey researchers should take social science courses, including economics, psychology, and sociology. Because of the importance of quantitative skills to market and survey researchers, courses in mathematics, statistics, sampling theory and survey design, and computer science are extremely helpful. Market and survey researchers often earn advanced degrees in business

administration, marketing, statistics, communications, or other closely related disciplines.

Id. Because the *Handbook* indicates that entry into the market research analyst occupation does not normally require a degree in a specific specialty, which is in accordance with the petitioner's example of not requiring at least a bachelor's degree or equivalent in a specific specialty for the proffered position¹, the *Handbook* does not support the proffered position as being a specialty occupation.

As the evidence of record does not establish that the particular position here proffered is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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.

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)).

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. 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.

To prove 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 establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study. USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) to require a degree

¹ See Petitioner's Advertisement on CaJobs requiring a bachelor's degree for a full-time position of business development specialist.

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 189, 2007 WL 1228792 (C.A. 1 (Puerto Rico) 2007).

The petitioner has also not satisfied 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 AAO here notes that the petitioner employs six individuals, has a net annual income of under \$40,000 and is offering to pay the beneficiary \$17.97 per hour. 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, given the petitioner's small size and income, the AAO does not find that there is enough evidence to document that the proffered position is that of a business development specialist. 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 development 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).

The petitioner did not submit any documentation to evidence that the proffered position requires at least a bachelor's degree or the equivalent in a specific specialty. Indeed, the CalJobs advertising for the position of business development analyst submitted by the petitioner listed a bachelor's degree as the educational requirement, without specifying any specialty. As the record has not established a prior history of 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).

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent. The proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than market-research-analyst positions that are not usually associated with a degree in a specific specialty.

The AAO notes the opinion letter of [REDACTED] at the [REDACTED] states that a business development position such as the one offered by the petitioner would "normally" be filled by an individual with a minimum of a bachelor's degree in marketing or a related area. 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).

It appears that [REDACTED] did not base his opinion on any objective evidence, but instead restates the proffered position description as provided by counsel. Moreover, [REDACTED] finds that the duties of the proffered position "are of a professional nature and require preparation at the Bachelor's Degree level at a minimum." Although [REDACTED] notes the beneficiary's marketing background, and the requirements for obtaining a marketing degree, he concludes that a bachelor's degree, without designating a specialty, is the typical minimum requirement for business development specialists and similar positions. Even if established by the evidence of record, which it is not, the requirement of a bachelor's degree in general is inadequate to establish that a position qualifies as a specialty occupation. Since there must be a close correlation between the required specialized studies and the position, the requirement of a bachelor's degree, without further specification, does not establish the position as a specialty occupation. *See Matter of Michael Hertz, supra*. As stated above, a general-purpose bachelor's degree may be a legitimate prerequisite for a particular position, but will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam, supra*. The AAO thus finds that the letter from [REDACTED] does not establish that the proffered position is a specialty occupation.

Therefore, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.