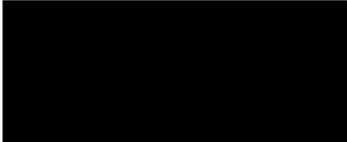


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



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



D2

Date: **DEC 27 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: SELF-REPRESENTED

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

The petitioner is engaged in the tourism industry and seeks to employ the beneficiary as a tourism supervisor and to classify him 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, finding that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation. On appeal, former counsel for the petitioner contends that the director's decision was erroneous and submits a brief and additional evidence in support of this contention.¹

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 RFE; (4) the notice of decision; and (5) Form I-290B and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. 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 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.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

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 [(2)] which 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, a proposed position must also meet one of the following criteria:

¹ On September 16, 2011, [REDACTED], former counsel for the petitioner, submitted a letter to the California Service Center requesting that his appearance on behalf of the petitioner be withdrawn.

- (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 382, 387 (5th Cir. 2000) (hereinafter *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), 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 the letter of support dated February 11, 2010, the petitioner claimed that it is a newly-established tourism company that provides local tours for Korean tourists, and also provides “logistics of trade conferences and annual/quarterly overseas visits to the Northwest by city and provincial governments of Korea.” The petitioner claimed that it currently employs three persons, and seeks to employ the beneficiary as a tourism supervisor/manager at an annual salary of \$36,000. Regarding the beneficiary’s proposed duties, the petitioner stated:

His work will involve supervising a team of travel agents to plan, organize and conduct various tours for both individuals and groups. [The beneficiary] will also be responsible for managing various client contacts like Korean Provincial and City Government along with all of the commercial companies. [The beneficiary] will be directly responsible for overseeing and managing all the logistics of their travel. His duties will be important to the success of our company and our ability to continue to develop our business in the Pacific Northwest and Pacific Asia.

The petitioner concluded by stating that the duties of the position are professional in nature and require the incumbent to possess a bachelor's degree or its equivalent in tourism management or a closely related field. The petitioner claimed that the beneficiary holds a bachelor's degree in tourism management from [REDACTED]

The director found the initial evidence insufficient to establish eligibility, and thus issued an RFE on April 9, 2010. The RFE, five pages in total, was a detailed request for additional evidence pertaining to the proposed position and its qualification as a specialty occupation position. Specifically, the director requested information such as a more detailed description of the duties of the proffered position as well as evidence demonstrating that the position qualified as a specialty occupation. Finally, the director requested additional information pertaining to the petitioner's business and the manner in which its business and the proffered position were more complex and specialized than other similar tourism businesses in the industry.

In a response dated May 20, 2010, former counsel for the petitioner addressed the director's queries. Counsel first addressed the beneficiary's proposed duties, noting that he would have two primary job duties at the petitioner's company, namely: (1) training and supervising new employees; and (2) developing, implementing, and marketing new tourism packages for both Korean and U.S. customers. Counsel asserted that the beneficiary would not be performing day-to-day tasks similar to those of a travel agent, but rather would be performing duties that required more advanced business knowledge than simply booking airplane tickets and making hotel reservations. Counsel concluded by stating that, since the petitioner's business was targeted primarily to Korean nationals or Korean-Americans, the beneficiary's educational and cultural background made him "well-suited" for the position.

The director denied the petition on July 6, 2010, finding that the petitioner had failed to establish that the proffered position was a specialty occupation. On appeal, former counsel for the petitioner submitted a brief asserting that the director's findings were erroneous along with a declaration from the petitioner and letters of recommendation for the beneficiary.

To make its determination as to whether the employment described above qualifies as a specialty occupation, the AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. Factors considered by the AAO when determining this criterion include whether the U.S. Department of Labor's (DOL) *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.

The petitioner has stated that the proffered position is that of a tourism supervisor. The director found, and the AAO concurs, that the proffered position is most akin to the occupation of travel agent as described by the *Handbook*.²

According to the 2010-2011 online edition of the *Handbook*, the occupation of travel agent is described in relevant part as follows:

Travel agents assist travelers by sorting through vast amounts of information to help their clients make the best possible travel arrangements. Travel agents offer advice on destinations and make arrangements for transportation, hotel accommodations, car rentals, and tours for their clients. In addition, resorts and specialty travel groups use travel agents to promote travel packages to their clients.

Travel agents are expected to be able to advise travelers about their destinations, such as the weather conditions, local ordinances and customs, attractions, and exhibitions. For those traveling internationally, agents also provide information on customs regulations, required documents (passports, visas, and certificates of vaccination), travel advisories, and currency exchange rates. In the event of changes in itinerary in the middle of a trip, travel agents intercede on the traveler's behalf to make alternate booking arrangements.

Travel agents use a variety of published and computer-based sources for information on departure and arrival times, fares, quality of hotel accommodations, and group discounts. They may also visit hotels, resorts, and restaurants themselves to evaluate the comfort, cleanliness, and the quality of specific hotels and restaurants so that they can base recommendations on their own experiences or those of colleagues or clients. Many travel agents specialize in specific destinations or regions; others specialize in travel targeted to particular demographic groups, such as senior citizens.

Bureau of Labor Statistics, U.S. Dept. of Labor, *Occupational Outlook Handbook*, 2010-11 ed., "Travel Agents," <http://www.bls.gov/oco/ocos124.htm> (accessed Dec. 14, 2011). According to the petitioner's statement in the letter of support dated February 11, 2010, the beneficiary will be directly responsible for managing and overseeing the logistics of travel for Korean clients, most particularly those associated with city and provincial governments. This task is directly related to the duties of a travel agent.

² This finding is in accord with the petitioner's own classification of the proffered position on the supporting Labor Condition Application (LCA). Specifically, the petitioner classified the position as SOC (ONET/OES) code 41-3041.00, "Travel Agents."

The AAO further notes that the duties of the beneficiary include overseeing a team of travel agents who plan, conduct and organize tours. This duty, while supervisory in nature, falls into the category of a travel guide, as described by the DOL's *Occupational Employment Statistics's (OES)* online publication entitled "Occupational Employment and Wages, May 2010." Specifically, the duties of this occupation are described as follows: "[p]lan, organize, and conduct long distance travel, tours, and expeditions for individuals and groups." These duties are akin to the services the petitioner claims it provides to its primarily Korean clientele.

Regarding the educational requirements for entry into this occupation, the *Handbook* states:

Employers prefer to hire travel agents who have formal training in this field. Superb communication and computer skills are essential for talking with clients and making travel reservations.

Education and training. Most travel agencies prefer applicants who have received training specific to becoming a travel agent. Many vocational schools offer full-time travel agent programs. Travel agent courses also are offered in public adult education programs, online, and in community colleges. These programs teach students about geography, sales, marketing, and travel industry forms and procedures for ticketing and reservations.

A few colleges offer a bachelor's or master's degree in travel and tourism that can benefit prospective agents. Backgrounds in geography, foreign languages, or world history can also be useful for job applicants because they suggest an existing interest in travel and culture, which could help agents develop a rapport with clients.

Continuing education is critical for travel agents because the abundance of travel information readily available through the Internet and other sources has resulted in more informed consumers who expect travel agents to be experts in their field.

Other qualifications. Travel agents must be well-organized, accurate, and detail oriented in order to compile information from various sources and to plan and organize travel itineraries. Agents must have excellent communication skills and must be professional and courteous when dealing with travel representatives and clients.

Personal travel experience is an asset because knowledge about a city or foreign country often helps influence a client's travel plans. Business experience or training is important for self-employed agents who run their own business. In addition, computer skills are necessary and essential, because most travel arrangements are now made using the Internet or electronic reservation systems.

Handbook, 2010-11 ed., "Travel Agents," <http://www.bls.gov/oco/ocos124.htm> (accessed December 14, 2011). The *Handbook* does not require a degree in a specific specialty for entry into the occupation of travel agent. While it acknowledges that employers often prefer candidates who have formal training in the field, it does not state that a bachelor's degree or its equivalent in a specific specialty is a prerequisite for entry into the occupation. According to the *Handbook*, many vocational schools offer travel agent programs, and such courses are also offered in public adult education programs, online, and in community colleges. Therefore, the petitioner cannot establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the proffered position of tourism supervisor. Accordingly, 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. Factors considered by the AAO when determining this criterion include 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)).

In the instant matter, the petitioner has failed to satisfy either prong. The petitioner submitted no evidence that was responsive to the first prong of this criterion in response to the director's request for evidence. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petitioner, therefore, has failed to establish the first prong of the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

In the alternative, the petitioner may show under the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. The AAO notes the contentions of the petitioner and its former counsel with regard to the claimed complexity and unique nature of the position, in that the petitioner and its employees cater almost exclusively to Korean nationals and Korean-Americans and that an understanding of Korean culture and language is thus required to perform the duties of the proffered position.

According to the job description of the proffered position, it appears that the tourism supervisor will have similar job duties to those described in the *Handbook*; thus the evidence of record does not establish the proposed position as unique from or more complex than the general range of such positions. While the AAO notes that the beneficiary may deal primarily with Korean clients, this job requirement does not make the position complex or unique under this criterion.³

³ The AAO also notes that the petitioner has designated the proffered position as a Level II travel agent on the submitted LCA, indicating that it is a position for a qualified employee who has a good understanding of the occupation and who will perform moderately complex tasks that require limited

In the instant petition, the petitioner has submitted insufficient documentation to distinguish the proffered position from similar but non-degreed employment as a travel agent/tourism supervisor. Moreover, the evidence of record about the particular position that is the subject of this petition does not establish how aspects of the position, alone or in combination, make it so unique or complex that it can be performed only by a person with at least a bachelor's degree in a specific specialty or its equivalent. The petitioner has therefore failed to establish that the proffered position has satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. In an attempt to satisfy this criterion, counsel for the petitioner claims for the first time on appeal that another employer, [REDACTED], requires a degree for the position and that such company's petition for H-1B employment based on this claim was approved in 2007. This claim, however, carries no evidentiary weight. The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) requires a petitioner to demonstrate through its own hiring history that it routinely requires a degree for the proffered position. The petitioner submits no evidence establishing this criterion, and further suggests that, since it is a newly-formed company with only three employees, it has never hired an individual to work in the position of tourism manager.

In addition, the AAO observes that the petitioner's desire to employ an individual with a bachelor's degree or equivalent does not establish that the position is a specialty occupation. The critical element is not the title of the position or 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. To interpret the regulations any other way would lead to absurd results. If USCIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 387. Accordingly, the AAO finds the record does not establish that the proffered position meets the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). The evidence of record does not establish this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) – the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

judgment. *See* Employment and Training Administration (ETA), *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009). Therefore, it is simply not credible that the position is one with specialized and complex duties, as such a higher-level position would be classified as a Level IV position, requiring a significantly higher prevailing wage.

The petitioner provides a general overview of the duties of the proposed position in the initial letter of support and in response to the RFE. The petitioner, however, has not established that the duties to be performed exceed in scope, specialization, or complexity those usually performed by travel agents, an occupational category that does not normally require a baccalaureate or higher degree in a specific specialty or its equivalent. The AAO finds nothing in the record to indicate that the beneficiary, in his role, would face duties or challenges any more specialized and complex than those outlined in the *Handbook*. Simply claiming that the beneficiary's foreign degree in tourism management obtained from a Korean University qualifies him to deal with Korean clientele is not sufficient to satisfy the burden of proof in these proceedings. In fact, the *Handbook* states that "backgrounds in geography, foreign languages, or world history can also be useful for job applicants because they suggest an existing interest in travel and culture, which could help agents develop a rapport with clients." Therefore, the beneficiary's background and knowledge of Korean language and customs is one of a number of useful tools travel agents generally are expected to possess in the industry, and thus do not raise the proffered position to a level of complexity above and beyond that contemplated by the *Handbook*, and, by extension, certainly not to the degree required to meet the requirements of a specialty occupation as that term is defined in the Act and its implementing regulations.

To the extent that they are depicted in the record, the duties of the proposed position have not been established as being so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Again, aside from the claims of the petitioner and its former counsel, there is no information in the record to support a finding that the proposed position is more complex or unique than similar positions in other, similar organizations. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). As the *Handbook* reveals, such organizations do not normally impose a bachelor's degree requirement in a specific specialty. Therefore, the evidence does not establish that the proposed position satisfies 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Therefore, for the reasons related in the preceding discussion, the proposed position does not satisfy any of the four criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4), and the petition was properly denied for that reason. The proposed position in this petition is not a specialty occupation, so the beneficiary's qualifications to perform its duties are inconsequential. Accordingly, the AAO will not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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