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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**

[REDACTED]

D2

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: FEB 02 2011

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,

Joe 
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the 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 be denied.

The petitioner is a healthcare services provider that currently employs 68 persons. It seeks to employ the beneficiary as a marketing manager. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the proffered position is not a specialty occupation. On appeal, counsel for the petitioner submits Form I-290B and a brief, and asserts that the director erred in finding that the proffered position was not a specialty occupation. Specifically, counsel asserts that the director incorrectly determined that the proffered position of marketing manager did not require at least a bachelor's degree in a specific specialty for entry into the occupation.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, with counsel's brief in support of the appeal. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job 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 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. See *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); see also *COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. See *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). 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.

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. Cf. *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.

The petitioner is a home healthcare agency with 68 employees. In a letter of support dated March 31, 2009, the petitioner claimed that in the proposed position of marketing manager, the beneficiary would be responsible for "the promotion, referral base, and sales of Agency services within the assigned territory; meet and exceed the short term and long term sales goals as outlined in the marketing plan; direct, implement, act on, track and supervise all marketing activities." The petitioner further indicated that the minimum prerequisite for the position was a bachelor's degree in marketing or a related field, and concluded that the beneficiary, who held a bachelor's degree in tourism from [REDACTED] in the Philippines, was thus qualified to perform the duties of the proffered position,

Finding that the record contained insufficient evidence of eligibility, the director issued an RFE on April 30, 2009. The director specifically addressed the issue of whether the proffered position was a specialty occupation, and requested that the petitioner submit additional evidence to establish eligibility under this criterion. In addition, the director requested information pertaining to the petitioner, such as its annual income, its current staffing levels, and the type of business in which it was engaged.

In a response dated March 30, 2009, the petitioner addressed the director's request. The petitioner provided additional details regarding the proffered position, and submitted copies of job postings for similar positions in the industry in support of the contention that a degree was a standard requirement for the proffered position. With regard to the proffered position, the petitioner provided the following updated list of duties:

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

The petitioner also contended that the beneficiary's three main functions as marketing manager would entail (1) market research and analysis; (2) marketing strategy; and (3) implementation planning, among others.

On June 18, 2009, the director denied the petition. The director found that the duties of the proffered position do not require a bachelor's degree. Citing the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent in a specific specialty. The director concluded that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel submits Form I-290B accompanied by a brief, and contends that the director's findings were erroneous. Specifically, counsel contends that the director "missed the point" with regard to the *Handbook's* degree requirements for marketing managers, and misinterpreted the complexity of the duties of the proffered position. No documentary evidence is submitted in support of the appeal.

Upon review of the record, the AAO concurs with the director's decision and finds that the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, it cannot be found that the proffered position is a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement 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. Factors often considered by USCIS when determining these criteria 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)).

In determining whether a proposed position qualifies as a specialty occupation, USCIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty, as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations.

The occupation of marketing manager is discussed in the 2010-2011 edition of the *Handbook* under the chapter entitled "Advertising, Marketing, Promotions, Public Relations, and Sales Managers." The section pertaining to marketing managers states, in pertinent part:

Marketing managers. Marketing managers work with advertising and promotion managers to promote the firm's or organization's products and services. With the help of lower level managers, including *product development managers* and *market research managers*, marketing 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.

Upon review of the description of the duties of the proffered position, this list encompasses a number of the key duties of the proffered position.

As the *Handbook* does not indicate that the occupation of marketing manager normally requires at least a bachelor's degree, or the equivalent, in a specific specialty, this aspect of the proffered position does not appear to require at least a bachelor's degree level of knowledge in a specific specialty. Specifically, the *Handbook* states:

A wide range of educational backgrounds is suitable for entry into advertising, marketing, promotions, public relations, and sales manager jobs, but many employers prefer college graduates with experience in related occupations.

Education and training. For marketing, sales, and promotions management positions, employers often prefer a bachelor's or master's degree in business administration with an emphasis on marketing. Courses in business law, management, economics, accounting, finance, mathematics, and statistics are advantageous. In addition, the completion of an internship while the candidate is in school is highly recommended. In highly technical industries, such as computer and electronics manufacturing, a bachelor's degree in engineering or science, combined with a master's degree in business administration, is preferred.

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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.

The director concluded that, according to the *Handbook*, a baccalaureate or higher degree or its equivalent is not required for a marketing manager. Counsel contends that this finding is erroneous, and asserts that the director's reliance on the *Handbook's* use of the term "prefer" resulted in an inaccurate finding. The *Handbook* indicates that, while employers often *prefer* candidates to have a bachelor's degree in business administration, courses in a variety of fields, such as business law, management, economics, accounting, finance, mathematics, and statistics are advantageous. Relying on this phrase, counsel contends that the *Handbook* clearly requires a bachelor's degree for entry into the field, but such a degree can be in a number of disciplines. Counsel concludes that the *Handbook's* statement that a *preference* toward a degree in business administration simply means that employers

prefer the degree to be in a specific category, but will accept any number of degrees for entry into the field. The AAO disagrees.

Counsel's interpretation of the *Handbook's* educational requirements for the position of marketing manager is flawed. In the section pertaining to educational requirements, the *Handbook* begins by stating that "a wide range of educational backgrounds is suitable for entry into advertising, marketing, promotions, public relations, and sales manager jobs, but many employers prefer college graduates with experience in related occupations." The fact that the *Handbook* states that employers "prefer" college graduates does not, as counsel contends, equate to a requirement that all candidates possess at least a bachelor's degree, or its equivalent, for entry into the profession. This is further supported later in the educational section where the *Handbook* states that "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."¹ Most importantly, however, counsel ignores the regulatory definition of specialty occupation, which indicates that a bachelor's degree, or its equivalent, *in a specific specialty*, is required. See 8 U.S.C. § 1184(i)(1)(A). Even if the AAO concurred with counsel's interpretation of the *Handbook's* section on educational requirements, the fact that a degree in such a broad spectrum of disciplines would be acceptable for entry into the position further undermines the contention that the position of marketing manager is a specialty occupation. The requirement of a degree with a generalized title, such as business administration or liberal arts, without further specification, does not establish the position as a specialty occupation. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988).

The *Handbook* does not state that a bachelor's degree in a specific specialty is required for entry into the position. Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(1).

The AAO now turns to a consideration of whether the petitioner, unable to establish its proposed position as a specialty occupation under the first criterion set forth at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under one of the three remaining criteria: a degree requirement as the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position; or the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree.

The proposed position does not qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations. In support of this contention, the

¹ According to the *Handbook's* section on sales representatives, "there usually is no formal educational requirement for sales representatives." See <http://www.bls.gov/oco/ocos119.htm>. The fact that a sales manager, serving in a non-specialty occupation position that has no specific educational requirements for entry into the position, can be promoted to a marketing manager further indicates that the proffered position in this matter is not a specialty occupation.

petitioner submitted several job postings for the position of marketing manager. However, these job postings are not indicative that a degree is a common requirement in the industry among similar organizations. Specifically, two of the postings submitted, from [REDACTED], are companies that surpass the petitioner in size and scope, since they have 18,000 and 4,000 employees, respectively. The posting for marketing manager at [REDACTED] Centers requires merely 2-3 years of experience in marketing and sales, and the final posting, from [REDACTED], merely states that a degree in marketing, business, or a related field is *preferred*, not required.

Moreover, the petitioner failed to submit documentation from professional associations of persons serving in the type of position proffered in this petition attesting that a bachelor's degree in a specific specialty, or its equivalent, is the standard minimum educational credential required for entry into the proffered position. The petitioner has likewise failed to submit letters or affidavits from companies or individuals in the industry which attest that such firms "routinely employ and recruit only degreed individuals." Accordingly the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations. Therefore, the proposed position does not qualify for classification as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Furthermore, the AAO also concludes that the record does not establish that the proposed position is a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires a demonstration that the position is so complex or unique that it can only be performed by an individual with a degree. According to the job description of the proffered position, it appears that the marketing manager 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 both the petitioner and counsel contend that the duties of the position are complex and specialized, they have submitted no evidence to support this contention. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In the instant petition, the petitioner has submitted insufficient documentation to distinguish the proffered position from similar but non-degreed employment as a marketing manager. 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 failed to establish the proffered position as a specialty occupation under either prong of 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. While the petitioner submitted copies of its quarterly tax returns and copies of W-2 forms for its employees, the petitioner did not assert that any of these persons were employed as marketing managers. The petitioner, therefore, has not established eligibility under this criterion since it failed to submit evidence that it has a history of employing degreed individuals in the proffered position.

Although the petitioner did submit copies of its job posting for the proffered position, in which it requires an individual with a bachelor's degree, 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 degrees or higher degrees. Accordingly, the AAO finds that the record does not establish the proffered position as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

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.

The petitioner provides a general overview of the duties of the proposed position in the initial letter of support and in response to the request for evidence. The petitioner, however, has not established that the duties to be performed exceed in scope, specialization, or complexity those usually performed by marketing managers, 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 her role at the petitioner's place of business, would face duties or challenges any more specialized and complex than those outlined in the *Handbook*.

To the extent that they are depicted in the record, the duties of the proposed position do not appear 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, 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, and no new evidence is submitted on appeal to support this contention. 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 is a specialty occupation under 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 qualify for classification as a specialty occupation under 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. 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.

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