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U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090



U.S. Citizenship
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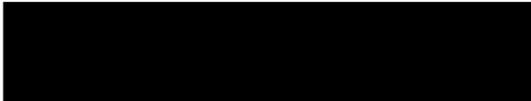
Office: CALIFORNIA SERVICE CENTER

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IN RE:

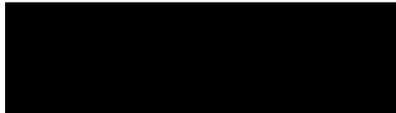
Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director 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.

On the Form I-129 visa petition the petitioner stated that it is a travel agency with five employees. To employ the beneficiary in what it designates as a budget analyst position, the petitioner endeavors 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 it would employ the beneficiary in a specialty occupation position. On appeal, counsel asserted that the director's basis for denial was erroneous, and that the petitioner satisfied all evidentiary requirements.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief in support of the appeal.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation. The issue before the AAO is whether the petitioner has provided evidence sufficient to establish that it will employ the beneficiary in a specialty occupation position.

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.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means 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 a particular position 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.

With the visa petition, counsel submitted a letter, dated April 9, 2009, from the petitioner’s vice president. That letter states:

[The petitioner has] at any given time, 5 full[-]time employees who oversee our daily operation in order to assure its smooth and satisfactory rendition. Our gross annual income varies and at times exceeds one million dollars. In the past decade, we have constantly experienced a sizeable profit which tops nearly [sic] a quarter million dollars per annum.

The petitioner's vice president also provided the following description of the duties of the proffered position:

- Direct the preparation of regular and special needs budget reports
- Analyze monthly budgeting and accounting reports to maintain expenditure controls.
- Provide advice and technical assistance with cost analysis, fiscal allocation, and budget preparation.
- Examine budget estimates for completeness, accuracy, and conformance with procedures and regulations.
- Summarize budgets and submit recommendations for the approval or disapproval of fund requests.
- Review operating budgets to analyze trends affecting budget needs
- Consult with managers to ensure that budget adjustments are made in accordance with program changes.
- Compile and analyze accounting records and other data to determine the financial resources required to implement a program.
- Perform cost-benefit analyses to operating programs, review financial requests, or explore alternative financing methods.
- Interpret budget directives and establish policies for carrying out directives.

The petitioner's vice president further stated:

This is a position in an occupation requiring the theoretical and practical application of highly specialized knowledge in budget analysis and requires the attainment of at least a master's degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

The petitioner's vice president did not reveal what specific specialty the requisite master's degree must be in.

In his own letter, dated April 3, 2009, counsel reiterated the vice president of the petitioner's description of the duties of the proffered position and stated:

[The petitioner's] Encino office employs 5 full[-]time employees who oversee their daily operation and California services. Their gross annual income varies and at times exceeds one million dollars. In the past decade, they have constantly experienced a sizeable profit which exceeds nearly [sic] a quarter million per annum.

On May 4, 2009, the service center issued an RFE in this matter. The service center requested additional evidence to demonstrate that the petitioner would employ the beneficiary in a specialty occupation. The service center also requested evidence pertinent to the petitioner's five claimed employees; specifically, the service center requested, quarterly wage reports (California Form DE-6 and Federal Form 941) for the previous four quarters. The service center requested complete copies of the petitioner's 2007 and 2008 Federal income tax returns.

In his own letter of June 10, 2009, counsel provided what he asserts is an expanded list of the duties of the proffered position. Counsel did not state his basis for asserting that those are the duties of the position. 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). Counsel's assertions pertinent to the duties of the proffered position, with no corroborating evidence, will not be considered.

Counsel also provided a copy of the petitioner's 2007 Form 1120S, U.S. Income Tax Return for an S Corporation and a 2008 Form 7004, Application for Automatic Extension to file its 2008 tax return. The Form 7004 contains no indication that it was filed. Counsel asserted that the petitioner's 2008 tax return would be submitted when it became available. That 2008 tax return is not currently in the record.

The Form 2007 tax return shows gross receipts and sales of \$281,458 and ordinary business income of \$35,288.

The AAO notes that both the petitioner's vice president and counsel previously stated, in letters dated April 9, 2009 and April 3, 2009, respectively, that the petitioner's annual profit consistently "exceeds nearly" or "tops nearly" \$250,000. The evidence provided demonstrates that those assertions pertinent to the petitioner's annual profit were false.

Counsel also provided a letter, dated June 10, 2009, from the petitioner's president. That letter states that the requested quarterly wage reports are "not applicable to our business" because the petitioner has sales agents in different states around the nation who deduct their fee from amounts collected and send the balance to the petitioner. The petitioner's president asserted, in effect, that the petitioner has no employees, and that the contractors who support the organization are dispersed around the United States.

In his April 9, 2009 letter, the petitioner's vice president stated that the petitioner has five full-time employees. In his April 3, 2009 letter, counsel stated, even more specifically, that the petitioner's office in Encino, California employs five full-time employees. When asked for evidence to corroborate those assertions, the petitioner's president responded by implying that the petitioner actually has no employees at all.

The assertions of the petitioner's vice president and counsel, that the petitioner has five employees and net profit of almost \$250,000 annually, are both flatly contradicted by the evidence subsequently

requested. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* at 591-592.

The director denied the petition on June 30, 2009, finding, as was noted above, that the petitioner had satisfied none of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), and therefore had not established that the proposed position qualifies for classification as a specialty occupation.

On appeal, counsel asserted that the proffered position qualifies as a budget analyst position, that budget analyst positions qualify as specialty occupation positions, and that the beneficiary has the requisite education.

The AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹ The *Handbook* describes the duties of budget analyst positions as follows:

Budget analysts help organizations allocate their financial resources. They develop, analyze, and execute budgets, as well as estimate future financial needs for private businesses, nonprofit organizations, and government agencies. In private sector firms, a budget analyst's main responsibility is to examine the budget and seek new ways to improve efficiency and increase profits. In nonprofit and governmental organizations, which usually are not concerned with profits, analysts try to find the most efficient way to distribute funds and other resources among various departments and programs. In addition to managing an organization's budget, analysts are often involved in program performance evaluation, policy analysis, and the drafting of budget-related legislation. At times, they also conduct training sessions for company or government personnel regarding new budget procedures.

Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-11 ed., available at <http://www.bls.gov/oco/ocos003.htm> (last accessed June 24, 2011). Given the other misstatements made by the petitioner's vice president, the AAO is reluctant to accept his description of the duties of the proffered position at face value. Nevertheless, the AAO observes that the description of the duties of the proffered position is consistent with the duties of a budget analyst as discussed in the *Handbook*, and will assume, *arguendo*, that the proffered position is a budget analyst position.

¹ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2010 - 2011 edition available online.

The *Handbook* describes the educational requirements of budget analyst positions as follows:

Employers generally require budget analysts to have at least a bachelor's degree, but some prefer or require a master's degree. Within the Federal Government, a bachelor's degree in any field is sufficient for an entry-level budget analyst position. State and local governments have varying requirements, but usually require a bachelor's degree in one of many areas, including accounting, finance, business, public administration, economics, statistics, political science, or sociology. Because developing a budget requires strong numerical and analytical skills, courses in statistics or accounting are helpful, regardless of the prospective budget analyst's major field of study. Some States may require a master's degree. Occasionally, budget-related or finance-related work experience can be substituted for formal education.

Id. That section of the *Handbook* states that employers "generally" require a bachelor's degree for budget analyst positions, which implies that in many instances they do not. *See Id.* In any event, it does not indicate that budget analyst positions normally require a bachelor's degree *in a specific specialty*. Neither the *Handbook* nor any other evidence in the record suggests that budget analyst positions normally require a minimum of a bachelor's degree or the equivalent in a specific specialty. The petitioner has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO will consider 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)).

As was noted above, the *Handbook* provides no support for the proposition that a minimum of a bachelor's degree or the equivalent in a specific specialty is a common requirement for budget analyst positions in the petitioner's industry, or any other. The record contains no evidence to suggest that a professional association of budget analysts requires a minimum of a bachelor's degree or the equivalent in a specific specialty as a condition of entry. Counsel submitted no letters or affidavits from others in the petitioner's industry. In short, the record contains no evidence that other travel agencies require a budget analyst with a minimum of a bachelor's degree or the equivalent in a specific specialty.

In his response to the RFE in this matter, counsel asserted that, because the petitioner's operation is international in scope, its requirement for a budget analyst should correctly be compared to that of other

large, international organizations, rather than to other travel agencies. The AAO notes that the evidence does not demonstrate that the petitioner has a large international organization. The AAO further observes that, showing that large international organizations that are not in the petitioner's industry require a budget analyst with a minimum of a bachelor's degree or the equivalent in a specific specialty would not satisfy the requirement of the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Finally, counsel provided no evidence to support the proposition that large international organizations require a budget analyst with a minimum of a bachelor's degree or the equivalent in a specific specialty.

The petitioner has not demonstrated that a requirement of a minimum of a bachelor's degree in a specific specialty or the equivalent is common to the petitioner's industry in parallel positions among similar organizations, and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner demonstrates that, notwithstanding that other budget analyst positions do not require a minimum of a bachelor's degree or the equivalent in a specific specialty, the proffered position is so complex or unique that it can be performed only by an individual with such a degree or its equivalent.

However, nothing about the duties of the proffered position, as described by the petitioner's vice president, indicates any degree of complexity or uniqueness beyond the ken of a budget analyst in a typical budget analyst position, which position would not normally require a minimum of a bachelor's degree or the equivalent in any specific specialty. The record contains no other indication that the proffered position is complex or unique as compared to other budget analyst positions.

Further, although the petitioner's vice president stated, [REDACTED] letter, that the proffered position requires "at least a master's degree in a specific specialty," neither the petitioner's vice president, nor its president, nor counsel has ever indicated what the specific specialty is that the requisite master's degree must be in.

The petitioner has not demonstrated that the particular position proffered is so complex or unique that it can be performed only by an individual with a degree in a specific specialty or its equivalent; and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Next, the AAO will consider the alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which is satisfied if the petitioner demonstrates that it normally requires a minimum of a bachelor's degree or the equivalent in a specific specialty for the proffered position.

In the May 4, 2009 RFE, the service center requested that the petitioner, "Provide evidence to establish that [it] has a past practice of hiring persons with a baccalaureate degree, or higher[,] in a specific specialty, to perform the duties of the proffered position." The service center also requested

copies of present and past vacancy announcements for the proffered position to establish such a requirement.

In his June 10, 2009 response, counsel stated that the instant visa petition represents the petitioner's first attempt to employ a budget analyst and also observed that the petitioner is not required to advertise the vacancy. Counsel's observation is correct, but does not, of course, demonstrate that the petitioner normally requires a minimum of a bachelor's degree or the equivalent in a specific specialty for the proffered position. Further, as was noted above, although the petitioner's vice president stated that the proffered position requires a degree "in a specific specialty," he never identified that specific specialty.

In any event, the record contains no evidence of a previous history of recruiting and hiring to fill the proffered position, and the petitioner has not, therefore demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).²

Finally, the AAO will consider the alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which is satisfied if the petitioner demonstrates that the nature of the specific duties required by the proffered position is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

The duties of the proffered position, though, appear to be merely the generic duties of a budget analyst position, which would not necessarily require a minimum of a bachelor's degree or the equivalent in a specific specialty. Directing the preparation of budget reports, examining budget estimates for completeness and accuracy, summarizing budgets and submitting recommendations, etc., contain no indication of their relative complexity, and no indication that the knowledge required to perform them is usually associated with attainment of a minimum of a bachelor's degree or the equivalent in a specific specialty or the equivalent. Nothing in those duties, or any of the duties attributed by the petitioner's vice president to the proffered position, suggests that they are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. The petitioner has not, therefore, demonstrated that

² While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation"). Here, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

the proffered position qualifies as a position in a specialty occupation pursuant to the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO finds that the director was correct in her determination that the record before her failed to establish that the beneficiary would be employed in a specialty occupation position, and it also finds that the argument submitted on appeal has not remedied that failure. Accordingly, the appeal will be dismissed and the petition denied on this basis.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. The appeal will be dismissed and the petition denied.

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