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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



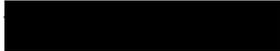
U.S. Citizenship  
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DATE: JUN 02 2011

Office: VERMONT SERVICE CENTER

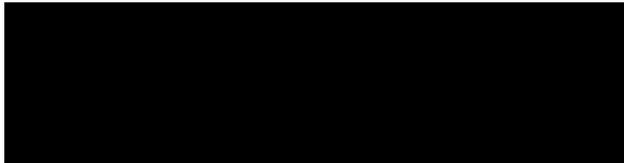
FILE: 

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:



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 Vermont 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 surgical device and utensil manufacturer and designer that currently employs nine persons. It seeks to employ the beneficiary as its director of business development 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).

In denying the petition, the director determined that the beneficiary was not qualified to perform the duties of a specialty occupation. On appeal, counsel contends that the director's conclusion was erroneous, and that the beneficiary, by virtue of his degree and extensive experience in the industry, is in fact qualified to perform the duties of the proffered position.

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 counsel's brief. The AAO reviewed the record in its entirety before reaching its decision.

As a preliminary issue, the AAO will examine the record to determine whether the proffered position is that of a specialty occupation. Most directors should, and will, first determine whether a job is a specialty occupation before deciding whether the individual is qualified for the job. A beneficiary's credentials to perform a particular job, therefore, are relevant only when the job is found to be a specialty occupation. In this matter, however, the director did not analyze the proffered position to determine whether it met the definition of a specialty occupation. As will be discussed below, the proffered position does not require a baccalaureate or higher degree, or its equivalent, in a specific specialty.

To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires 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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

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 (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 which (2) 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 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 (5<sup>th</sup> 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 seeks the beneficiary’s services as a director of business operations. Evidence of the beneficiary’s duties includes: the Form I-129; the petitioner’s March 28, 2009 letter in support of the petition; and the petitioner’s July 7, 2009 response to the director’s RFE.

In the petitioner’s March 28, 2009 letter of support, it stated that the beneficiary will perform the following duties:

- Manage, and oversee the Public Relations and Marketing operations for the [petitioner];
- Establish and maintain cooperative relationships with representatives of community, consumer, employee and public interest groups;
- Direct and oversee the sales activities of the Company;
- Develop, implement, and direct the Company’s marketing and sales strategy;
- Develop and implement a strategic marketing campaign to target the correct market for the offered services and to ensure the correct positioning of [the petitioner] in the marketplace;
- Monitor trends, the industry, and competitive services in order to ascertain the need for new or different services;

- Manage and oversee the expansion of the Company's services;
- Generate new business and enhance existing business from creative sources as well as prequalified leads;
- Attend business meetings to promote the Company's services and give client presentations;
- Coordinate between Sales and Technical Teams to ensure profitability;
- Manage and oversee the Company's contact management system;
- Maintain good relations with vendor; and,
- Enforce the policies and standards of the Company to ensure effective operations and profitability.

Regarding the beneficiary's qualifications for the position, the petitioner indicated that the beneficiary possessed the U.S. equivalent of a bachelor's degree in Business Administration with a concentration in management.

The director found this initial evidence insufficient to establish eligibility, and consequently issued an RFE on June 8, 2009. In his request, the director noted that the duties of the proffered position appeared to be that of a marketing manager. The director asked the petitioner to submit a more detailed description of the duties of the proffered position, as well as additional evidence establishing that the proffered position satisfied the criteria for a specialty occupation set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A). The director also requested information pertaining to the nature of the petitioner's business, as well as clarification with regard to the business premises of the petitioner.

In a response dated July 7, 2009, the petitioner addressed the director's queries. In a statement written by [REDACTED] petitioner's CEO, the petitioner provided an updated description of the duties of the proffered position, an organizational chart and tax records for the petitioner's organization, as well as Internet job postings for similarly-titled positions.

[REDACTED] provided the following updated description of duties of the proffered position in an attached statement dated July 3, 2009:

**1. Direct and oversee the Business Development operations of the Petitioner (25%):**

The Director of Business Development is responsible for managing and overseeing significant areas of the day-to-day Business Development operations to ensure excellence of standards and maximum profitability. Specifically, the Director of Business Development is responsible for the following: develop,

implement, and direct the Company's business development strategies; identify strategic gaps in the market and research opportunities to address these gaps; evaluate and oversee Company's short and long term growth strategies; monitor trends, the industry, and competitive services in order to ascertain the need for new or different services, manage and oversee the expansion of the Company's services; coordinate between Sales and Technical Teams to ensure profitability; manage and oversee the Company's contact management system; maintain good relations with vendor; and, enforce the policies and standards of the Company to ensure effective operations and profitability.

**2. Develop, maintain and oversee new and existing business opportunities (50%)**

The Director of Business Development is responsible to generate new business and enhance existing business from creative sources as well as pre-qualified leads; establish and maintain cooperative relationships with representatives of community, consumer, employee and public interest groups; identify potential new opportunities and new business model to drive revenue growth over the next five (5) years; monitor trends and competition to ascertain the need for new services; manage and campaign to target the correct market for the offered services and to ensure the correct positioning of [the petitioner] in the marketplace.

**3. Manage and oversee the business meetings and promotions (25%):** The Director of Business Development is responsible to ensure the development and the maintenance of a good relationship with the Petitioner's clients while complying with the Company guidelines; plan and organize meetings with existing and possible new clients; and, attend business meetings to promote the Company's services and give client presentations.

On August 5, 2009, the director denied the petition, citing the qualifications of the beneficiary as the basis for the denial. The AAO notes, however, that a review of the duties of the proffered position indicates that the proffered position is akin to that of a marketing manager as set forth in the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* and, according to the *Handbook*, the profession of marketing manager is not a specialty occupation.

To make its determination whether the employment described above qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; and 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 considered by the AAO when determining these criteria include: whether the *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, reports 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 AAO finds that the duty descriptions provided in the record of proceeding indicate that the proffered position generally comports with the Marketing Manager occupational category as addressed in the *Handbook*. The *Handbook* addresses marketing managers in its chapter entitled Advertising, Marketing, Promotions, Public Relations and Sales Managers, and there describes this particular occupational category as follows:

*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.

Having found the duties of the proffered position to be those of a marketing manager, the AAO now turns to the *Handbook* for its discussion of the educational requirements imposed on individuals who seek employment within this profession:

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.

\* \* \* \* \*

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.

As the *Handbook* indicates no specific degree as a normal minimum requirement for employment as a marketing manager, the AAO concludes that the performance of the proffered position's duties does not require the beneficiary to hold a baccalaureate or higher degree in a related field. Accordingly, the AAO finds that the petitioner has not established its proffered position as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner. To establish its degree requirement as an industry norm, the petitioner has submitted 8 Internet job advertisements for employment related to business operations/marketing managers. None of this evidence, however, establishes the petitioner's degree requirement as the norm within its industry.

Of the eight (8) job announcements submitted by the petitioner in response to the director's request for evidence, none appear to come from businesses that are similar to the petitioner, a business management and consulting company. Six of the eight postings are for the following industries: accounting, construction consulting, product engineering outsourcing, biotechnology, and search engine marketing solutions. The posting by the [REDACTED] does not specify the industry for which the job is offered. Finally, although the posting by [REDACTED] which indicates that it is engaged in management consulting services, requires a master's degree, there is no requirement that the degree be in a specific specialty. Moreover, specific details regarding the position offered are not featured in the excerpt submitted by the petitioner. Accordingly, these job postings fail to satisfy the second criterion's condition that a petitioner establish its degree requirement is common in parallel positions among similar organizations.

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. The record does also not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; and 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.

To determine a petitioner's ability to meet the third criterion, USCIS often reviews the position's employment history, including the names and dates of employment of those employees with degrees

who previously held the position, as well as the petitioner's hiring practices with regard to similar positions. In response to the director's RFE, the petitioner asserted that it requires all professional and managerial personnel to hold a bachelor's degree or higher in a relevant field of study. While the documentation submitted by the petitioner suggests that it routinely hires degreed individuals for professional positions, it is insufficient to prove that the petitioner normally requires a degree for the proffered position of director of business operations. Other than the beneficiary who is currently being offered the proffered position, there is no documentation to demonstrate that the petitioner previously and/or routinely hires degreed individuals for the proffered position. Therefore, the petitioner has failed to establish that the petitioner's normal hiring practice is to require the minimum of a baccalaureate degree for the proffered position.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. Upon review of the duties of the proffered position, the AAO has concluded that the position is closely aligned to that of a marketing manager. It does not find these duties, as described by the petitioner, to reflect a higher degree of knowledge and skill than would normally be required of marketing managers whose business responsibilities require them to survey and analyze industry trends and consumer behavior. Nor do they represent an amalgam of jobs that would require the beneficiary to possess qualifications beyond those of a marketing manager. The AAO, therefore, concludes that the proffered position has not been established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the AAO shall not disturb the director's denial of the petition. The AAO conducts appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and it was in the exercise of this function that the AAO identified this additional ground for denying the petition, which was not addressed by the director.

An additional issue to be reviewed is whether the beneficiary is qualified to perform the duties of a specialty occupation. Ordinarily, a beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. However, for purposes of issuing a through decision on all relevant facts in this matter, the AAO will address this issue.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. If the alien does not possess the required degree, the petitioner must demonstrate that the alien has both (1) education, training, and or experience in the specialty equivalent to the completion of such degree, and (2) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must also meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

In this matter, the petitioner indicated that the beneficiary possesses the equivalent to a U.S. bachelor's degree in Business Administration, with a concentration in management, based on his training and professional work experience. Therefore, the petitioner must demonstrate that, according to 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), the beneficiary has education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating the beneficiary's credentials to a United States baccalaureate or higher degree shall be determined by one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials; or
- (4) Evidence of certification or registration from a nationally-recognized

professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

The petitioner submits a letter dated [REDACTED] from [REDACTED] in support of the contention that the beneficiary's experience is equivalent to that of U.S. baccalaureate or higher degree. However, the evidence in the record does not establish that, as required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(I), Hofstra University has a program for granting college credit for work experience other than that gained in its intern program.<sup>1</sup> The AAO does not consider that an internship program preapproved by the evaluating official's educational institution qualifies as a program which invests that official with authority to independently evaluate, determine the educational equivalency of, and award college credit for, training or work experience.

The record contains a letter dated [REDACTED] which confirms that [REDACTED] "can approve credit for professional experience through our internship programs." However, this statement fails to establish that Hofstra is "a college or university that which has a program for granting such credit based on an individual's training and/or work experience." The description of [REDACTED] work-evaluation authority does not clearly indicate that faculty members ever convert non-Hofstra internship work experience into Hofstra college credits. Instead, it appears that Hofstra faculty grant college credit via faculty-approved internships worked in conjunction with related Hofstra course work or by success at certain specified types of examinations. Therefore, the AAO finds that the [REDACTED] letter is not an evaluation "prepared in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(D)(I)" as required by the labor certification.

In summary, the petitioner has failed to establish that the beneficiary has a U.S. bachelor's degree or foreign equivalent degree, an educational equivalency evaluation prepared by a qualified evaluation service, or an educational equivalency prepared in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(D). Accordingly, even if the proffered position were a specialty occupation, and it is not, the petitioner has failed to establish that the beneficiary is qualified to perform the duties of a specialty occupation. For this additional reason, the petition may not be approved.

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.

<sup>1</sup> A review of [REDACTED] only mentions the issuance of college credit for work experience gained through internships that have received prior approval from the Off-Campus Education Office. See [http://www.hofstra.edu/academics/colleges/hclas/hclas\\_intern\\_howto.html](http://www.hofstra.edu/academics/colleges/hclas/hclas_intern_howto.html).

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