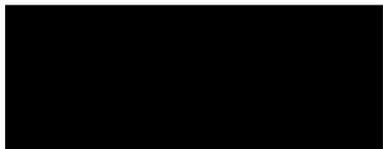


identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

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

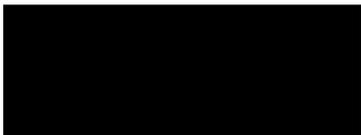
DATE: JUN 02 2011 Office: VERMONT SERVICE CENTER

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:



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 "Provider of high quality cleaning, laundry, and other clothing services and products," with "Appx. 2" employees. To employ the beneficiary in what it designates as a Market Analyst I 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 contended that the petitioner satisfied all evidentiary requirements. In support of these contentions, counsel submitted a brief and additional evidence.

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 director's denial letter; and (3) the Form I-290B and counsel's brief and attached exhibits in support of the appeal.

At the outset, the AAO will comment on certain assertions by counsel against the latitude exercised by the director in reaching his decision to deny this petition.

Counsel's assertion that USCIS was required to issue a Request for Evidence (RFE) before issuing its decision is erroneous. The current regulation at 8 C.F.R. § 103.2(b)(8)(ii), which became effective on June 18, 2007, states:

Initial evidence. If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS.

Accordingly, counsel's complaint that the director exceeded his authority by not issuing an RFE before reaching an adverse decision is without merit.

The AAO also disagrees with counsel's assertion that USCIS "overstepped its jurisdiction and scope of authority in denying the present H-1B case because it is in effect dictating how the company is to conduct its business." Nothing in the director's decision or in any aspect of the record of proceeding reflects that USCIS is prohibiting the petitioner from recruiting and hiring persons to perform the duties that the petitioner has ascribed to the proffered position, and the petitioner remains free to assign to the position whatever title it deems appropriate. Rather, the record reflects that the director was acting in the exercise of his lawful authority and responsibility to determine whether the petitioner had satisfied the requirements that statute and regulation set for establishing eligibility for the H-1B program.

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 would be employing 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.

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, 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 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 petition, counsel submitted evidence that the beneficiary has a master’s degree in business administration (MBA) awarded by Chung-Ang University in Seoul, South Korea. Counsel provided an educational evaluation pertinent to the beneficiary’s educational credentials. The evaluator stated that the beneficiary’s Korean MBA is equivalent to an MBA awarded in the United States. The evaluator also stated that admission into the MBA program at Chung-Ang University requires a bachelor’s degree. The record contains no other evidence that the beneficiary has a bachelor’s degree.

Counsel also submitted a letter, dated June 23, 2009, from the petitioner’s president. The petitioner’s president stated that the petitioner seeks to “ventur[e] into the international high[-]quality cleaning, laundry, and other clothing services and products market segments,” and that:

Because of the dynamic increase in demand for [the petitioner's] products and services, [the petitioner] has an immediate need for a highly qualified individual to fulfill the complex and professional duties of a Market Analyst I.

The record contains Form 1120S U.S. Income Tax Returns for an S Corporation. Those returns show that the petitioner had Line 1 Gross receipts or sales of \$414,771 during 2006, \$430,267 during 2007, and \$420,731 for 2008. Those returns do not support the petitioner's president's assertion that the petitioner has experienced a dynamic increase in demand for its services.

In his June 23, 2009 letter, the petitioner's president provided the following description of the duties of the proffered position:

1. Aid in conducting analytical research and studies of market conditions, including financial aspects, relating to potential sales of company's cleaning, laundry, and other clothing services and products;
2. Gather in-depth market and financial information pertaining to competitors, prices, sales, clientele requirements and inquiries, and methods of marketing, sales, and distribution in the cleaning laundry, and other clothing services and products market;
3. Help develop marketing and sales analysis reports, as well as financial analysis reports, relating to cleaning, laundry, and other clothing services and products for management by providing appropriate market data input;
4. Aid in the determination of appropriate marketing and sales and financial investment strategies aimed at the further penetration of the cleaning, laundry, and other clothing services and products market segments;
5. Aid in development of sales plans for international cleaning, laundry, and other clothing services and products market segments for company;
6. Respond to clientele inquiries relating to company's cleaning, laundry, and other clothing services and products, and prepare marketing documentation designed to inform and attract new clientele;
7. Prepare marketing reports to management;
8. Prepare, examine, and/or analyze records for accounting and journal reconciliation tasks for use by company in developing marketing strategies.

The president's letter also includes the following comments advocating that the proffered position is a specialty occupation:

As can be seen from the above list of duties, the successful candidate chosen for this highly professional position must necessarily possess a solid foundation in the areas of market analysis in order to address the highly complex and often abstract tasks and duties associated with the proffered position of Market Analyst I. In addition, because the economy is in a delicate state due to the economic recession occurring around the world, it is of extreme importance that the successful candidate chosen for this highly professional position possess a strong background in finance, as money

and financial resources cannot be inefficiently used or wasted in a delicate economic environment.

Therefore, it is extremely important that the individual selected for this position be highly qualified for this professional position. As this position emphasizes market analysis, the successful candidate must possess at least a Master's degree in Business Administration (MBA), or in any suitable field of study or combination of education substantially related to Business Administration, or an equivalent academic foundation. Such a degree would sufficiently provide the candidate with the necessary level of market analysis skills needed to not only effectively, but also efficiently, execute the proposed responsibilities associated with the offered position. As the courses associated in the acquisition of this degree (or its equivalent) concentrate on thinking abstractly, critically, analytically, and practicably, a person with such a degree would possess the adequate level of skills and understanding needed to produce accurate marketing reports relevant and comprehensive enough to make an impact for our company in the cleaning, laundry, and other clothing service and products markets, which would specifically allow our company to effectively expand the services and products breadth of our company.

The petitioner's president did not further explain what he meant by the international high-quality cleaning and laundry market segment. The petitioner's president did not indicate which of the duties listed would require a minimum of a master's degree or the equivalent in business administration or a related field - and why - in the context of working for a clothes cleaning service with one location and approximately two employees.

The director denied the visa petition on July 7, 2009, finding, as was noted above, that the petitioner had not demonstrated that it would employ the beneficiary in a specialty occupation. In that decision, the director stated, in part:

The record does not established [sic] a need to have a full[-]time, onsite market analyst for a laundry business consisting of 2 employees with a net annual income of \$16,500.00. The evidence does not establish that the petitioner can sustain an employee performing duties at the level required for consideration as a "specialty occupation"

On appeal, counsel provided, *inter alia*, (1) an undated document entitled "Proposed Duties and Responsibilities for Market Analyst I" (consisting of (A) a "Detailed Description" of the position's duties in 48 parts, and (B) a "Summary/Synopsis" which appears to be a repetition of the same duties listed in the petitioner's president's letter of June 23, 2009, with the addition of estimates of the relative percentages of worktime to be spent in the performance of each duty); (2) an undated, two-page "Job Opportunity" document for the "Available Position" of Market Analyst I, which repeats the job duties listed in the president's June 23, 2009 letter and also lists the petitioner's requirements for the job; and (3) a letter from the petitioner's president, dated July 28, 2009.

The undated, two-page "Job Opportunity" document bears no indication that it was submitted for publication in a newspaper's classified advertisements or otherwise broadcast, and, as such, the AAO considers it as no more than the petitioner's reaffirmation of the grounds for its view that the proffered position should be classified as a specialty occupation.

In his July 28, 2009 letter submitted on appeal, the petitioner referred to real estate he had purchased in Cambridge and Belmont, Massachusetts and stated that they "are being allocated for use of expansion and growth of [the petitioner's business]." The petitioner's president asserted that, between the petitioner's income and assets and his own, he is able to afford to pay the proffered wage to the beneficiary. Evidence in the record shows that the petitioner is an S-corporation, and that its president is also its owner.

In the appeal brief, counsel noted that the petitioner's two employees are its owner and the owner's wife, and provided a chronology of the petitioner's president's real estate transactions. Counsel asserted that the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* supports the petitioner's position that the proffered position is a position in a specialty occupation.

Counsel further asserted:

[The petitioner's need for a market analyst] is genuine and bona fide because Petitioner recently changed physical business premises to a new location, because Petitioner seeks to utilize Beneficiary to guide its expansion plans, and because the nature of the job responsibilities associated with the position are highly complex and abstract.

On appeal, counsel stated, for the first time, that the petitioner "tentatively intends to acquire a second store location," and counsel makes assertions, not stated prior to the director's decision, that the petitioner intends to expand into the residential and commercial real estate markets and needs the services of a market analyst to be successful in these expansion endeavors. As these aspects of the need for the beneficiary's services materially expand the nature of the proffered position, they will not be considered on appeal. Likewise, of the 48 duties listed in the "Detailed Description" submitted on appeal, the AAO will not consider any that expand the duties beyond those stated in the eight duties listed for the director's review in the petitioner's president's letter of June 23, 2009. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as specialty occupation. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Counsel and the petitioner's president appear to misapprehend the thrust of the director's statement that the petitioner has not demonstrated the ability to sustain a specialty occupation market analyst. From context, it is clear that the director was not questioning the petitioner's ability, or the

petitioner's president's ability, to pay the proffered wage, but the petitioner's ability to provide sufficient specialty occupation market-analyst duties to employ the beneficiary full-time in that capacity.

The petitioner appears to be a dry cleaning and laundry service that offers some additional, unspecified, services, possibly alterations, and that sells some products, possibly related to care of clothing. The record contains no evidence to suggest that any portion of the petitioner's business is more complex than that.

The AAO finds that, to the extent that the duties of the proffered position are described in the record of proceeding, which is in abstract, generalized, and generic terms that do not inherently indicate that a particular educational level of any body of highly specialized knowledge in specific specialty that would be required to perform them, the AAO is unable to conclude that they require a minimum of at least a bachelor's degree, or the equivalent, in any specific specialty. For instance, there is no evidence establishing that gathering information pertinent other cleaners' prices and modes of advertising, categorically requires an MBA. Although the petitioner's president and counsel have repeatedly stated that the duties described require a minimum of an MBA, they have not explained which of those duties requires such a degree or adequately explained why. Even if the petitioner had demonstrated that the duties described are specialty occupation duties, it would not have demonstrated that the petitioner has any need for a person to perform those duties.

The petitioner's president also cited the *Handbook* as support for the proposition that the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty and qualifies as a specialty occupation.

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹ In its chapter "Market and Survey Researchers," the *Handbook* describes the duties of market research analysts as follows:

Market research analysts help companies understand what types of products people want, determine who will buy them and at what price. Gathering statistical data on competitors and examining prices, sales, and methods of marketing and distribution, they analyze data on past sales to predict future sales.

Market research analysts devise methods and procedures for obtaining the data they need by designing surveys to assess consumer preferences. While a majority of surveys are conducted through the Internet and telephone, other methods may include focus group discussions, mail responses, or setting up booths in public places, such as shopping malls, for example. Trained interviewers usually conduct the surveys under a market research analyst's direction.

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, accessed February 14, 2011.

Although the petitioner, a laundry service with "Appx. 2" employees, has not demonstrated that it has any need for a person to perform such duties, the duties described do suggest that the proffered position is a position for a market research analyst. The AAO will analyze the specialty occupation issue assuming, *arguendo*, that the proffered position is a position for a market research analyst.

As to the education required for market research analyst positions, the *Handbook* states:

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

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

That passage indicates that a bachelor's degree is only required for "many market and survey research jobs," and it suggests a wide range of subjects in which a person seeking a market research analyst position should take classes. Neither this passage nor any other section of the *Handbook* states or suggests that a position as a market research analyst requires a minimum of a bachelor's degree or the equivalent *in a specific specialty*.

Further, as was noted above, the petitioner's president stated that the proffered position requires "at least a Master's degree in Business Administration (MBA), or in any suitable field of study or combination of education substantially related to Business Administration, or an equivalent academic foundation.

An MBA, absent a specific concentration, such as accounting or finance, is not a degree in a specific specialty. The requirement of a degree in business administration is inadequate to establish that a position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). To prove that a job requires the theoretical and practical application of a body of specialized knowledge as required by Section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study. As explained above, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a

specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007). Thus, requiring an otherwise unspecified MBA an acceptable educational qualification for the proffered position is indicative of the proffered position's not being a specialty occupation.

As neither the *Handbook* nor any other evidence in the record of proceeding supports the petitioner's position that market research analyst positions categorically require a degree in any specific specialty, the petitioner has not demonstrated that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position and 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).

As the petitioner did not provide evidence establishing that a requirement for a minimum of a bachelor's degree in a specific specialty is "common to the industry in parallel positions among similar organizations," the petitioner has not satisfied the criterion at the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." The evidence of record does not refute the *Handbook's* information to the effect that a bachelor's degree in a specific specialty is not normally required for entry into the occupation in which the proffered position appears to belong. Further, it is not self-evident that the position as described in the record of proceeding is comprised of duties that, alone or in the aggregate, generate complexity or uniqueness that would necessitate the services of a person with at least a bachelor's degree, or the equivalent, in a specific specialty; and the petitioner has not produced any independent evidence documenting such complexity or uniqueness.

Next, the record of proceeding contains no evidence that the petitioner has ever previously hired anyone to fill the proffered position, and the petitioner has not, therefore demonstrated that it normally requires a degree for the proffered position and that the 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).

Finally, the petitioner has not satisfied the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), which 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 in a specific specialty.

In particular, the AAO finds that the petitioner has described the duties of the proffered position in terms of generalized and generic functions which do not, either individually or in the aggregate, establish a distinct body of highly specialized knowledge in a specific specialty that must be applied

to perform the proffered position, let alone that such knowledge would be usually associated with at least a bachelor's degree, or the equivalent, in a specific specialty.

As reflected in this decision's discussion of the *Handbook's* information about market research analysts, inclusion in that occupational category does not suffice to establish the educational attainment, or equivalent, that would be required to perform a particular market-research-analyst position. Upon review of all of the evidence regarding the duties of the proffered position, the AAO finds that record of proceeding does not develop and demonstrate specialization and complexity as attributes of the proffered position that would satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

In sum, the AAO finds that the director was correct in his determination that the record before him failed to establish that the beneficiary would be employed in a specialty occupation position, and it also finds that the evidence and argument submitted on appeal have 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.