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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

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[REDACTED]

FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: MAR 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,

*for Michael T. Kelly*  
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 salon and spa with nine employees, established during 2005. To employ the beneficiary in what it designates as a marketing manager position, the petitioner endeavors to classify her 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 petition states that the petitioner would employ the beneficiary for 30 hours per week at \$19.64 per hour.

The director denied the petition, finding that the petitioner failed to establish that the petitioner 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 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 and attached exhibits 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 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 (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.

In a letter submitted with the visa petition, the petitioner's president stated that the beneficiary "would be the key person in developing relationships with hotel management in order to establish a bridge of referral sources for the salon through concierge and guest services." She further stated, "We also aim to immediately upon her employment establish and coordinate referral relationships with tourist transportation services, which transport tourists to the malls and other tourist destinations." The petitioner's president did not state that the beneficiary was necessary to establishing those liaisons, nor indicate why a bachelor's degree is required to initiate those contacts. The petitioner's president offered the following additional list of duties of the proffered position:

[The beneficiary would] assist the salon owner in promoting our services, reaching new markets including tourists, developing specific marketing campaigns, evaluating the results of our marketing campaign and making the necessary adjustments, performing research on trends, and continuous development of an updated salon service menu with appropriate pricing [and] will also coordinate some related administrative duties.

The petitioner's president did not indicate which of those duties requires a minimum of a bachelor's degree or the equivalent in a specific specialty or why. The petitioner's president did not indicate that the proffered position requires a position in any specific specialty, but did state that the beneficiary's degree in business administration, together with her employment experience, qualify her to work in the proffered position.

Because the evidence submitted did not demonstrate that the proffered position qualifies as a specialty occupation position, the service center, on April 15, 2009, issued a request for evidence in this matter. The service center requested, *inter alia*, (1) evidence that the petitioner or similar companies in the petitioner's industry a bachelor's degree in a specific field of study is a minimum requirement for entry into the proffered position, (2) a detailed description of the duties of the proffered position, (3) a position description for each of its other employees, and (4) an organizational chart. The service center also asked that the petitioner reveal how many marketing managers it has employed in the past and documentation of their educational credentials.

In response, counsel provided a letter, dated May 12, 2009, from the petitioner's president. That letter describes the duties of the proffered position as follows:

- Formulate, direct and coordinate marketing activities and policies to promote products and services including market research studies and analysis to identify, develop, evaluate and implement marketing strategy.
- Collect and analyze data on customer demographics, preferences, needs, and buying habits to identify potential markets and factors affecting product and service demand.

- Develop pricing strategies, balancing salon objectives with customer satisfaction and customer service issues measuring the effectiveness of marketing efforts.
- Use sales forecasting and strategic planning to ensure the sale and profitability of products and services, analyzing business developments and monitoring market trends.
- Coordinate and participate in promotional activities and trade shows, working with advertisers and local resort managers, to market products and services.
- Consult with salon owner to report marketing findings and attend staff conferences to discuss and disseminate information and proposals concerning the promotion, distribution, design, and pricing of company products and services.
- Other miscellaneous related administrative tasks.

The petitioner's president stated that her business requires a marketing manager, and that the duties of the position can only be performed by a person with a degree in business with a concentration in marketing. She also stated that, during more than 25 years in the salon industry, she has never employed a marketing manager.

The petitioner's president stated that she was previously overwhelmed with marketing and administrative duties when she owned two spas during 2008, which suggests that she performed the duties of the proffered position herself. She did not provide any evidence that she has a degree in business with a concentration in marketing. She provided no evidence, and did not even allege, that other salons require marketing managers who must have a minimum of a bachelor's degree in a specific specialty. She did not indicate that she had ever heard of a salon employing a marketing manager.

Counsel provided an organizational chart that shows that, in addition to the marketing manager position, the petitioner employs its owner/manager, six nail/hair cosmetologists, a nail/skin care worker, and a salon assistant.

The director denied the visa petition on June 12, 2009, finding that the petitioner had not demonstrated that it has sufficient specialty-occupation marketing manager duties to occupy the beneficiary in that capacity even part-time. The director also noted that the petitioner did not establish that similar companies in the petitioner's industry employ a marketing manager.

With the appeal, counsel submitted an evaluation of the proffered position from an associate professor of management science at the [REDACTED]. The professor paraphrased the description of the duties of the proffered position listed above, less the administrative duties, stated that those are the duties of the proffered position, and stated that those

duties require a minimum of a bachelor's degree or the equivalent in marketing, business administration, or a related field. The professor also stated:

Additionally, it is standard for a company such as [the petitioner] to hire a Marketing Manager and require that individual to have attained at least a Bachelor's Degree. Various salon and spa facilities with approximately 9 employees regularly hire a Marketing Manger or someone in a similar professional position to develop new marketing strategies and initiatives, and require the minimum attainment of a Bachelor's Degree for the position.

In summation, then, the professor stated that the duties described are, in fact, the duties of a marketing manager with a salon; that those duties do require a minimum of a bachelor's degree or the equivalent in a specific specialty, and that salons of the petitioner's size routinely employ a marketing manager.

In his appeal brief, counsel stated that the evidence demonstrates that the proffered position qualifies as a specialty occupation position pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), because the nature of the specific duties of 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. Counsel asserted, however, that the petitioner does not intend to rely on any of the other criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A), but to demonstrate that the proffered position qualifies as a position in a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). Counsel stated that the duties described demonstrate that the proffered position qualifies as a position in a specialty occupation.

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.<sup>1</sup> The *Handbook* describes the duties of marketing manager positions, in the section entitled Advertising, Marketing, Promotions, Public Relations, and Sales Managers positions as follows:

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.

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<sup>1</sup> 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, January 24, 2011.

The duties of the proffered position, as described by the petitioner's president and in the professor's evaluation, correspond with the duties of a marketing manager as described in the *Handbook*. Assuming, *arguendo*, that the duties described are the actual duties of the proffered position, the proffered position is a marketing manager position as described in the *Handbook*.

The *Handbook* describes the educational requirements of marketing manager positions as follows:

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.

A preference, of course, is not a requirement. That passage does not indicate that marketing manager positions categorically require a bachelor's degree in business administration with an emphasis on marketing, or any specific specialty. The *Handbook* does not support the assertion that marketing manager positions categorically require a minimum of a bachelor's degree or the equivalent in a specific specialty, and the record of proceeding lacks probative evidence that the proffered position in particular is one that normally requires at least a bachelor's degree, or the equivalent, in a specific specialty.

For the reasons discussed above, 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).

The professor stated, in his evaluation, that salons routinely hire marketing managers to perform the duties attributed to the proffered position and require those marketing managers to have a minimum of a bachelor's degree or the equivalent in a specific specialty. Other than his assertion about his experience in general, the professor did not reveal any basis for that pronouncement. He did not provide any evidence in support of that conclusory declaration, nor did he provide any evidence indicating that his asserted experience yielded an accurate basis from which to extrapolate an industry-wide recruiting and hiring standard.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). In the instant case, the AAO does not find credible the professor's assertion that hair and nail salons routinely employ, even part-time, marketing managers 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 clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Next, the AAO finds that the petitioner failed to satisfy the second alternative prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). That is, the petitioner did not "show that its particular position is so complex or unique that it can be performed only by an individual with a degree."

The petitioner describes the proffered position in terms of generalized and generic functions that appear consistent with the marketing manager occupational classification as discussed in the *Handbook*. However, the *Handbook* indicates that the ranks of marketing managers includes persons without at least a bachelor's degree, or the equivalent, in a specific specialty, and there is no probative evidence in the record of proceeding that the proffered position is unique or complex to a level that distinguishes it from marketing manager positions, particularly in salon/spas, that can be performed by persons without at least a bachelor's degree, or the equivalent, in a specific specialty.

The petitioner's president acknowledged that the petitioner has never employed a marketing manager. 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).

Further, the AAO notes that the record of proceeding does not establish that the hair and nail salon actually has a need for a person to formulate, direct and coordinate marketing activities and policies; to collect and analyze data on customer demographics, preferences, needs, and buying habits; to develop pricing strategies, et cetera, on a continuous basis for the period of requested employment.

Further still, the AAO finds that nothing in the record of proceeding demonstrates that performance of the proffered position would require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. For example, the evidence of record does not establish that the pricing strategies pertinent to the goods and services available at a nail and hair salon would require someone with a minimum of a bachelor's degree or the equivalent in a specific specialty. The record contains no reason that the performance of that duty, or any of the duties of the proffered position, at the level required by the petitioner, would require a minimum of a bachelor's degree or the equivalent in a specific specialty.

Finally, the AAO finds that neither the extent to which the duties of the proffered position are described, nor any other evidence in this record of proceeding, establish a distinct body of highly specialized knowledge in a specific specialty that the beneficiary would have to apply to perform in the proffered position, and that such a body of knowledge is usually associated with attainment of at least a bachelor's degree, or the equivalent, in a specific specialty. Rather, to the extent to which they are described – which is generalized and generic – the proposed duties do not convey a need for a particular educational level of knowledge in marketing or any other specialty. Accordingly, the petitioner has not satisfied the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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.