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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: CALIFORNIA 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:

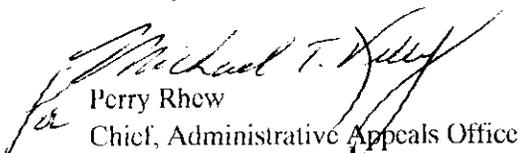
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INSTRUCTIONS:

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 healthcare services. 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 director denied the petition, finding (1) that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position and (2) that the petitioner failed to establish that the beneficiary is qualified for the proffered 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 proceedings, 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 timely-submitted response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief.

As will be discussed below, the AAO finds that the director's determination to deny the petition for failure to establish that the proffered position qualifies as a specialty occupation position is correct. As this finding is dispositive of the appeal, the AAO will not address in any detail its affirmation of the director's determination that the petitioner has not demonstrated that the beneficiary is qualified to perform in the proffered position.

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 professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

With the petition counsel submitted a letter, dated March 31, 2009, from the petitioner’s president. That letter states that the petitioner operates an outpatient physical therapy clinic and provides physical therapists, occupational therapists, and speech therapists to various healthcare facilities and home health agencies. That letter and the petitioner’s résumé states that the beneficiary has a bachelor’s degree in marketing from the College of the Holy Spirit in Manila, Philippines. No evidence in support of that assertion accompanied the visa petition, although documentation pertinent to the beneficiary’s nursing degree was submitted with the visa petition.

Counsel also submitted an unsigned, undated, unattributed description of the duties of the proffered position. It states:

RESPONSIBILITIES:

1. Responsible for the promotion, referral base, and sales of Agency services within the assigned territory.
2. Meet and exceed the short[-]term and long[-]term goals as outlined in the marketing plan;
3. Direct, implement, act on, track and supervise all marketing activities.

It further states that the qualifications for the proffered position include a bachelor’s degree in marketing or a related field.

Counsel submitted an Illinois Department of Employment Security notice of the proffered position indicating that counsel applied for a prevailing wage determination, which was issued on March 19, 2009. That notice states the duties of the proffered position as follows:

Develop sound relationship with clients; make initial contact with other healthcare providers regarding service agreements and financial agreements to ensure appropriate services; develop pricing strategies, balancing firm objectives and customer satisfaction; identify, develop, and evaluate marketing strategy based on knowledge of established objectives, market characteristics, and cost and mark up factors; formulate, direct and coordinate marketing activities and policies to promote products and services, direct the

hiring, training, and performance evaluations of marketing staff and oversee their daily activities.

The official who issued the prevailing wage determination indicated that the position corresponds to that of Marketing Manager as shown at 11-2021 of the U.S. Bureau of Labor Statistics Occupational Employment Statistics.

Because the evidence submitted did not demonstrate that the petition was approvable, the service center, on May 21, 2009, issued a RFE in this matter. The service center accorded the petitioner 12 weeks, until August 13, 2009, to provide the requested evidence and noted that the failure to provide all of the evidence in one single submission might result in denial of the visa petition.

The service center requested, *inter alia*, a copy of the beneficiary's foreign college/university transcripts that establish that she received a degree in marketing. The service center also requested that the petitioner provide information and evidence to establish that the proffered position is a specialty occupation position, asserting that the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* does not establish that a bachelor's degree in a specific specialty is a minimum requirement for marketing manager positions in general.¹ The service center requested that the petitioner "Explain what differentiates the petitioner's products or services from others in the industry and why it requires a baccalaureate level of study to perform the duties of the position," and "what differentiates the proffered position from other related 'non-specialty occupation' positions." The service center further clarified that request, asking that the petitioner "Clarify what it is about the petitioner's business that is so specialized, distinctive and/or exceptional that it requires the services of an individual with a degree in a specific field of study even though it is not an industry minimum standard."

In a response dated August 6, 2009, counsel stated, "Beneficiary needs additional time to obtain the [requested transcript] from her school, located outside of the United States." Counsel requested an additional 30 days to comply, but did not explain why the 12 weeks originally accorded was insufficient to obtain a copy of the requested transcript. Counsel's request was not granted.

On August 31, 2009 counsel submitted the requested transcript and a letter dated August 26, 2009. In his letter counsel asserted that the *Handbook* establishes that marketing manager positions categorically require at least a bachelor's degree. Counsel did not assert that the *Handbook* suggests that the degree must be in any specific specialty. The assertion that the *Handbook* supports the petitioner's position will be addressed further below.

The director denied the visa petition on September 9, 2009, finding, as was noted above, that the evidence does not demonstrate that the proffered position qualifies as a specialty occupation and that

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.

even if it were, the evidence submitted would not demonstrate that the beneficiary is qualified to work in the that particular specialty occupation.

The AAO notes that the director did not consider the petitioner's August 31, 2009 submission when she issued the September 9, 2009 decision denying the visa petition. The order of items in the record suggests that, when the director issued the decision, the August 31, 2009 submission, although received, had not yet been interfiled in the instant record of proceeding.

The AAO finds, however, that the director did not err in failing to consider that evidence. The RFE made clear that the petitioner's evidence in response must be submitted on or before August 13, 2009. Although counsel requested an extension of time, that request was not granted, nor could it have been, as 8 C.F.R. § 103.2(b)(8) states that extensions of time to provide evidence requested in an RFE are not permitted. The late submitted evidence was correctly disregarded by the director.

The AAO notes that the requested transcript was not resubmitted on appeal. Had it been submitted on appeal, however, it should again not have been considered, as it was requested previously and not timely submitted. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); and see 8 C.F.R. §§ 103.2(b)(8) and (b)(11).

The record does not contain any timely-submitted transcript showing that the beneficiary has been awarded a bachelor's degree in marketing. The evidence that may be considered does not demonstrate that, assuming that the proffered position required such a degree, she would be qualified to work in it. The appeal will be dismissed and the visa petition will be denied on this basis.

On appeal, however, counsel asserted that the evidence demonstrates that the proffered position is, in fact, in a specialty occupation, in that it requires a minimum of a bachelor's degree or the equivalent in a specific specialty, again, citing the *Handbook*.

The *Handbook* discusses marketing manager positions in the chapter "Advertising, Marketing, Promotions, Public Relations, and Sales Managers." As to the education required for marketing manager positions, the *Handbook* states, "For marketing . . . management positions, employers often prefer a bachelor's or master's degree in business administration with an emphasis on marketing."

That employers often prefer such a degree does not indicate that it is a minimum requirement for entry into the proffered position or any other particular marketing manager position. The *Handbook* does not support the position that marketing manager positions categorically require a minimum of a bachelor's degree or the equivalent in a specific specialty. Further, the petitioner has not provided any evidence in the record of proceeding that establishes the proffered position as one that normally requires at least a bachelor's degree, or the equivalent, in a specific specialty.

As the petitioner has not established that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of this petition, the petitioner has not satisfied the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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.

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)).

The AAO here reiterates that the minimum educational requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, or the equivalent. Rather, as required by the overarching definition of a specialty occupation at Section 214(i)(1) of the Act, the bachelor's or higher degree, or equivalent, must be in a specific specialty that is directly related to the performance of the specialty-occupation position claimed in the petition, and its possession must signify attainment of a body of highly specialized knowledge in the specific specialty that must be theoretically and practically applied to perform the proffered position.

As reflected in this decision's earlier comments, the relevant chapter of the *Handbook* does not indicate that the proffered position as described in this petition would require at least a bachelor's degree in a specific specialty. Thus, the *Handbook* does not support a favorable finding under this criterion. The AAO also notes that the record does not include submissions from a professional association or from individuals or other firms in the petitioner's industry attesting to routine employment and recruiting practices. In fact, the petitioner submitted no evidence pertinent to the recruitment and hiring practices of similar organizations for positions parallel to the one proffered in this petition.

The petitioner has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to 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." In this regard, the AAO notes that neither the duties that the petitioner ascribes to the proffered position nor any other evidence submitted with regard to the position shows whatever relative level of complexity or uniqueness may reside in the proffered position as compared to marketing manager positions that may be performed by persons without at least bachelor's degree the equivalent, in a specific specialty. As the evidence in the record of proceeding does not demonstrate that the proffered position is so complex or unique as to be distinguishable from marketing manager positions that can be performed by persons without at least a bachelor's degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The record contains no evidence that the petitioner has ever previously hired anyone 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).

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

The AAO finds that the duties of the proffered position are described in terms of generalized and generic functions (such as responsibility for “the promotion, referral base, and sales of Agency services within the assigned territory”; “meet[ing] and exceeding the short[-]term and long[-]term goals as outlined in the marketing plan”; “[d]evlop[ing] [a] sound relationship with clients”; “[d]evlop[ing] pricing strategies”; and “balancing firm objectives and customer satisfaction”) which do not convey any particular level of specialization and complexity in the duties, let alone a level such that performance of the duties would require the application of a body of highly specialized knowledge that is usually associated with at least a bachelor’s degree, or the equivalent, in a specific specialty. Further, the petitioner has not supplemented these duty descriptions with evidence establishing the requisite association between proffered position’s duties and knowledge usually associated with at least a bachelor’s degree, or the equivalent, in a specific specialty.

For the reasons discussed above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO will not disturb the director’s decision to deny the petition for failure to establish a specialty occupation. The appeal will be dismissed, and the petition will be denied.

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director’s decision shall not be disturbed. As this adverse determination of the specialty occupation issue is dispositive of the appeal, the AAO will not further address its affirmation of the director’s denial of the petition for the petitioner’s failure to establish that the beneficiary is qualified for the proffered position.

The appeal will be dismissed and the visa petition will be denied on both of the bases described above, with each considered as an independent and alternative basis for the decision. 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.

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