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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 2000
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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Date: **NOV 01 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,

for 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 claims that its business is “a chain” of [REDACTED] was established in 2006 and employs over 80 employees. The petitioner’s gross annual income is \$4.5 million. It seeks to employ the beneficiary as a market research analyst 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, concluding that the petitioner does not have a credible need for the position and that the proffered position is not a specialty occupation.

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 the petitioner’s supporting documentation. The AAO reviewed the record in its entirety before reaching its decision.

The primary issue for consideration is whether the petitioner's proffered position qualifies as a specialty occupation. 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 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 [(1)] theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires [(2)] the attainment of a bachelor’s degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position:
or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. See *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); see also *COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions 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.

The petitioner states that it is seeking the beneficiary's services as a market research analyst. In a March 30, 2009 letter, the petitioner described the duties of the proffered position as follows:

- Research market conditions in local, regional, or national area to determine potential sales of product;
- Analyze past buying trends, sales records, and pricing to determine values and yield;
- Collect and analyze data on customer preferences and buying habits;
- Prepare cost estimate reports to determine accurate and competitive pricing of products and services;
- Produce and analyze monthly budgets and activity reports;
- Review market trends and competition in the restaurant industry; and
- Prepare reports and graphic illustrations of findings.

The AAO finds that the above duty descriptions present the proffered position only in terms of generalized functions generic to market research analysis in general. The AAO further finds that, in the context of the asserted Market Research Analysts occupational category which (as will be discussed later in this decision's review of the relevant information in the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*) includes persons with less than a bachelor's degree, or the equivalent, in a specific specialty) such terms do not indicate the need for at least a bachelor's degree in a specific specialty.

The petitioner states that the minimum requirement for the proffered position is a bachelor's degree in business administration, marketing, or a related field.

The documentation submitted by the petitioner included a copy of the beneficiary's foreign degrees, awarded by the [REDACTED] and [REDACTED], course transcripts and an educational credentials evaluation report finding that the beneficiary has the equivalent of a bachelor's degree in business administration.

On May 8, 2009, the director issued an RFE requesting a detailed statement setting forth the beneficiary's proposed duties and responsibilities, the educational requirements for the proposed position, and the beneficiary's qualifications. The director noted that the beneficiary appears to have no restaurant experience. The director also asked the petitioner to state how many other individuals are employed in similar positions and, of these, how many hold a bachelor's degree and in what field.

The petitioner responded on June 1, 2008 by submitting a letter from counsel, its tax returns, a selection from the of the U.S. Department of Labor's *Directory of Occupational Titles* and also from the *Handbook*, and a sample of job advertisements for market research analyst positions.

Counsel's letter describes the petitioner's business as a chain of [REDACTED]. Counsel's letter explains [REDACTED] is a multinational restaurant franchise selling sandwiches and salads. Counsel cites a number of cases where market research analysts or similar positions have been recognized as specialty occupations. Counsel states that petitioner's "voluminous transactions" require an "in-house full time 'Market Research Analyst.'" Finally, counsel claims that the proffered position is a specialty occupation requiring a bachelor's degree in business, marketing or a related field.

The director denied the petition on July 30, 2009. The director noted that the petitioner's business is a franchise and that the petitioner had failed to establish a need for a market research analyst in view of the marketing functions provided by the franchisor.

On appeal, the petitioner, through counsel, reiterates the marketing strategies of the franchise. Counsel asserts that the petitioner requires the services of a market research analyst with a bachelor's degree because a small business must hire individuals who require little or no supervision. Finally, counsel states that the duties of the market research analyst position differ from the advertising and marketing services offered by the franchise.

The proffered duties of the position of market research analyst within the petitioner's business include preparing, reviewing and evaluating sales operations, implementing cost management techniques, and advising management.

Counsel states, and publicly available information confirms, that the franchise provides marketing, training and purchase recommendations to individual business owners. Although counsel explains that "the independent restaurant owners make the final decision for appropriate business action," it is unclear, at best, what duties would be performed by a market research analyst beyond the services already provided by the franchise. Further, no documentary evidence was provided to support the petitioner's claims beyond the assertions of counsel. The unsupported assertions of counsel do not constitute evidence and cannot satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Additionally, even if the petitioner could demonstrate a credible need for a market research analyst, the *Handbook*, 2010-2011 edition, does not indicate that entry into positions in that occupation normally requires at least a bachelor's degree, or the equivalent, in a specific specialty. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-11 ed., available at (last accessed October 11, 2011).

While the *Handbook* reports that a baccalaureate degree is the minimum educational requirement for many market and survey research jobs, it does not indicate that the degrees held by such workers must be in a specific specialty that is directly related to market research, as would be required for the occupational category to be recognized as a specialty occupation. *See id.* This is evident in the range of qualifying degrees indicated in the Significant Points section that introduces the *Handbook's* chapter "Market and Survey Researchers," which states: "Market and survey researchers can enter the occupation with a bachelor's degree, but those with a master's or Ph.D. in marketing or a social science should enjoy the best opportunities." *Id.*

That the *Handbook* does not indicate that market research analyst positions normally require at least a bachelor's degree in a specific specialty is also evident in the following discussion in the "Training, Other Qualifications, and Advancement" section of its chapter "Market and Survey Researchers," which does not specify a particular major or academic concentration:

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.

Id. Because the *Handbook* indicates that entry into the market research analyst occupation does not normally require a degree in a specific specialty, which is in accordance with the petitioner's example of not requiring at least a bachelor's degree or equivalent in a specific specialty for the proffered position, the *Handbook* does not support the proffered position as being a specialty occupation.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d at 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The fact that the petitioner finds a generalized degree in business administration acceptable for the proffered position is not indicative of a specialty occupation position. Since there must be a close corollary 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 [REDACTED] Associates*, 19 I&N Dec. 558.

As the *Handbook* indicates that the proffered position does not belong to an occupational classification for which there is a categorical requirement for at least a bachelor's degree in a specific specialty, as the duties of the proffered position as described in the record of proceeding do not indicate that the particular position proffered in this petition is one for which a baccalaureate or higher degree or its equivalent in a specific specialty is normally the minimum requirement for entry, and as the petitioner indicated that a degree in business administration was acceptable, rather than a degree in a *specific specialty*, the petitioner failed to satisfy the first criterion of 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.

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 petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. Even if established by the evidence of record, which it is not, the requirement of a bachelor's degree in business administration is inadequate to establish that a position qualifies as a specialty occupation. Again, 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 corollary 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.

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. Again, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) 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 189, 2007 WL 1228792 (C.A. 1 (Puerto Rico) 2007).

The petitioner has also not satisfied 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 petitioner did not submit any documentation to evidence that the proffered position is so complex or unique that it could only be performed by an individual with a degree in a specific specialty. Although the record includes a copy of advertising for the position of market research analyst within the petitioner's company, and requiring a degree in business administration, the record also has not established a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty.

Contrary to the petitioner's purpose for submitting them, the record's job-vacancy advertisements are not evidence of a common degree-in-a-specific-specialty requirement in positions that are

both (1) parallel to the proffered position and (2) located in organizations similar to the petitioner. The advertisements are too few to be indicative of an industry-wide practice. Further, as they are only solicitations for hire, they are not evidence of the advertisers' actual hiring practices. There is no independent evidence of how representative these job advertisements are of the particular employers' recruiting histories for the type of job advertised. Most of the advertisements state only a bachelor's degree requirement, without specifying that the degree be in a particular specialty. The advertisements' content and the record's information about this petition's proffered position and the petitioner's business operations are too limited and generalized to establish that the advertised positions are parallel to the proffered position and that the advertising organizations are similar to the petitioner. Furthermore, the range of the degree requirements cited in the job advertisements are not inconsistent with the *Handbook's* information to the effect that a bachelor's degree in a specific specialty is not normally a requirement for market-research-analyst positions. Thus, the petitioner has also not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 or its equivalent. As reflected in this decision's earlier discussion of the generalized and generic level at which the proposed duties have been presented, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than market-research-analyst positions that are not usually associated with a degree in a specific specialty.

Therefore, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications further, except to note that, in any event, the record indicates that the beneficiary has a degree in business administration and not in any specific specialty such that the petition could be approved even if eligibility for the benefit sought had been otherwise established.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The appeal will be dismissed and the petition denied. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. § 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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