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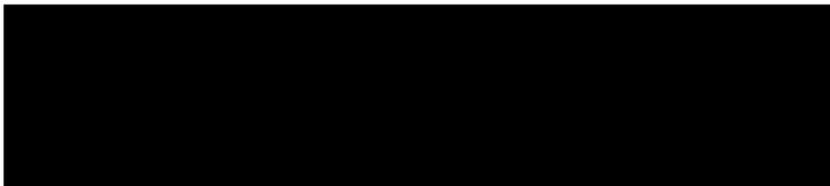
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

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U.S. Citizenship
and Immigration
Services

D2



DATE: NOV 03 2011 OFFICE: CALIFORNIA 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 The director's decision will be affirmed in part and withdrawn in part. The appeal will be dismissed and the petition will remain denied.

The petitioner claimed on the Form I-129 to be a nonprofit organization engaging in social advocacy with five employees and a gross annual income of \$360,363. It seeks to employ the beneficiary as a budget 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 on the basis of his determination that the petitioner failed to demonstrate that its proposed position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's responses to the director's request for additional evidence; (4) the director's letter denying the petition; and (5) the Form I-290B and supporting documentation. The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Upon review of the entire record, we find that the petitioner has failed to overcome the director's ground for denying this petition. Beyond the decision of the director, we find additionally that the petitioner has failed to demonstrate that the petition is supported by a certified labor condition application (LCA) which corresponds to the petition.

The first issue before us on appeal is whether the proposed position qualifies for classification 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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one that requires:

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

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

An occupation which requires [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 proposed 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 its March 25, 2009 letter of support, the petitioner stated that the beneficiary would research the economies of foreign countries and organizations; examine budget estimates; and examine the petitioner's distribution of grants, its fundraising, and its office administration. In its June 18, 2009 letter submitted in response to the director's request for additional evidence, the petitioner stated that the beneficiary would spend twenty percent of her time researching foreign countries' economies, political subdivisions, and organizations; fifteen percent of her time providing advice regarding the preparation of project proposals and preparing project budgets; fifteen percent of her time communicating with overseas offices; ten percent of her time reviewing budgets, project proposals, and other documents; five percent of her time contributing financial analysis to fundraising proposals; five percent of her time preparing and monitoring the office's internal operating budget; five percent of her time on data entry and other administrative tasks; five percent of her time supervising an intern; and five percent of her time on travel and travel preparation.

In making our determination as to whether the proposed position qualifies for classification as a specialty occupation, we turn first to the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, a resource upon which we routinely rely for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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)).

On appeal, counsel asserts that the proposed position coincide with those of a budget analyst as discussed in the *Handbook*. We agree with counsel's assessment, and that portion of the director's decision in which she concluded the petitioner lacks the organizational complexity to support a budget analyst position is hereby withdrawn. The director also erred in concluding that the position of a budget analyst as defined in the *Handbook* qualifies for classification as a specialty occupation. Consequently, this part of the director's decision will also be withdrawn. Nonetheless, we agree with the director's determination that the petitioner failed to demonstrate that its proposed position constitutes a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A), and we therefore affirm the director's decision to deny the petition.

The overarching reason for our dismissal of this appeal is that the proposed duties as described in the record do not establish that performance of those duties requires the theoretical and practical application of at least a bachelor's degree level of highly specialized knowledge in a specific specialty, as required by the H-1B specialty occupation provisions of the Act and their implementing regulations. The record's descriptions of the proposed duties are limited to generic and generalized functions which, even when read in the context of the evidence submitted in

support of the petition, do not convey the educational level of any body of highly specialized knowledge that the beneficiary would apply theoretically and practically.

The *Handbook's* description of budget analyst positions states, in pertinent part, the following:

Budget analysts help organizations allocate their financial resources. They develop, analyze, and execute budgets, as well as estimate future financial needs for private businesses, nonprofit organizations, and government agencies. *In private sector firms, a budget analyst's main responsibility is to examine the budget and seek new ways to improve efficiency and increase profits.* In nonprofit and governmental organizations, which usually are not concerned with profits, analysts try to find the most efficient way to distribute funds and other resources among various departments and programs.

In addition to managing an organization's budget, analysts are often involved in program performance evaluation, policy analysis, and the drafting of budget-related legislation. At times, they also conduct training sessions for company or government personnel regarding new budget procedures.

At the beginning of each budget cycle, managers and department heads submit operational and financial proposals to budget analysts for review. These plans outline the organization's programs, estimate the financial needs of these programs, and propose funding initiatives to meet those needs. Analysts then examine these budget estimates and proposals for completeness, accuracy, and conformance with established procedures, regulations, and organizational objectives. Sometimes they employ cost-benefit analyses to review financial requests, assess program tradeoffs, and explore alternative funding methods. They also examine past budgets and research economic and financial developments that affect the organization's income and expenditures.

After the initial review process, budget analysts consolidate individual departmental budgets into operating and capital budget summaries. These summaries contain statements that argue for or against funding requests. Budget summaries are then submitted to senior management, or as is often the case in government organizations, to appointed or elected officials. Budget analysts then help the chief operating officer, agency head, or other top managers analyze the proposed plan and devise possible alternatives if the projected results are unsatisfactory. The final decision to approve the budget usually is made by the organization head in a private firm, or by elected officials, such as State legislators, in government.

Throughout the year, analysts periodically monitor the budget by reviewing reports and accounting records to determine if allocated funds have been spent as specified. If deviations appear between the approved budget and actual spending, budget analysts may write a report explaining the variations and recommending

revised procedures. To avoid or alleviate deficits, budget analysts may recommend program cuts or a reallocation of excess funds. They also inform program managers and others within the organization of the status and availability of funds in different accounts.

Data and statistical analysis software has greatly increased the amount of data and information that budget analysts can compile, review, and produce. Analysts use spreadsheet, database, and financial analysis software to improve their understanding of different budgeting options and to provide accurate, up-to-date information to agency leaders. In addition, many organizations are beginning to incorporate Enterprise Resource Planning (ERP) programs into their budget-making process. ERP programs can consolidate all of an organization's operating information into a single computer system, which helps analysts estimate the effects that a budget alteration will have on each part of an organization.

Handbook, 2010-11 ed., available at <http://www.bls.gov/oco/ocos003.htm> (last accessed October 13, 2011) (emphasis added). We find this information generally reflective of the duties of the proposed position. With regard to the education and training necessary to enter into this field, the *Handbook* states, in pertinent part, the following:

A bachelor's degree usually is the minimum educational requirement for budget analyst jobs, but some organizations prefer or require a master's degree. Entry-level budget analysts usually begin with limited responsibilities but can be promoted to intermediate-level positions within 1 to 2 years, and to senior positions with additional experience.

[E]mployers generally require budget analysts to have at least a bachelor's degree, but some prefer or require a master's degree. Within the Federal Government, *a bachelor's degree in any field is sufficient* for an entry-level budget analyst position. State and local governments have varying requirements, but usually require *a bachelor's degree in one of many areas*, including accounting, finance, business, public administration, economics, statistics, political science, or sociology. Because developing a budget requires strong numerical and analytical skills, courses in statistics or accounting are helpful, regardless of the prospective budget analyst's major field of study. Some States may require a master's degree. Occasionally, budget-related or finance-related work experience can be substituted for formal education.

Id. (emphasis added). Although the *Handbook* states that budget analysts are usually required to possess a bachelor's degree, the bachelor's degree is not required to be *in a specific specialty*, as required under section 214(i)(1) of the Act. To prove that a job requires the theoretical and practical application of a body of highly 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. When a range of degrees, e.g., the liberal arts, or a degree of generalized title without further specification, e.g., business administration, can perform a job, the

position does not qualify as a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). As such, budget analyst positions do not qualify for classification as specialty occupations under the first criterion.

As the evidence of record does not establish that the particular position proposed here is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, *in a specific specialty* closely related to the position's duties, the proposed position does not qualify for classification as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

We turn next to a consideration of whether the petitioner, unable to establish its proposed position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under one of the three remaining criteria: a degree requirement as the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position; or the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree.

The petitioner has not satisfied the first of the two alternative prongs at 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, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proposed position; and (2) located in organizations that are similar to the petitioner.

Again, 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 at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

As already discussed, the petitioner has not established that its proposed position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree *in a specific specialty*. Nor has the petitioner submitted evidence that the industry's professional associations have made a degree in a specific specialty a minimum requirement for entry. Nor has the petitioner submitted any evidence to establish that its degree requirement is common to the industry in parallel positions among similar organizations.

The petitioner has 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 duties of the proposed position are similar to those of budget analysts as outlined in the *Handbook*, and the *Handbook* does not indicate that a baccalaureate degree in a specific field, or its equivalent, is a normal minimum entry requirement for such positions. The duties proposed by the petitioner are no more complex or unique than those outlined by the *Handbook*; to the contrary, the duties proposed by the petitioner largely mirror those outlined in the *Handbook*. The duties discussed by the

petitioner appear no more unique, complex, or specialized than those discussed in the *Handbook*. The evidence of record does not refute the *Handbook's* information indicating that a bachelor's degree from a specific field of study is not the normal minimum entry requirement for positions such as the one proposed here.

We turn next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires that the petitioner demonstrate it normally requires a degree or its equivalent for the position. To determine a petitioner's ability to satisfy the third criterion, we normally review its past employment practices, as well as the histories, including the names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas.¹ In order to satisfy this criterion, the petitioner submitted information regarding its previous budget analyst, who possesses a bachelor's degree in international studies. However, given the beneficiary's possession of a bachelor's degree in economics, the information indicating that the individual who previously held the position possesses a bachelor's degree in international studies confirms that an individual possessing a degree from a wide range of fields could perform the duties of the proposed position. In order to classify its proposed position as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), the petitioner must demonstrate that it normally requires an individual with a bachelor's degree *in a specific specialty* as a normal minimum requirement for entry into the position. The petitioner has failed to make that demonstration and has not satisfied 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The fourth criterion, 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), requires the petitioner to establish that the nature of its proposed 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 the specialty. As previously discussed, the *Handbook* indicates that a baccalaureate degree in a specific specialty is not a normal minimum entry requirement. The petitioner has failed to differentiate the duties of the proposed position from those described in the *Handbook* and, as such, has failed to indicate the specialization and complexity required by this criterion. The evidence of record does not distinguish the duties of the proposed position as more specialized and complex than those normally performed by budget analysts, which do not normally require, nor are they usually associated with, at least a bachelor's degree in a specific field. As a result, the record fails to establish that the proposed position meets the specialized and complex threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

¹ Even if a petitioner believes or otherwise assert that a proposed position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any job so long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proposed position does not *in fact* require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation"). Here, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

For all of these reasons, we agree with the director's determination that the petitioner failed to demonstrate that the proposed position qualifies for classification as a specialty occupation.

Beyond the decision of the director, we note that the certified LCA provided in support of the petition lists a Level I prevailing wage level for budget analysts in the [REDACTED] metropolitan division.² This indicates that the LCA, which is certified for an entry-level position, is at odds with the statements by counsel and the petitioner regarding the complexity of the duties to be performed by the beneficiary.

Given that the LCA submitted in support of the petition is for a Level I wage,³ it must therefore be concluded that either (1) the position is a low-level, entry position relative to other budget analysts or (2) the LCA does not correspond to the proposed petition.

While the DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part, the following:

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.*

(Italics added). The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has not demonstrated that its petition is supported by an LCA which actually corresponds to it, and the petition must be denied for this additional reason.

² The Level I prevailing wage for a budget analyst in [REDACTED] was \$48,838 at the time the LCA was certified. The Level II prevailing wage was \$60,694; the Level III prevailing wage was \$72,530; and the Level IV prevailing wage was \$84,386. *See* Foreign Labor Certification Data Center, Online Wage Library, available at <http://www.flcdatcenter.com> (accessed October 13, 2011).

³ According to guidance regarding wage level determination issued by the DOL in 2009 entitled *Prevailing Wage Determination Policy Guidance*, at page 7, Level I wage rates, which are labeled as "entry" rates, "are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered."

The petitioner has failed to demonstrate that the proposed position qualifies for classification as a specialty occupation. Beyond the decision of the director, the petitioner has also failed to demonstrate that the petition is supported by an LCA which corresponds to the petition.⁴ Accordingly, the beneficiary is ineligible for nonimmigrant classification under section 101(a)(15)(H)(i)(b) of the Act and this petition must remain denied.

The petition will remain denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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 and the appeal will be dismissed.

ORDER: The appeal is dismissed.

⁴ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).