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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship
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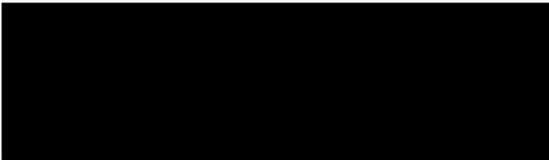


Date: **NOV 14 2011** Office: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, 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 remain denied.

The petitioner claims it provides entertainment,¹ was established in 2002, has 28 employees, and had a gross annual income of over \$10 million in 2008. It seeks to employ the beneficiary as a promotion and advertising manager 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 failed to establish that the proffered position is a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129, Petition for Nonimmigrant Worker, and supporting documentation; (2) the director's request for additional evidence (RFE) and the petitioner's response to the RFE; (3) the director's denial letter; and (4) Form I-290B, Notice of Appeal or Motion, with counsel's statement and previously submitted documentation. The AAO reviewed the record in its entirety before reaching its decision.

The central issue is whether the 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 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 copy of the petitioner's 2008 completed uncertified Internal Revenue Service (IRS) Form 1120S lists the petitioner's business as coin operated games.

- (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.

In this matter, the petitioner seeks the beneficiary’s services as a promotion and advertising manager. The petitioner’s September 4, 2009 letter in support of the petition provided the following description of the position’s duties and the estimated time allocated to those duties:

- Prepare budgets and submit estimates for program costs as part of campaign plan development – 10%
- Plan and prepare advertising and promotional material to increase sales of products or services, working with customers, company officials, sales departments and advertising agencies – 10%
- Inspect layouts and advertising copy and edit scripts, audio and video tapes, and other promotional material for adherence to specifications – 10%
- Coordinate activities of departments, such as sales, graphic arts, media, finance, and research – 10%
- Confer with department heads or staff to discuss topics such as contracts, selection of advertising media, or product to be advertised – 10%
- Gather and organize information to plan advertising campaigns – 10%
- Identify and develop contacts for promotional campaigns and industry programs that meet identified buyer targets such as dealers, distributors, or consumers – 5%
- Coordinate activities of departments, such as sales, graphic arts, media, finance, and research – 10%
- Confer with clients to provide marketing or technical advice – 10%
- Assemble and communicate with a strong, diverse coalition of organizations or public figures, securing their cooperation, support and action, to further campaign goals. Coordinate with the media to disseminate advertising. Contact organizations to explain services and facilities offered. Consult publications to learn about conventions and social functions and to organize prospect files for promotional purposes. Represent company at trade association meetings to promote products. – 15%

The petitioner stated that the proffered position was a new and permanent position for the company. The petitioner indicated that it needed an individual who had obtained a U.S. bachelor's degree in mass media/communication or its foreign equivalent to perform the duties of the proffered position. The petitioner noted that this requirement appeared to be an industry standard.

On October 1, 2009, the director issued an RFE requesting additional evidence that the proffered position is a specialty occupation, including a more detailed job description and any evidence that an industry standard existed for parallel positions in similar organizations requiring a baccalaureate degree in a specific discipline.

In response to the RFE, the petitioner stated: “[t]he Job requires media co-ordination, planning Media and Promotion events, developing strategies and policies to attract more customers, plan business promotion campaign and develop strategy to utilize Mass Media for profitability of company and increase customer base.” The petitioner added that the proffered position “is analogous to a marketing manager position but is more focused on developing business through utilization of Mass Communication.” The petitioner noted that the manager had to develop strategy, apply the strategy, and then monitor to ensure the strategy leads to the desired result. The petitioner added that the duties of the proffered position included organizing, developing and maintaining the company's website, and developing E marketing projects.

The petitioner also provided copies of 11 advertisements for positions with titles such as marketing manager or coordinator, communication manager, sales/production manager, media relations/promotion manager, and new business manager. A review of the advertisements does not establish that the advertising businesses are similar to the petitioner's organization either in income or size or in the nature of their business. Neither is it clear from the general descriptions of the advertised positions that the positions are parallel to the petitioner's proffered position. In addition, the majority of the advertisements indicate that a general bachelor's or four-year degree is preferred although sometimes required. Only two of the advertisements indicate that a degree in a specific discipline is required to fulfill the position.

The petitioner also submitted an October 7, 2009 opinion letter prepared by [REDACTED] and [REDACTED] of the Journalism and Multimedia Arts Department at Duquesne University. [REDACTED] recited the petitioner's initial description of the duties of the proffered position and opined: "the position of Advertising and Promotion Manager requires the theoretical and practical application of a highly specialized body of knowledge in the field of Communications, or a related field, which requires the attainment of a[t] least Bachelor's degree or its equivalent as the minimum requirement for entry into this occupation." [REDACTED] noted that a bachelor's degree provides the necessary skills and abilities such as decision-making, technical problem-solving, and analytical-thinking crucial to a position such as the proffered position. [REDACTED] claims that "no company would hire someone in the position of Advertising and Promotion Manager tasked with managing its marketing and advertising initiatives without possessing the skills and expertise that can only be gained through the equivalent of Bachelor's degree in Communications or a related field."

The director denied the petition on October 29, 2009.

On appeal, counsel for the petitioner asserts that the evidence submitted is sufficient to establish that the proffered position is a specialty occupation. Counsel contends that the director improperly categorized the proffered position as that of a public relations specialist, a position that is not the same as the proffered position.

To make its determination whether the employment described qualifies as a specialty occupation, the AAO turns 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 U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies 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)).

The AAO notes that although the petitioner claims it has 28 employees and a gross annual income of over \$10 million in 2008, it has not provided documentary evidence in support of its claim. The record does not include an organizational chart or a description of the petitioner's other employees' positions and job duties. The petitioner's 2008 IRS Form submitted is not certified and there is no evidence that it has been filed. The June 30, 2009 financial statement submitted is not sufficient to establish the nature or solvency of the petitioner's business. As the record does not include a description of the petitioner's other employees and their duties, and a more complete description of its business, the AAO cannot determine whether the petitioner has sufficient work for the beneficiary to perform duties requiring at least a bachelor's degree or its equivalent in a specific specialty on a full-time basis. Even if there was evidence of sufficient work for the beneficiary to perform as an advertising and promotions manager, the position does not qualify as a specialty occupation as defined at 8 C.F.R. § 214.2(h)(4)(ii). The training and qualifications required for advertising, marketing, promotions, public relations,² and sales managers are described as follows in the DOL *Handbook*, 2010-11 online edition:

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.

For advertising management positions, some employers prefer a bachelor's degree in advertising or journalism. A relevant course of study might include classes in marketing, consumer behavior, market research, sales, communication methods and technology, visual arts, art history, and photography.

For public relations management positions, some employers prefer a bachelor's or master's degree in public relations or journalism. The applicant's curriculum should include courses in advertising, business administration, public affairs, public speaking, political science, and creative and technical writing.

Most advertising, marketing, promotions, public relations, and sales management positions are filled through promotions of experienced staff or related professional personnel. For example, many managers are former sales representatives; purchasing agents; buyers; or product, advertising,

² Although counsel for the petitioner asserts on appeal that the proffered position is not a public relations specialist position, the *Handbook* includes public relations management positions in its chapter on Advertising, Marketing, Promotions, Public Relations, and Sales Managers. We observe that a public relations specialist occupation is described in a separate chapter in the *Handbook*. The director's reference to the proffered position's resemblance to a public relations specialist is withdrawn.

promotions, or public relations specialists. In small firms, in which the number of positions is limited, advancement to a management position usually comes slowly. In large firms, promotion may occur more quickly.

Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-11 ed., available at <http://www.bls.gov/oco/ocos020.htm> (last accessed November 2011). Therefore, although a bachelor's degree in business administration may be preferred for marketing, sales, and promotion managers, the *Handbook* does not indicate that at least a bachelor's degree in a specific specialty is required for marketing, advertising, or promotion managers. As explained above, USCIS interprets the supplemental degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) as requiring a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

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 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.

As the *Handbook* indicates no specific degree requirement for employment as an advertising, promotions, or marketing manager, and as it is not self-evident that, as described in the record of proceeding, the proposed duties comprise a position for which the normal entry requirement would be at least a bachelor's degree, or its equivalent, in a specific specialty, the AAO concludes that the performance of the proffered position's duties does not require the beneficiary to hold a baccalaureate or higher degree in a specific specialty.

The AAO acknowledges counsel's reference to the Department of Labor's Online (*O*NET*) summary report for the occupation of advertising and promotions manager. However, the AAO does not consider the *O*NET* to be a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. The *O*NET* provides only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. Its rating does not describe how the years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require.

Upon review of [REDACTED] opinion, [REDACTED] does not support his opinion with any objective evidence. He does not include the results of formal surveys, research, statistics, or any

other objective quantifying information to substantiate his opinion. He does not list the reference material on which he relies as a basis for his opinion. The *Handbook*, on the other hand, offers an overview of national hiring practices and draws on personal interviews with individuals employed in the occupation or from websites, published training materials and interviews with the organizations granting degrees, certification, or licenses in the field, to reach its conclusions regarding the nation's employment practices. [REDACTED] opinion is insufficient to refute or distinguish the educational information provided in the *Handbook* regarding advertising and promotion managers. Thus, [REDACTED] opinion letter, which primarily repeats the petitioner's description of job duties and provides the conclusion that the position requires a bachelor's degree in communications or a related field, is not probative. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Accordingly, the AAO finds that the petitioner has not established its proffered position as a specialty occupation under the requirements of the first criterion at 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.

As stated earlier, 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 proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. As discussed *supra*, the advertisements and opinion letters provided at best establish that a bachelor's degree generally is required, but not at least a bachelor's degree or the equivalent in a *specific specialty*. As a result, the petitioner has not established that similar organizations routinely require at least a bachelor's degree in a specific specialty for parallel positions.

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." The evidence of record does not refute the *Handbook's* information to the effect that there is a spectrum of degrees acceptable for advertising and promotions manager positions, including degrees not in a specific specialty. As discussed previously, the petitioner failed to demonstrate that it has sufficient work and resources for the beneficiary to perform any complex duties on a

full-time basis. Therefore, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than an advertising and promotion manager or other positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

As the record has not established a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. The AAO here augments its earlier comments regarding the petitioner's failure to establish this criterion given the lack of information regarding its business and organizational complexity. The petitioner failed to establish that it has sufficient work and resources for the beneficiary to perform specialized and complex duties usually associated with the attainment of a baccalaureate or higher degree on a full-time basis. Further, the AAO finds that, to the extent that they are described in the record of proceeding, the duties of the proffered position do not appear more specialized and complex than advertising or promotions manager positions not associated with the attainment of at least a bachelor's degree in a specific specialty. The AAO, therefore, concludes that the proffered position has not been established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petition will be denied and the appeal dismissed. 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 remains denied.