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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**

D2

Date: **OCT 14 2011** Office: VERMONT SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

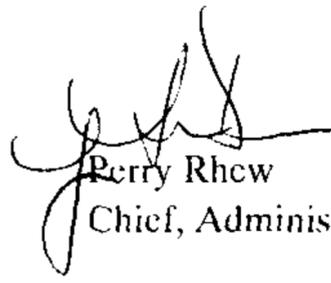
[REDACTED]

**INSTRUCTIONS:**

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

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

Thank you,

  
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 to be an online/offline English education business that has three employees and a projected net annual income of \$292,300. It seeks to employ the beneficiary as an administrative assistant 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; (4) the petitioner's motion to reopen the matter; (5) the director's reopening of the matter and affirmation of the denial; and (6) Form I-290B, Notice of Appeal to the Administrative Appeals Office (AAO), with counsel's brief and supporting materials. 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 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 (5<sup>th</sup> Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

In this matter, the petitioner seeks the beneficiary’s services as an administrative assistant. On the Form I-129, the petitioner described the duties of the position as: “[a]ids executive in staff capacity by coordinating office services such as personnel, budget preparation and control, records control, and special management studies for on/off-line English education [b]usiness.” In

the initial letter from the petitioner submitted with the petition, the petitioner noted that the beneficiary's experience as an English teacher in Korea would contribute to the petitioner's business in relation to organizing and directing the sales market in South Korea. The petitioner submitted a credential evaluation report that evaluated the beneficiary's master's degree in English Literature awarded by the Jeonju University in South Korea as equivalent to a bachelor's and master's degree from a U.S. regionally accredited institution.

On November 10, 2004, the director issued a request for evidence (RFE) that the proffered position is a specialty occupation, including a more detailed job description. The RFE also requested additional information regarding the beneficiary's qualifications.

In response to the RFE, the petitioner provided the following job description:

- Aids executive in staff capacity by controlling office services, such as personnel, budget preparation and control, records control.
- Studies management methods in order to improve workflow, simplify reporting procedures, or implement cost reductions.
- Studies methods of improving work measurements or performance standards.
- Handles data to compile, store, and retrieve management data using the computer.
- Assists in maintenance of internet control database.
- Assists controller with various report preparation and distribution.
- Works with executive in staff and responsibilities includ[ing] resolving salesperson and marketing issues.
- Coordinates daily operations of the program.
- Provide[s] high level administrative support by conducting research, preparing statistical reports, handling information requests, as well as performing clerical functions above.
- Promotes the company's interests by organizing and directing sales market, especially for the Korean community in both South Korea and the United States.

The petitioner provided a printout from the U.S. Department of Labor Employment & Training Administration ([www.doleta.gov](http://www.doleta.gov)) indicating that most executive secretarial and administrative assistant positions required a four-year bachelor's degree but some did not. Additionally, the petitioner submitted copies of advertisements for administrative assistants placed by other businesses. Although many of the advertisements state that a college degree is required, they do not require at least a bachelor's degree or the equivalent in a *specific specialty*. None of the advertisements require a bachelor's degree in a specific academic discipline. The petitioner also submitted an H-1B approval notice for an individual in the position of assistant manager who had been awarded a master's degree in business administration.

The director denied the petition determining the above evidence was insufficient to establish that the proffered position was a specialty occupation.

On motion, counsel for the petitioner asserted that the proffered position was not a secretary or administrative assistant with office skills but a business operation specialist or operation research analyst position. Counsel also submitted information from the company's study materials and website to demonstrate why the company needed to employ an administrative assistant who held a bachelor's degree.

Upon review of the assertions and material submitted in support of the motion, the director determined that the petitioner had not provided evidence sufficient to overcome the grounds of denial.

On appeal, counsel for the petitioner asserts that the individual in the proffered position should have at least a bachelor's degree in English or a business-related major. The petitioner also provided a revised job description adding that the beneficiary would:

- Formulate and apply mathematical modeling and other optimizing methods using a computer to develop and interpret information that assists management with decision making, or other managerial functions.
- [Have] [e]xcellent interpersonal and verbal and written communication skills characterized by tact and diplomacy.
- [Have] [e]xcellent organization and prioritization skills as demonstrated by the effective structuring of work; and
- [Have] [d]emonstrated ability to handle confidential information with the utmost discretion.

The petitioner also submitted additional job postings for administrative assistants from other businesses. Only one of the advertisements indicated that a bachelor's degree in business management or a related field was required. The other advertisements did not indicate that a bachelor's degree in a specific academic discipline was required.

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 the petitioner claims it has three employees and a projected net annual income of \$292,300. The petitioner, however, does not provide Internal Revenue Service (IRS)

tax returns or employment records to substantiate its claim. Moreover, the petitioner does not provide a description of the petitioner's other employees and their duties, and thus, 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. Further, the petitioner adds new duties to the job description on appeal. However, when submitting documentation on appeal, a petitioner cannot offer a new or expanded position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its January 18, 2006 job description does not clarify or provide more specificity to the original duties of the position, but rather adds new generic duties to the job description. Therefore the analysis of these criteria will be based on the job description submitted with the initial petition and in response to the director's RFE.

The overarching reason for the AAO's dismissal of this appeal is that the proposed duties as described in the record do not establish that performance of the proffered position 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. In this regard, the AAO has considered all of the assertions of counsel in support of the requirements of the position, but finds that they are not supported by documentation in the record. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Although counsel indicates that the beneficiary will also perform the duties of a business operation specialist or operation research analyst, the petitioner does not provide a detailed description of what these duties entail. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

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* provides the following regarding the training and educational requirements of executive administrative assistants:

Employers of executive secretaries increasingly are seeking candidates with a college degree, as these secretaries work closely with top executives. A degree related to the business or industry in which a person is seeking employment may provide the jobseeker with an advantage in the application process.

Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-11 ed., available at <http://www.bls.gov/oco/ocos020.htm> (last accessed September 26, 2011). Therefore, although some employers may seek an individual with a college degree to fill the position of an executive administrative assistant, the *Handbook* does not indicate that at least a bachelor's degree in a specific specialty is required for such employees.

Even if considering that the individual in the proffered position had the added duty of promoting the company's interests by organizing and directing its sales market, the training and qualifications required for marketing managers, as set out in the *Handbook*, do not include a bachelor's degree or higher in a specific discipline. The educational and training requirements of marketing managers are found in the *Handbook's* section on advertising, marketing, promotions, public relations, and sales managers. The DOL *Handbook*, 2010-11 online edition states in pertinent part:

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 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, 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 September 26, 2011). Therefore, although a bachelor's degree in business administration may be preferred, the *Handbook* does not indicate that at least a bachelor's degree in a specific specialty is required for marketing managers.

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 executive administrative assistant or a 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. 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). The first prong 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 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. Moreover, a review of the advertisements provided does not establish that a bachelor's or higher degree or the equivalent in a *specific specialty* is required. As observed above, the advertisements submitted do not indicate that a bachelor's degree in a specific academic discipline is required for entry into the proffered positions. As a result, the petitioner has not established that parallel firms routinely require at least a bachelor's degree in a specific specialty.

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 no bachelor's degree in a specific specialty required for executive administrative assistants and that a spectrum of degrees is acceptable for marketing 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 executive assistant or a marketing management position that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

As the petitioner has not established a prior history of recruiting and hiring only persons with at least a bachelor's degree in a specific specialty for the proffered position, 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 its small size and the lack of evidence regarding its income. 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. Therefore, the AAO does not find that there is enough evidence to document that the proffered position is that of a full-time executive administrative assistant or a marketing manager. 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 any other 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.