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U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090

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U.S. Citizenship
and Immigration
Services

D₂

[Redacted]

Date: SEP 01 2011 Office: CALIFORNIA 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 service center director denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition the petitioner stated that it is an “Importers/Wholesalers/Retailers of Ladi[es] Clothing” firm with three employees. To employ the beneficiary in what it designates as a management analyst position, the petitioner endeavors to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that the petitioner would employ the beneficiary in a specialty occupation position. On appeal, counsel asserted that the director’s basis for denial was erroneous, and contended that the petitioner satisfied all evidentiary requirements. In support of these contentions, counsel submitted a brief and additional evidence.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner’s Form I-129 and the supporting documentation filed with it; (2) the service center’s request for additional evidence (RFE); (3) the response to the RFE; (4) the director’s denial letter; and (5) the Form I-290B and counsel’s brief and attached exhibits in support of the appeal.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation. The issue before the AAO is whether the petitioner has provided evidence sufficient to establish that it would employ the beneficiary in a specialty occupation position.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term “specialty occupation” as an occupation that requires:

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

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation “which 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 a particular position meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such 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.

With the visa petition, counsel submitted a letter, dated May 26, 2009, from the petitioner's vice president, who offered the following description of the duties of the proffered position:

Conduct research and study the market demand for [REDACTED] range of products. Collect, review and analyze the data, develop information on consumer trends affecting company's product line and sales at trade fairs. Conduct a study of company's procedures, study the pricing of products in relation to other competitive products and suggest appropriate price changes to optimize demand. Review, research, and coordinate the purchase of materials from various suppliers in India and coordinate with suppliers of raw materials from other countries. Serve as a liaison with suppliers and set up a system to use resources efficiently and describe the discipline of applying analytical techniques for rapid turnaround of inventory and disposal of discontinued items.

The petitioner's vice president also stated, "The position is akin to that of Management Analyst described in the [U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*]."

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹ The AAO will address the information available in the *Handbook* below.

On June 3, 2009, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence that the petitioner would employ the beneficiary in a specialty occupation, including a more detailed description of the duties of the proffered position. The service center also requested that the petitioner provide an evaluation of the beneficiary's foreign education to show its equivalent in the U.S. educational system.

In response, counsel submitted the requested evaluation of the beneficiary's foreign education. In his own letter, dated July 2, 2009, counsel provided what he asserts is another description of the duties of the proffered position. That description of duties is not accompanied by any indication that an employee of the petitioner produced it, confirmed it, or even saw it.

The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). While counsel is permitted to argue from the evidence, the amended version of the amended version of the duties of the proffered position is not such an argument based on evidence.

The director denied the petition on July 10, 2009, finding, as was noted above, that the petitioner had not established that the proposed position qualifies for classification as a specialty occupation. The

¹ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2010 – 2011 edition available online.

director found that, especially given the petitioner's small size and the relatively lack of complexity of its management structure, the petitioner failed to demonstrate that it would have any use for a full-time or part-time management analyst for the three-year period of requested employment requested by the petitioner.

On appeal, counsel stated, pertinent to the director's point about the petitioner's relative size and complexity:

[T]he [*Handbook*] recognizes that "a small but rapidly growing company that needs help in improving the system of control over inventories and expenses may decide to employ a consultant who is an expert in just-in-time inventory management."

In the chapter entitled *Management Analysts*, the *Handbook* provides the following more complete description of the duties of management analysts that includes, in context, the quote relied on by counsel.

As business becomes more complex, firms are continually faced with new challenges. They increasingly rely on *management analysts* to help them remain competitive amidst these changes. Management analysts, often referred to as *management consultants* in private industry, analyze and propose ways to improve an organization's structure, efficiency, or profits.

For example, a small but rapidly growing company might employ a consultant who is an expert in just-in-time inventory management to help improve its inventory-control system. In another case, a large company that has recently acquired a new division may hire management analysts to help reorganize the corporate structure and eliminate duplicate or nonessential jobs. In recent years, information technology and electronic commerce have provided new opportunities for management analysts. Companies hire consultants to develop strategies for entering and remaining competitive in the new electronic marketplace.

That passage from the *Handbook* does not support the petitioner's point. Although it uses the words "employ" and "hire," it is clearly not suggesting that it is usual for small companies to man a management analyst position as part of its organic staff. Rather, the use of the word "consultant" connotes that the *Handbook* is speaking about management analysts being hired by small companies on a relatively short-term, contract basis, as outside contractors, to help address and solve particularized problems needing immediate attention. This perspective, the AAO finds, is entirely consistent with the director's position, that a small company might temporarily use the services of a contract management-consultant, but would not typically hire a management analyst as either a full-time or part-time employee.

Thus, the AAO finds that, in the *Handbook* example cited by counsel, the management analyst would assess a company's inventory management, show how it could be improved, and leave the implementation of the new inventory management system to the company's own management

personnel. The AAO finds no fault with the director's reasoning that a company of the petitioner's small size and concomitant lack of complexity would be unlikely to have any use for a management analyst for almost three years.

Further, in the instant case, the duties described by the petitioner's vice president in his May 26, 2009 letter are not persuasive evidence that the proffered position qualifies as a management analyst position.

Conducting research and studying market demand; collecting, reviewing and analyzing information on consumer trends; conducting a study of the petitioner's procedures; studying the pricing of the petitioner's products, for instance, appear to be marketing duties, rather than management analyst duties. Marketing is not synonymous with management analysis. The *Handbook* discusses marketing positions in the chapters entitled Advertising, Marketing, Promotions, Public Relations and Sales Managers; Marketing Managers; and Market and Survey Researchers.

So, too, reviewing, researching, and coordinating the purchase of materials; coordinating with suppliers of raw materials; and serving as a liaison with suppliers are duties more commonly associated with Purchasing Managers, Buyers, and Purchasing Agents, positions the *Handbook* does not treat as synonymous with management analyst positions, but discusses separately in the *Handbook* chapter of that title. What's more, as reflected in the assignment of separate chapters in the *Handbook*, marketing and purchasing occupations are separate and distinct from the types of positions encompassed by the management analysts occupational classification.

Setting up a system to use resources efficiently and describing the discipline of applying analytical techniques for rapid turnaround of inventory and disposal of discontinued items are duties which are, in fact, consistent with the duties of a management analyst as described in the *Handbook*. The AAO agrees, however, that setting up such a system and explaining it would not likely encompass the entire period of requested employment, which is almost three years, and, likewise, that an actual management-analyst position would not likely be engaged in operating such an inventory system for several ensuing years. In any event, upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to provide sufficient evidence to establish the substantive nature of the work that the beneficiary would actually perform, a body of highly specialized knowledge that he would have to apply to perform those duties, and a minimum educational level of highly specialized knowledge in a specific specialty that would be required to acquire and apply the requisite knowledge.

The AAO concurs with the director that the proffered position does not appear to be a management analyst position. Rather, it appears to be a generalist position in management that includes some marketing duties, some purchasing duties, and some duties pertinent to maintaining inventory. Such positions are described in the Administrative Services Managers chapter of the *Handbook* and clearly do not require a minimum of a bachelor's degree or the equivalent in a specific specialty.

However, the AAO will assume, *arguendo*, that the proffered position is a position for a management analyst, in order to reach counsel's assertion that such a position would require a minimum of a bachelor's degree or the equivalent in a specific specialty.

The AAO will address the alternative requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A). It will first address the alternative requirement of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which is satisfied if the petitioner demonstrates that management analyst positions categorically require a minimum of a bachelor's degree or the equivalent in a specific specialty.

In the chapter entitled Management Analysts, the *Handbook* describes the educational requirements of those positions as follows:

Educational requirements for entry-level jobs in this field vary between private industry and government. Many employers in private industry generally seek individuals with a master's degree in business administration or a related discipline. Some employers also require additional years of experience in the field or industry in which the worker plans to consult. Other firms hire workers with a bachelor's degree as research analysts or associates and promote them to consultants after several years. Some government agencies require experience, graduate education, or both, but many also hire people with a bachelor's degree and little work experience for entry-level management analyst positions.²

That *many* employers *generally* seek candidates with a master's degree in business administration (MBA) does not indicate that an MBA is a minimum requirement. Rather, it suggests that some management analyst positions do not require such a degree. The *Handbook* does not state that a master's degree, or even a bachelor's degree in a specific specialty, is a minimum requirement for management analyst positions not so complex or unique as to require at least a bachelor's degree, or the equivalent, in a specific specialty.

Further, even if an MBA were a minimum requirement for entry into the proffered position, that would not be a requirement of a minimum of a bachelor's degree or the equivalent in a specific specialty.

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 correlation 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 (Comm. 1988). 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

² The referenced section of the U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-11 ed., available at <http://www.bls.gov/oco/ocos019.htm>.

field of study. As explained above, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) 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 139, 147 (1st Cir. 2007).

The *Handbook* does not indicate that management analyst positions categorically require a minimum of a bachelor's degree or the equivalent in a specific specialty, and the record contains no other evidence pertinent to that point.

The petitioner has not demonstrated that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO will consider 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)).

As was observed above, the *Handbook* provides no support for the proposition that the petitioner's industry, or any other, requires management analysts to possess a minimum of a bachelor's degree or the equivalent in a specific specialty. The record contains no evidence pertinent to a professional association of management analysts that requires a minimum of a bachelor's degree or the equivalent in a specific specialty as a condition of entry. The record contains no letters or affidavits from others in the petitioner's industry. In short, the record contains no evidence that a requirement of a minimum of a bachelor's degree in a specific specialty or the equivalent is common to the petitioner's industry in parallel positions among similar organizations, and the petitioner has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner demonstrates that, notwithstanding that other management analyst positions in the petitioner's industry may not require a minimum of a bachelor's degree or the

equivalent in a specific specialty, the particular position proffered in the instant case is so complex or unique that it can be performed only by an individual with such a degree.

The description of the proffered position provided in the petitioner's vice president's May 26, 2009 letter failed to distinguish the proffered position from other management analyst positions not so complex or unique as to require at least a bachelor's degree, or the equivalent, in a specific specialty. In fact, neither that letter nor any other evidence in the record of proceeding provides substantive evidence as to the relative complexity or uniqueness of the proffered position as compared to management analyst positions not requiring a minimum of a bachelor's degree or the equivalent in a specific specialty. Further, the AAO finds that, to the extent that they are developed in the record of proceeding, that is, in generalized terms about generic functions, neither the proffered position nor the duties comprising it established the complexity or uniqueness required to satisfy this particular criterion.

The petitioner has not demonstrated that the particular position proffered is so complex or unique that it can be performed only by an individual with a degree; and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Next, the record contains no evidence of a previous history of recruiting and hiring to fill the proffered position. Therefore, application of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) is not a factor in the disposition of this particular appeal.

Finally, the AAO will address the alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which is satisfied if the petitioner demonstrates that 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, or its equivalent.

The *Handbook's* discussion of management analysts indicates that there is nothing so specialized and complex in management analyst duties that their performance would inherently require knowledge usually associated with at least a bachelor's degree in a specific specialty. The AAO finds that in the present matter, the duties are described in general and generic terms that do not establish either the substantive requirements for the performance of those duties or any usual association with a particular educational level of knowledge in a specific specialty.

The petitioner has not demonstrated that 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. The petitioner has not, therefore, demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO finds that the director was correct in her determination that the record before her failed to establish that the beneficiary would be employed in a specialty occupation position, and it also finds

that the evidence and argument submitted on appeal have not remedied that failure. Accordingly, the appeal will be dismissed and the petition denied on this basis.

The record suggests an additional issue that was not addressed in the decision of denial.

Evidence in the record shows that the beneficiary has a master's degree in business administration awarded by the Institute of Advanced Studies in Education University in India. An evaluation of the beneficiary's education states that the beneficiary's degree is equivalent to a bachelor's degree in business administration awarded in the United States.

The AAO observes that if the petitioner had demonstrated that the proffered position required a minimum of a bachelor's degree or the equivalent in a specific specialty, the petitioner would be obliged, in order for the visa petition to be approvable, to demonstrate, not only that the beneficiary has a bachelor's degree or the equivalent, but that the beneficiary has a minimum of a bachelor's degree or the equivalent *in that specific specialty*. See *Matter of Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968).

As was noted above, 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. As was also noted above, pursuant to *Matter of Michael Hertz Associates*, a bachelor's degree in business administration is not considered to be a bachelor's degree in a specific specialty, because it is a degree with a generalized title.

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 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a de novo basis).

Pursuant to the instant visa category, however, a beneficiary's credentials to perform a particular job are relevant only when the job is found to qualify as a specialty occupation. As discussed in this decision, the proffered position has not been shown to require a baccalaureate or higher degree, or its equivalent, in a specific specialty and has not, therefore, been shown to qualify as a position in a specialty occupation. Because the finding that the petitioner failed to demonstrate that the proffered position qualifies as a specialty occupation position is dispositive, the AAO need not further discuss the issue of the beneficiary's qualifications.

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. The appeal will be dismissed and the petition denied.

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