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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

[redacted]

Date: FEB 0 8 2012 Office: CALIFORNIA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: 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,

for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner claims to be a dental supplies manufacturer and supplier established in 1962. It seeks to employ the beneficiary as a business manager and 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 on the grounds that the petitioner failed to establish that the proffered position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

> *Specialty occupation* means an occupation which [(1)] requires 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 [(2)] which requires 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, a proposed 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) (hereinafter *Defensor*). 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, U.S. Citizenship and Immigration Services (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 business manager. In the petitioner's support letter dated November 3, 2009, the petitioner states that the beneficiary will be responsible for the daily management of its dental manufacturing company. Specifically, the proffered position's duties would require the beneficiary to:

- Develop plans and implement programs to grow market share and profitability;
- Locate and schedule continuing training opportunities for dental technicians;
- Perform annual budget and sales forecasts, including monthly and quarterly review of

targets;
- Determine product margins on new products and analyze market conditions and competitor prices to determine pricing strategy;
- Manage outside accountant and bookkeeper;
- Review new equipment purchases, leasing options and facility needs;
- Negotiate major contracts for both sales and purchases, including materials/supplier agreements;
- Determine fixed costs of laboratory environment and examine need to replace or upgrade existing equipment;
- Review new technologies and new procedures in an effort to reduce costs and increase efficiencies;
- Maintain information flow among business owner, dental technicians and customer base (dentists);
- Attend trade shows and work with vendors to ensure the petitioner is using up-to-date materials and techniques within the industry;
- Assist the owner during the hiring process and implement human resources policies and new employee training;
- Maintain just-in-time supply flow to maximize adequate work materials while not tying up significant cash flow in materials inventory;
- Ensure legal, accounting, human resources, and health and safety compliance;
- Examine workflow, turnaround time, existing contracts, and order processing to determine scheduling and staffing needs; and
- Assist in daily management of laboratory staff with the owner.

The petitioner further states the following duties:

> The [b]usiness [m]anager is tasked with daily management of the business, ensuring that [the petitioner] achieve[s] both short and long-term goals. [The beneficiary] is also responsible for technical sales and sales management. This includes showing and discussing with doctors [the petitioner's] current products and service selections; providing feedback and design suggestions to doctors on case diagnosis; and ensuring quality assurance is completed by verifying all prosthetic orders are fabricated to a high degree of quality before they leave [the petitioner's] lab. . . .

The petitioner also states that the beneficiary obtained a bachelor's degree in business administration and management from [redacted] and submitted a copy of the beneficiary's degree.

In addition, the petitioner submitted letters from other dental manufacturing laboratories and dentists attesting that a bachelor's degree is the minimum requirement to fill the proffered position.

On November 12, 2009, the director issued an RFE requesting the petitioner to submit, inter alia, (1) a more detailed job description, including specific job duties, percentage of time spent on each duty, level of responsibility, hours per week of work and the minimum education, training

and experience necessary; (2) a line-and-block organizational chart showing the petitioner's hierarchy and staffing level; (3) evidence that the proffered position is a common position required by similar sized offices with similar annual incomes; (4) evidence to establish a degree requirement is common to the industry in parallel positions among similar organizations such as job listings or advertisements; (5) documentation to show that an industry-related professional association has made a bachelor's degree in a specific specialty a requirement for entry into the field; (6) letters or affidavits from firms or individuals in the industry that attest that such firms routinely employ and recruit only degreed individuals in a specific specialty; and (7) copies of the petitioner's present and past job vacancy announcements.

On December 24, 2009, in response to the director's RFE, the petitioner submitted, in part, (1) the same job description from the petitioner's support letter dated November 3, 2009; (2) another letter from a dental manufacturing laboratory attesting that a bachelor's degree is the minimum requirement to fill the proffered position; (3) copies of the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook's* (hereinafter the *Handbook*) excerpts for the positions of administrative services managers, top executives, and sales engineers; and (4) a line-and-block organizational chart.

The director denied the petition, finding that the petitioner had satisfied none of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), and therefore had not established that the proposed position qualifies for classification as a specialty occupation.

On appeal, counsel argues that the proffered position is a specialty occupation and that, because of the complex nature of the dental prosthetic business, the petitioner necessitates a degreed individual to fill the proffered position. Counsel also states that the director erred by misapplying the *Handbook* and by solely relying on the *Handbook* to determine if the proffered position is a specialty occupation.

As a preliminary matter, the petitioner states in its support letter dated November 3, 2009 that the proffered position requires at a minimum a bachelor's degree in business (with a concentration in management or accounting) or a related degree, or foreign equivalent. In addition, the petitioner states that the individual filling the proffered position must also have either a degree in dental technology or a related field, or at least two years of related experience fabricating dental prostheses. It must be noted, however, that the petitioner's letter dated December 23, 2009 indicates that a bachelor's degree in business, management, or a related field (or foreign equivalent) is required to perform the proffered position's duties. In addition, counsel's letters dated December 23, 2009 and February 3, 2010 state that the minimum requirement for the proffered position is at least a bachelor's degree in business or a related field. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In addition, it must be noted that counsel and the petitioner's claimed entry requirement of at least a bachelor's degree in "business, management or a related field (or foreign equivalent), or business or a related field" for the proffered position is inadequate to establish that the proposed

position qualifies as a specialty occupation. 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, without further specification, does not establish the position as a specialty occupation. *See Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

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 or its equivalent. As discussed, 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. Although a general-purpose bachelor's degree, such as a degree in business, 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).[1]

In this matter, the petitioner claims that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree, i.e., a bachelor's degree in business or a related field. This assertion is tantamount to an admission that the proffered position is not in fact a specialty occupation.

Moreover, it is also cannot be found that the proffered position is a specialty occupation due to the petitioner's failure to satisfy any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). To reach this conclusion, the AAO first turned 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 the *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

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[1] Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

> [t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. *See, e.g., Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; *cf. Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: elsewise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

Id.

> Many top executive positions are filled from within the organization by promoting experienced lower level managers when an opening arises. In industries such as retail trade or transportation, for example, individuals without a college degree may work their way up within the company and become executives or general managers. When hiring top executives from outside the organization, those doing the hiring often prefer managers with extensive managerial experience.

Id. Because the *Handbook* indicates that entry into the general manager occupation does not normally require at least a bachelor's degree in a specific specialty, the *Handbook* does not support the proffered position as being a specialty occupation.

As the evidence of record does not establish that the particular position here proffered 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 petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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).

Here and 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 or its equivalent.

In support of its assertion that its degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner submitted six letters from dental manufacturing laboratories and dentists. The letters provided, however, establish at best that a bachelor's degree is generally required, but not at least a bachelor's degree or the equivalent in a *specific specialty*. For instance, three of the letters state that a degree in business or dentistry is required for the proffered position. Business and dentistry are two disparate to delineate a specific specialty. In addition, two of the letters state that a degree in ~~business admin~~istration coupled with experience or education in the dental field is required to fill the proffered position. Again, as discussed *supra*, a general business or business administration degree requirement without any academic specialization is insufficient to establish a position as qualifying as a specialty occupation. Finally, one of the letters do not even indicate that a bachelor's degree is required for the proferred position. As a result, the petitioner has not established that similar

companies in the same industry routinely require at least a bachelor's degree in a specific specialty or its equivalent 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 petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of business manager.

Specifically, even though the petitioner and its counsel claim that the proffered position's duties are so complex and unique that a bachelor's degree is required, the petitioner failed to demonstrate how the business manager's duties described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it claims are so complex and unique. While one or two courses in business management may be beneficial in performing certain duties of a business manager position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in business (with a concentration in a field such as management, finance, or accounting) or a related degree, or foreign equivalent are required to perform the duties of the particular position here proffered.

Therefore, the evidence of record does not establish that this position is significantly different from other general manager positions such that it refutes the *Handbook's* information to the effect that there is a spectrum of preferred degrees acceptable for top executive positions, including degrees not in a specific specialty. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than top executive or other closely related positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent. Consequently, as the petitioner fails to demonstrate how the proffered position of business manager is so complex or unique relative to other top executive positions that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Next, the record of proceeding does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty or the equivalent. The AAO notes that the petitioner and counsel claim repeatedly that the duties of the business manager position can only be performed by an individual with at least a bachelor's or higher degree in business or a related field. While a petitioner may believe or otherwise assert that a proffered 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 occupation as 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 proffered 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* § 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.

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent. Again, relative specialization and complexity have not been developed by the petitioner as an aspect of the proffered position. In other words, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than other top executive positions that are not usually associated with a degree in a specific specialty.

The petitioner has therefore failed to establish that it has satisfied any of the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). As such, the petitioner has not established that the proffered position qualifies as a specialty occupation, and the appeal must be dismissed and the petition denied for this reason.

Beyond the decision of the director, the petitioner has failed to establish that the beneficiary is qualified to perform the duties of a specialty occupation. Even if the proffered position were a specialty occupation, which it is not, the beneficiary would not qualify to perform the duties of that specialty occupation based on his education credentials, because it has not been demonstrated that the beneficiary possesses a degree in a specialized field of study.

Specifically, while the petitioner indicates that the beneficiary obtained a bachelor's degree in business administration and management, it fails to designate any specific business specialty. As discussed earlier, a general degree in business administration alone is insufficient to qualify the beneficiary to perform the services of a specialty occupation, unless the academic courses pursued and knowledge gained is a realistic prerequisite to a particular occupation in the field. *Matter of Ling*, 13 I&N Dec. 35 (Reg. Comm'r 1968). The petitioner must demonstrate that the beneficiary obtained knowledge of the particular occupation in which he or she will be employed. *Id.* Thus, even if the petitioner had demonstrated that the proffered position requires at least a bachelor's degree in a specific specialty or its equivalent, the petition could not be approved, because the petitioner failed to demonstrate that the beneficiary has taken courses or gained knowledge considered to be a realistic prerequisite to any specific specialty within the field of business. For this additional reason, the petition must be denied.

Finally, the petition also cannot be approved, because the Labor Condition Application (LCA) submitted in support of the petition does not correspond to the petition. Specifically, the submitted LCA was certified for occupational code 199, Miscellaneous Professional, Technical, and Managerial Occupations, N.E.C. The job as described and classified by the petitioner, however, would fall under occupational code 189, Miscellaneous Managers and Officials,

N.E.C.[3] As the submitted LCA was certified for the wrong occupation, it cannot be found to correspond to the instant petition. The petition must therefore be denied for this additional reason.

The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The petition will be 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. § 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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

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[3] Although Research Assistant II, DOT code 199.267-034, corresponds to SOC code 11-9199.00, Managers, All Others, the proffered position as described by the petitioner is clearly not a Research Assistant II as defined by the Dictionary of Occupational Titels and cannot thereby fall under the 199 occupational code.