

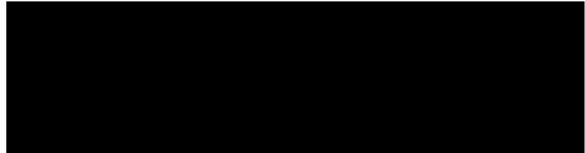
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



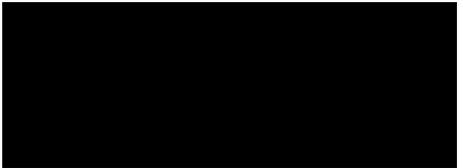
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Date: **FEB 08 2012** Office: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

On the Form I-129 the petitioner stated that it is a home health agency established in 2003. The petitioner's business employs 200 workers and claims \$98,195 in net annual income. The record of proceeding establishes that the petitioner filed this visa petition in order to obtain H-1B classification for the beneficiary 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), so that the petitioner may employ her as a part-time management analyst from [REDACTED]

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 size and complexity of the petitioner's business warranted the hiring of a management analyst with at least a bachelor's degree. In support of these contentions, counsel submitted a brief and additional evidence.

As will be discussed below, the AAO finds that the director did not err in denying the petition for its failure to establish a specialty occupation. The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and supporting documentation, (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, counsel's brief and attached exhibits in support of the appeal.

The AAO applies the following statutory and regulatory framework in its review of specialty occupation issues.

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 be employing 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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

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 (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 which (2) 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, 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.

In a [REDACTED] letter appended to the petition, the petitioner described the duties of the proffered position of a part-time management analyst as follows:

- Analysis and revision of the financial/accounting/management/record and productivity systems/areas in the business;
- Devise methods to increase profitability, manage expenditures and reduce overhead;
- Analysis of statistics and related data/revenues, expenditures;
- Study of organizational changes, communications, problem solving and procedures; and
- Gather data/information through diverse means and their analysis with regard to proposed or suggested changes/alterations to organizations, procedures, systems and related matters.

The petitioner further states that the job duties require, at a minimum, a bachelor's degree in business administration or management.

The director issued an RFE on [REDACTED] requesting, in relevant part, a more detailed job description and an explanation of why the duties to be performed require the services of a person who has a bachelor's degree in a specific specialty. Specifically, the director requested evidence that the proffered position is so complex or unique that it can only be performed by an individual with a bachelor's degree. The director also requested evidence that the position of management analyst is common in similarly sized offices with similar annual incomes, and that a bachelor's degree is normally required. The petitioner responded to the RFE on [REDACTED]

On [REDACTED] the director denied the petition finding that the proffered position is not in a specialty occupation.

The petitioner states that the beneficiary will work as part-time management analyst. According to the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, management analysts and consultants "analyze and propose ways to improve an organization's structure, efficiency, or profits." The *Handbook* further states that the "work of management analysts and consultants varies with each client or employer and from project to project. Some projects require a team of consultants, each specializing in one area. In other projects,

consultants work independently with the organization's managers. In all cases, analysts and consultants collect, review, and analyze information in order to make recommendations to managers."

The *Handbook* states that educational requirements for management analysts vary. Many of the management analyst positions require a bachelor's degree, but the *Handbook* appears to indicate that a degree in business, management, accounting, marketing, economics, statistics, computer and information science, or engineering might suffice. Those positions would also not qualify as specialty occupation positions, as accounting, marketing, economics, statistics, computer and information science, and engineering do not delineate a single specific specialty. Such a wide range of acceptable majors or academic concentrations is not indicative of a position requiring the theoretical and practical application of a distinct body of highly specialized knowledge in a specific specialty, as required by section 214(i)(1) of the Act and its implementing regulation at 8 C.F.R. § 214.2(h).

The *Handbook* does not support the proposition that management analyst positions require a minimum of a bachelor's degree or the equivalent in a specific specialty. The petitioner cannot, therefore, demonstrate that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the proffered 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 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.

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)).

The *Handbook*, as was noted above, does not support the proposition that a minimum of a bachelor's degree in a specific specialty or the equivalent is common to management analyst positions. The record contains no evidence from professional associations stating that a bachelor's degree in a specific specialty is required for admission into the proffered occupation. The selected vacancy announcements submitted with the response to the request for evidence relate to a variety of industries and do not establish that a bachelor's degree in a specific specialty is required for entry into the occupation. The petitioner has not demonstrated that 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 has not, therefore, demonstrated that the

proffered position qualifies as a specialty occupation pursuant to the criterion of the first clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will also consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This alternative requirement would be satisfied if the petitioner demonstrated that the position proffered in the instant case is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty.

The AAO notes that if a degree in business administration, without further specification, is a sufficient educational qualification for the proffered position, then the proffered position is not a position in a specialty occupation. The petitioner nevertheless claims that the nature of the specific duties is so specialized and complex that knowledge required to perform those duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The petitioner submits a declaration executed by its president stating, in relevant part, that a management analyst within its organization must work with professional and managerial personnel. The evidence in the record, including the petitioner's president's declaration, does not demonstrate that the proffered position is so complex or unique that it qualifies as a position in a specialty occupation.

The petitioner states that this is the first time it seeks to employ the services of a management analyst. Thus, there is no evidence of a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty. Therefore, 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 finds that the evidence in the record of proceeding does not support the proposition that the performance of the proposed duties requires a higher degree of specialized knowledge than would normally be required of management analysts not equipped with at least a bachelor's degree, or its equivalent, 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. 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 will remain denied.

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