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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: **FEB 09 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 Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner claims to be an operations consulting business that seeks to employ the beneficiary as a market research analyst. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant 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 proffered position is a specialty occupation.

On appeal, counsel for the petitioner submits a brief and contends that the director's findings were erroneous.

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

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.

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 (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.

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.

The petitioner states that it is an operations consulting business. In a November 2, 2009 letter of support, the petitioner claimed that its mission was to manage an import-export oriented business center and to provide related services to the residential companies in the center. Specifically, it claimed to provide the following services:

1. Lease or sell office rooms, manage the office condominium, and provide/maintain supportive facilities to residential communities.
2. Provide a variety of services to residential corporations including marketing, logistics and commercial consultation.
3. Provide market information for Chinese companies who will do business in US and American companies that will do business in China.

It further stated that it currently employed six persons, and claimed to require the services of the beneficiary as a market research analyst. Specifically, the petitioner claimed that the beneficiary would perform a "hybrid" of duties, namely internal accounting and price analysis, and described these duties as follows:

- Interview with clients to understand its business, products and services, sales and financial goals. Read the company's financial statement, product and service brochures or other documents pertaining to the product or service. About 20% of work time. College courses like business management, corporation finance, and marketing provide the necessary knowledge and skills.
- Prepare intake sheet at interview and help clients sort the problem for further analysis. About 15% of work time. College courses like business management, market strategies and marketing analyses provide the necessary knowledge and skills.
- Choose proper research methodology to perform further analyses. About 10% of work time. College courses in business administration and strategies management provide the necessary knowledge and skills.
- Conduct research on local or national market trend, data on competition, risk of international currency conversion based on the nature of the projects. About 30-40% of work time is required. College courses in international business, finance, and corporation behavior provide the necessary knowledge and skills.
- Conduct cost and operation efficiency analyses based on nature of the project, help clients control inventory level or cash flow. About 20-30% of work time. College courses in accounting and finance, and business management provide the necessary knowledge and skills.

- Perform pre-market survey or post-market survey upon request based on nature of the project. About 15-20 [%] of work time. College courses in marketing or market research provide the necessary knowledge and skills.
- Draft business plan as required by nature of the project. 15% of work time is required. College courses in business management provide the necessary knowledge and skills.
- Draft feasibility study report and present to clients, and discuss with clients any improvements, its budget, and pinpoint any necessary steps that need to be taken. 20% of work time is required. College courses in business management, marketing, human resource, strategies management, [and] international operation provide the necessary knowledge and skills.
- Arrange business advertising or trade shows upon request. About 10% of work time.

The petitioner concluded by stating that the tasks of the market research analyst are highly technical in nature, and thus require the incumbent to possess at least a master's degree in business administration or related disciplines.

On December 16, 2009, the director issued an RFE. Specifically, the director requested a more detailed description of the proposed position, as well as information pertaining to the petitioner's business, its hiring practices, its organizational chart, and future plans for expansion.

In response, the petitioner addressed the director's queries in a response dated December 29, 2009. The petitioner essentially restated the description of duties provided in the initial letter of support, and contended that the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* clearly required at least a bachelor's and/or master's degree for performance of the duties of a market research analyst. The petitioner concluded that, as a result, the proffered position was a specialty occupation.

Upon review, the AAO concurs with the director's findings. The petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any of the criteria set forth under 8 C.F.R. § 214.2(h)(4)(iii)(A).

As a preliminary matter, the AAO will address the director's conclusion that the petitioner's business operations lacked the organizational complexity to support the employment of a market research analyst. Since the petitioner's organizational complexity is not a decisive factor in this particular proceeding, the AAO withdraws this basis for denying the petition. The AAO also withdraws as a basis for denial the director's finding regarding the type of industry in which the beneficiary would be employed, as the *Handbook* states that market research analysts "are employed throughout the economy." Nevertheless, as discussed below, the AAO finds that the petitioner has not established that the proffered position is a specialty occupation. Accordingly, the director's decision to deny the petition on this basis shall not be disturbed.

In reviewing the record, the AAO observes that the critical element is not the title of the position or 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.

To make its determination as to whether the employment described above qualifies as a specialty occupation, the AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position. Factors considered by the AAO when determining this criterion include whether the *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, reports that the industry requires a baccalaureate or higher degree in a specific specialty or its equivalent.

The petitioner claims that the proffered position is that of a market research analyst. To determine whether the duties of the proffered position support the petitioner's characterization of its proposed employment, the AAO turns to the 2010-2011 online edition of the *Handbook* for its discussion of market research analysts. As stated by the *Handbook*, the occupation of market research analyst is described as follows:

*Market and survey researchers* gather information about what people think. Market research analysts help companies understand what types of products people want, determine who will buy them and at what price. Gathering statistical data on competitors and examining prices, sales, and methods of marketing and distribution, they analyze data on past sales to predict future sales.

Market research analysts devise methods and procedures for obtaining the data they need by designing surveys to assess consumer preferences. While a majority of surveys are conducted through the Internet and telephone, other methods may include focus group discussions, mail responses, or setting up booths in public places, such as shopping malls, for example. Trained interviewers usually conduct the surveys under a market research analyst's direction.

Market opinion research has contributed greatly to a higher standard of living as most products and services consumers purchase are available with the aid of market research. By making recommendations to their client or employer, market research analysts provide companies with vital information to help them make decisions on the promotion, distribution, and design of products or services. For example, child proof closures on medicine bottles exist because research helped define the most workable design; and the growing variety of ready to cook meals, such as microwaveable soups and prepackaged meat products, exist because of increasing public demand for fast and convenient meals. The information also may be used to determine whether the company should add new lines of merchandise, open new branches, or otherwise

diversify the company's operations. Market research analysts also help develop advertising brochures and commercials, sales plans, and product promotions such as rebates and giveaways based on their knowledge of the consumer being targeted.

The AAO finds that, contrary to the findings of the director, the duties of the proffered position appear sufficiently akin to those of a market research analyst as described by the *Handbook*. However, market research analyst positions do not comprise an occupational group which categorically includes only positions that normally require a baccalaureate or higher degree, or its equivalent, in a specific specialty for entry into those positions. Thus, the proffered position's inclusion within the market research analyst occupation is not sufficient in itself to establish the position as a specialty occupation by application of the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). In this regard, the *Handbook's* section pertaining to the educational requirements for market and survey researchers states:

While a bachelor's degree is often sufficient for entry-level market and survey research jobs, higher degrees are usually required for advancement and more technical positions. Strong quantitative skills and keeping current with the latest methods of developing, conducting, and analyzing surveys and other data also are important for advancement.

***Education and training.*** A bachelor's degree is the minimum educational requirement for many market and survey research jobs. However, a master's degree is usually required for more technical positions.

The *Handbook* does not indicate that a bachelor's degree or higher *in a specific specialty* or its equivalent is the normal minimum requirement for entry into the position. While the *Handbook* indicates that a bachelor's degree is the most significant source of postsecondary education for persons employed in market and survey research jobs, no specific specialty is identified as the area in which the degree must be obtained.

On appeal, counsel argues that the director failed to provide the petitioner with a definition of "specific specialty," and argues that USCIS has provided an insufficient basis for denial by failing to distinguish between the terms "specific specialty" and "specific academic discipline." As discussed previously, however, 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. USCIS further finds that certain professions, such as college professors and certified public accountants, have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a *specific specialty*, and thus such occupations fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category. Counsel provides no evidence in support of its contention that the director's application of these terms, in evaluating the proffered position for compliance with 8 C.F.R. § 214.2(h)(4)(iii)(A), was inappropriate in any way. 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. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

It is further noted that the petitioner states that a master's degree in business administration (without any specialization identified) or a related discipline are acceptable for entry into the proffered position. 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'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 *supra*, 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 or master'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).<sup>1</sup>

The petitioner has failed to establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the position of a market research analyst as described in the record of proceeding. Accordingly, the petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

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<sup>1</sup> 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: otherwise, 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.*

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. Factors often considered by USCIS when determining the industry standard include: 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)).

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. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions. Moreover, the record is devoid of additional evidence such as job vacancy advertisements to demonstrate that a degree requirement is common for parallel positions in similar organizations within the petitioner's industry. The petitioner, therefore, has not established eligibility under the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

In the alternative, the petitioner may submit evidence to establish that the position is so complex or unique that only an individual with a degree in a specific specialty can perform the duties associated with the position. The petitioner does not explain or clarify which of the duties, if any, of the proffered position are so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment, and, to the extent that they are described in the record, it is not evident that any of them are, or that they comprise a position characterized by the requisite complexity or specialization. The petitioner has thus failed to establish that it has satisfied either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet this criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. In this matter, the petitioner claims that it previously employed only degreed individuals in the position of market research analyst. Although the record contains copies of the educational credentials for [REDACTED] and [REDACTED], there is no evidence demonstrating that the petitioner actually employed these persons. Although the petitioner, in response to the RFE, submitted a copy of [REDACTED] H-1B approval notice for employment with the petitioner, there is no evidence to support a finding that [REDACTED] actually worked for the petitioner, particularly since [REDACTED] H-1B petition, approved on September 18, 2009, was revoked on December 15, 2009 based on a written withdrawal filed by the petitioner. Absent documentary evidence such as payroll records or quarterly tax returns listing these individuals as employees of the petitioner, the claim that these persons formerly worked as market research analysts for the petitioner is

without merit. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The AAO notes that the petitioner claims repeatedly that the duties of the proffered position can only be employed by a degreed individual. 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 at least 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.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. Here, the described duties of the position encompass routine market research. While the petitioner claims that the duties of the proffered position are sufficiently complex, the record does not contain explanations or clarifying data sufficient to elevate the position to one that is so specialized and complex that the knowledge to perform these additional tasks is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, especially compared to other market research analyst positions for which the *Handbook* indicates a bachelor's or higher degree in a specific specialty or its equivalent is not required for entry into the occupation.

The AAO notes that the duties as described in the record of proceeding are broad and numerous and appear to span a variety of marketing functions. However, the AAO finds that, to the extent that they are described, the duties do not convey either the need for the beneficiary to apply a particular body of highly specialized knowledge in a specific specialty, or a usual association between such knowledge and the attainment of a particular educational level in a specific specialty. As the petitioner has not established that the proffered position's specific duties require the application of specialized and complex knowledge usually associated with the attainment of a baccalaureate degree or higher degree in a specific discipline, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As the petitioner has failed to satisfy any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), the petitioner has not established that the proffered position is a specialty occupation. For this reason, the appeal must be dismissed and the petition denied.

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.

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