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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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U.S. Citizenship and Immigration Services

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[redacted]

Date: JAN 03 2012 Office: CALIFORNIA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

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

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

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will remain denied.

The petitioner is a wholesaler and retailer of women's apparel. It claims it was established in 1985, employs 25 personnel, and had earned a gross annual income of $1,917,231 when the petition was filed. It seeks to employ the beneficiary as a marketing analyst pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition concluding that the proffered position is not a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129, Petition for Nonimmigrant Worker, and supporting documentation; (2) the director's request for evidence (RFE) and the petitioner's response to the RFE; (3) the director's denial letter; (4) the petitioner's motion to reopen the matter and the director's decision on the motion; and (5) Form I-290B, Notice of Appeal or Motion, with counsel's supplemental brief. The AAO reviewed the record in its entirety before reaching its decision.

The primary issue for consideration is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements:

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

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

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

> An occupation which requires [1] theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires [2] the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also meet one of the following criteria:

(1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

(2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

(3) The employer normally requires a degree or its equivalent for the position; or

(4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (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.

The petitioner states that it is seeking the beneficiary's services as a marketing analyst. In an August 25, 2009 letter, the petitioner indicated that it needed a marketing analyst to develop analytical insights and target selling opportunities, to collect and analyze economic and demographic data, and to present findings and recommendations to management on product

needs, market trends, growth and expansion opportunities, and distribution needs and trends. The petitioner noted that the marketing analyst needed at least a bachelor's degree in marketing, business administration, or equivalent related disciplines for this entry-level position. The petitioner listed the job duties of the proffered position as:

- Research market conditions in local, regional, national, or international area to determine how the business would realize potential sales of products - 10%
- Collect and analyze data on customer demographics, preferences, needs, and buying habits to identify potential markets and factors affecting product demand – 10%
- Establish research methodology and design format for data gathering such as surveys, opinion pools, or questionnaires – 10%
- Develop marketing campaigns and promotional materials to exploit market based on established guidelines – 10%
- Develop weekly and monthly sales volume reports and provide information to management to determine their position in the marketplace – 10%
- Monitor sales trends and make recommendations as needed to ensure product supply and assist in the development of relevant online exclusive products – 5%
- Develop and implement procedures for identifying advertising needs – 5%
- Measure the effectiveness of marketing, advertising, and communication programs and strategies – 5%
- Monitor industry statistics and follow trends in the apparel business and recommend content, marketing and product changes based on observed trends – 5%
- Manage and execute Seasonal Product Catalog – 5%
- Review customers' growth for key sales programs and organize external trade shows to promote products – 8%
- Monitor competitors' websites and offerings and make recommendations for new and improved product offerings, website features, and marketing initiatives – 7%
- Research competitors' prices or lowest price offers and discounts and recommend approval for activities to improve sales – 5%
- Proactively pursue self-education and awareness required to maintain current with the fashion trends and industry practices and advise the management – 5%.

The petitioner referenced the Department of Labor's *Occupational Outlook Handbook's* (*Handbook*) section on Market and Survey Researchers and provided a printout of the same as well as a printout from the Department of Labor's *O*NET Online Summary Report* (*O*NET*) for market research analysts. The petitioner also provided a printout of its apparel line.

On October 2, 2009, the director issued an RFE requesting additional evidence that the proffered position is a specialty occupation, among other items.

In response, the petitioner submitted its business plan including plans to develop an e-commerce

wholesale only website and to otherwise expand its business. The petitioner also provided its buyer and supplier lists, flyers, photographs of the company's business premises and trade show exhibit, and advertisements for its products. The petitioner noted that the beneficiary would report directly to the president of the company but would work independently and would not supervise other employees. The petitioner provided its current organizational chart and a proposed organizational chart. The proposed organizational chart included the addition of a marketing and sales manager position and the proffered position reporting to the marketing and sales manager. The petitioner also provided copies of job postings from advertising for marketing analysts. The advertisements indicated that a four-year degree was required to fill the advertised position. None of the advertisements specified that the degree must be in a specific discipline. Counsel asserted that the petitioner's size was immaterial when determining the petitioner's need for a market analyst.

The director denied the petition on November 10, 2009 and affirmed the decision on January 26, 2010.

On appeal, counsel for the petitioner references the previously submitted documentation and notes the petitioner's expansion plans and the need for the market analyst to determine the feasibility of expansion in terms of market reach and product offerings. Counsel contends that the duties of the proffered position resemble those of a market and survey researcher as set out in the *O*NET* and in the *Handbook* and that the *Handbook* reports that a baccalaureate level of education in a specific specialty is a normal minimum for entry into the position of marketing analyst. Counsel notes that the petitioner has 15 sales personnel to implement the company's marketing plan.

To make its determination whether the employment described qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)*(1)* and *(2)*: a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

Upon review of the proffered position's duties, the petitioner has borrowed liberally from the *O'NET's* outline of general duties set out for a marketing research analyst occupation and the *Handbook's* overview of the market research analyst occupation. The petitioner has not provided sufficient details regarding the proffered duties of its specific position for the AAO to determine what the beneficiary will actually be doing on a day-to-day basis. However, even if the petitioner could demonstrate that the proffered position is that of a market research analyst,

contrary to counsel's claim, the U.S. Department of Labor's *Occupational Outlook Handbook* (*Handbook*), 2010-2011 edition, does not indicate that entry into positions in that occupation normally requires at least a bachelor's degree, or the equivalent, in a specific specialty. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-11 ed., available at http://www.bls.gov/oco/ocos013.htm (last accessed December 2011).

While the *Handbook* reports that a baccalaureate degree is the minimum educational requirement for many market and survey research jobs, it does not indicate that the degrees held by such workers must be in a specific specialty that is directly related to market research, as would be required for the occupational category to be recognized as a specialty occupation. *See id.* This is evident in the range of qualifying degrees indicated in the Significant Points section that introduces the *Handbook's* chapter "Market and Survey Researchers," which states: "Market and survey researchers can enter the occupation with a bachelor's degree, but those with a master's or Ph.D. in marketing or a social science should enjoy the best opportunities." *Id.*

That the *Handbook* does not indicate that market research analyst positions normally require at least a bachelor's degree in a specific specialty is also evident in the following discussion in the "Training, Other Qualifications, and Advancement" section of its chapter "Market and Survey Researchers," which does not specify a particular major or academic concentration:

> 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.
>
> In addition to completing courses in business, marketing, and consumer behavior, prospective market and survey researchers should take social science courses, including economics, psychology, and sociology. Because of the importance of quantitative skills to market and survey researchers, courses in mathematics, statistics, sampling theory and survey design, and computer science are extremely helpful. Market and survey researchers often earn advanced degrees in business administration, marketing, statistics, communications, or other closely related disciplines.

Id.. Because the *Handbook* indicates that entry into the market research analyst occupation does not normally require a 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.

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 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. Even if established by the evidence of record, which it is not, the requirement of a bachelor's degree in the general fields of marketing and/or business administration is inadequate to establish that a 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 corollary between the required specialized studies and the position, the requirement of a degree with a generalized title, such as marketing or 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.

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner submitted copies of three advertisements as evidence that its degree requirement is standard amongst its peer organizations for parallel positions in the wholesale and retail apparel industry. However, as observed above, the three advertisements 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*. In addition, even if all of the job postings indicated that a bachelor's or higher degree in a specific specialty or its equivalent were required, as the petitioner has not provided a comprehensive description of the duties of its proffered position, it is not possible to establish that its position is parallel to the advertised positions. 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 has also not satisfied 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." As observed above, the petitioner failed to credibly demonstrate exactly what the beneficiary will do on a day-to-day basis such that complexity or uniqueness can even be determined. 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 marketing analyst 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. The evidence of record does not establish that this position is significantly different from other marketing positions such that it refutes the *Handbook's* information to the effect that there is a spectrum of preferred degrees acceptable for marketing analyst 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 a marketing occupation 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 marketing analyst is so complex or unique relative to other marketing 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).

As the petitioner states and the record reveals, the petitioner has not established a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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. The AAO acknowledges the petitioner's business plan and desire to expand its marketing reach and product line. However, the petitioner has not provided sufficient detailed information regarding the actual duties of the proffered position to establish that the duties are so specialized and complex. Again, there is nothing in the record that elevates the proffered position to a position with duties that are more specialized and complex than market-research-analyst positions that are not usually associated with a degree in a specific specialty. Repeatedly claiming that the generically described duties are specialized and complex and that the petitioner needs a marketing analyst to perform duties similar to that of a marketing research analyst to increase its market reach and product line do not offer the documentary evidence necessary to establish that the duties of the proffered position require the attainment of a baccalaureate or higher degree in a specific specialty. 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)).

Therefore, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petition will be denied and the appeal dismissed for the above stated reason. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. § 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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