

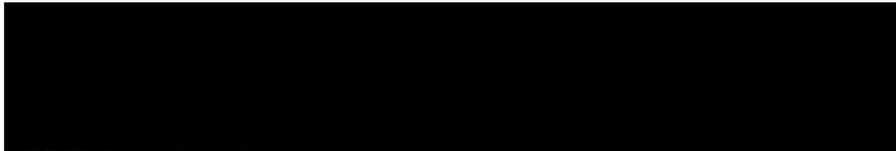
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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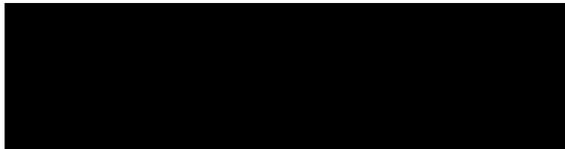
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Date: **JAN 06 2012** Office: CALIFORNIA SERVICE CENTER FILE:

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 | . 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 of the California Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal.¹ The appeal will be dismissed. The petition will remain denied.

The petitioner claims to be a non-profit interdenominational missionary organization. It employs eight individuals and has a net annual [REDACTED] contributions. It seeks to employ the beneficiary as a communication and media specialist 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 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the director's RFE; (3) the director's denial letter; and (4) Form I-290B with the petitioner's appeal brief and supporting documents. 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.

¹ This decision relates to the Form I-290B appeal with a receipt number of [REDACTED]. The decision for the Form I-290B appeal with a receipt number of [REDACTED] is being issued under separate cover.

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, part time, as a communication

and media specialist. In an [REDACTED] letter, the petitioner states that the duties of a communication and media specialist within the petitioner's organization include:

- Research for contents of TV programs, documentary DVDs, websites and other promotional material;
- Design and manage the petitioner's websites; and
- Participate in the production of mass media communications products.

The petitioner states that a bachelor's degree in communications, public relations, journalism, or advertising is the minimum requirement for its position of communications and media specialist. The beneficiary holds a master's degree in communications, obtained from the University of Wyoming.

On August 28, 2009, the director issued an RFE requesting additional evidence that the proffered position is a specialty occupation. The director specifically requested a more detailed description of the work to be performed, including the specific job duties, the percentage of time to be spent on each duty, the level of responsibility, hours per week of work and the minimum education, training, and experience necessary to do the job.

The petitioner, through former counsel, responded to the RFE on September 18, 2009 stating that a bachelor's degree is normally the minimum education required for the proffered position. The petitioner explained that the proffered position's duties include (1) research and technical writing; (2) production management; and (3) website coordination and management. The petitioner stated that the position is equivalent to the public relations specialist occupation as described in the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*. Former counsel argued that many entry level public relations specialists hold a bachelor's degree in a communications-related field.

The director denied the petition on September 28, 2009.

On appeal, the petitioner is represented by new counsel. New counsel states, in relevant part, that the petitioner was unaware of the submissions made on its behalf by previous counsel and requests consideration of the petition on the basis of the information and documentation submitted on appeal. The petitioner now claims that that position of communication and media specialist within its organization is akin to the *Handbook's* "writers and editors" positions and that a bachelor's degree is the minimum requirement for entry into the proffered position. The petitioner states that the proffered position's duties include writing and editing promotional materials, magazine articles, documentary film subtitles, and website communications.

Contrary to new counsel's claims, the proffered duties of a communication and media specialist within the petitioner's organization closely resemble those of the *Handbook's* description of a public relations specialist, and not a writer or editor.² Such a position would not qualify as a

² The AAO notes further that a petitioner cannot, on appeal, offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary

specialty occupation under 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the AAO notes that the *Handbook* states:

A bachelor's degree in a communications-related field combined with public relations experience is excellent preparation for a person interested in public relations work.

In terms of education and training, the *Handbook* states:

Many entry-level public relations specialists have a college degree in public relations, journalism, marketing, or communications. Some firms seek college graduates who have worked in electronic or print journalism. Other employers seek applicants with demonstrated communication skills and training or experience in a field related to the firm's business—information technology, healthcare, science, engineering, sales, or finance, for example.

In other words, although a bachelor's degree may be preferred for entry-level public relations specialists, such a degree is not the minimum entry-level requirement for the position.

Even if the petitioner could demonstrate that the proffered position is that of a writer or editor as described in the *Handbook*, the *Handbook's* 2010-2011 edition does not indicate that entry into positions in that occupation normally require at least a bachelor's degree, or the equivalent, in a specific specialty. *Id.*

While the *Handbook* reports that a bachelor's degree is generally required for authors, writers, and editors, it does not indicate that a degree is the minimum entry-level requirement or that degrees held by such workers must be in a specific specialty. *See id.* This is evident in the range of qualifying degrees indicated in the Significant Points section that introduces the *Handbook's* chapter "Authors, Writers, and Editors," which states that degrees in communications, journalism, or English are preferred. *Id.*

when the petition was filed merits classification as a specialty occupation. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 ('Reg. Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). The AAO further notes that any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

That the *Handbook* does not indicate that author, writer and editor 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 "Authors, Writers, and Editors," which does not specify a particular major or academic concentration:

because writing skills are essential in this occupation, many employers like to hire people with degrees in communications, journalism, or English, but those with other backgrounds and who can demonstrate good writing skills may also find jobs as writers.

Id. Because the *Handbook* indicates that entry into the writer and editor occupation, or the public relations specialist position, does not normally require a degree in a specific specialty, the *Handbook* does not support the proffered position as being a specialty occupation.

The petitioner cites to the Department of Labor's *O*Net* System (*O*Net*) in support of its claims that a bachelor's degree is normally required for the position of editor. According to the petitioner, *O*Net* states that "[m]ost editor positions require a bachelor's degree, but some do not." "Most," as defined in *Webster's New Collegiate College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of editors require at least a bachelor's degree in communications or a related field, it could be said that "most" editors require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist.

The petitioner also indicates that *O*Net* assigns a Job Zone "Four" to the position of public relations specialist. A Job Zone "Four" rating groups public relations specialists among occupations of which "most," but not all, "require a four-year bachelor's degree." *O*Net* does not indicate that four-year bachelor's degrees required by Job Zone Four occupations must be in a specific specialty closely related to the requirements of that occupation. Nor, as previously discussed, does the term "most" indicate that a bachelor's degree is the minimum entry-level requirement for the position. Therefore, the *O*Net* information is not probative of the proffered position being a specialty occupation.

The petitioner also cites to an overview of the public relations field prepared by [REDACTED]. The [REDACTED] document states that "there is no single set of 'ideal' qualifications" for the public relations field. The [REDACTED] further indicates that a bachelor's degree is "essential" and a "basic grounding in the liberal arts is strongly recommended." These PRSA statements do not support the petitioner's claim that a public relations entry-level position requires a bachelor's degree in a specific specialty.

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)(I).

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)).

As discussed above, 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. Additionally, the evidence submitted by the petitioner from a public relations professional association, as noted above, does not indicate that a bachelor's degree is the minimum industry-wide requirement for entry into positions similar to one proffered here.

Indeed, the monster.com and other advertisings for the position of public relations specialists submitted by the petitioner listed a bachelor's degree as the educational requirement, without specifying any specialty. Even if a specialty was specified, which it is not, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the few sample job postings submitted with regard to determining the common educational requirements for entry into parallel positions in similar organizations.

Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that the position of communications and media specialist for an organization such as petitioner's required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the statistics-based findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

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." The AAO does not find that there is enough evidence to document that the proffered position is more

specialized and complex than that of a position not associated with the attainment of at least a bachelor's degree 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).

The AAO notes that the petitioner claims repeatedly that the duties of the proffered position can only be performed 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 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. The proposed duties as described are not more specialized and complex than those of positions that are not usually associated with a degree in a specific specialty.

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 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. 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.