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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090

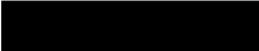


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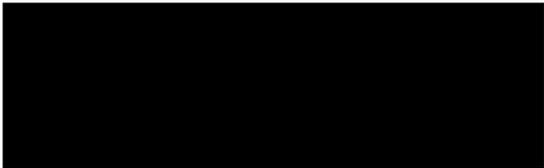


D2

Date: JAN 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)

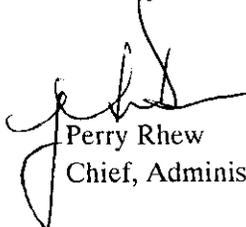
ON BEHALF OF PETITIONER:


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, 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 an apparel manufacturing company that was established in 2008 and employed 11 personnel when the petition was filed. It seeks to employ the beneficiary as a marketing manager 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 petitioner failed to establish that the proffered position is 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 additional evidence (RFE) and the petitioner's response to the RFE; (3) the director's denial letter; and (4) Form I-290B, Notice of Appeal or Motion, and counsel's brief. The AAO reviewed the record in its entirety before reaching its decision.

The central issue is whether the 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 Immigration and Nationality Act (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.

In this matter, the petitioner initially stated that it sought the beneficiary’s services as a marketing manager on a part-time basis. The petitioner stated in its October 22, 2009 letter in support of the petition that it had four organized branches in its organization composed of production, marketing, design and pattern departments, all reporting to its president. The petitioner provided the following description of the position’s duties:

- Create and oversee research into future market situation for the domestic and international textile and apparel manufacturing industry;
- Monitor the company's product popularity and availability;
- Consult with buying personnel to gain advice regarding the types of products expected to be in demand;
- Negotiate contracts with vendors and distributors to manage product distribution, establishing distribution networks and developing distribution strategies;
- Evaluate the financial aspects of product development, such as budgets, expenditures, research and development appropriations, return-on-investment and profit-loss projections;
- Identify, develop and evaluate marketing strategy based on knowledge of establishment objectives, market characteristics, cost and markup factors;
- Consult with product development personnel on product specifications such as design and color;
- Gather information on competition's price, products and methods of marketing, selling and distribution; and
- Research and analyze international fashion trend to be able to predict popularity of different fashion styles, and create new and innovative items.

The petitioner stated that in order to perform the duties of the position, a bachelor's or higher degree from an accredited college or university is essential. The petitioner also referenced the Department of Labor's publications such as the *Occupational Outlook Handbook*, *O*NET*, *America's Career Info Net Occupation Report* and the *PERM* regulations and noted that these publications indicated that a bachelor's degree plus work experience is the normal minimum requirement for marketing managers. The petitioner also provided its organizational chart depicting a marketing department with the proffered position vacant and two freelancing positions that would report to the marketing manager position.

On November 6, 2009, the director issued an RFE requesting additional evidence that the proffered position is a specialty occupation, including a more detailed job description and any evidence that an industry standard existed for parallel positions in similar organizations requiring a baccalaureate degree in a specific discipline, among other items.

In response to the RFE, the petitioner through counsel stated that the beneficiary would spend: 35 percent of his time on typical duties of a marketing manager; 35 percent of his time developing the company's marketing department as the senior officer in charge; 15 percent of his time assessing budgetary needs in accordance with the company's organizational objectives; and 15 percent of his time supporting creation and execution of public relations programs. Counsel indicated that the beneficiary would work no less than 40 hours per week. Counsel asserted that the nature of the specific duties of the position were specialized and complex and that the duties fell under the fourth category of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A). Counsel noted that the petitioner, created in December 2008, was fast growing and incorporated all phases of the manufacturing process including designing, pattern-making, production, and marketing. Counsel noted however, that the petitioner lacked an in-house marketing and sales department and wished to remedy that by creating a position for marketing and market research. Counsel

indicated that upon review, the petitioner's president concluded that a separate position of marketing manager with at least a bachelor's degree in business administration was needed. The petitioner provided its list of clients to establish that the size and scope of the company's operations were significant.

The petitioner also provided six advertisements for marketing positions. Three of the advertisements did not indicate that a bachelor's degree in a specific discipline was required. Of the remaining three advertisements, one listed a bachelor's degree in marketing or a related discipline; one listed a bachelor's degree in marketing, advertising, or public relations; and one listed a business or marketing related degree or equivalent professional qualification but did not specify the type of degree. It is not clear from the advertisements submitted that any of the advertising companies required a bachelor's degree in a specific discipline.

The director denied the petition on December 16, 2009.

On appeal, counsel for the petitioner asserts that the size and scope of the petitioner's growth is evidence that the petitioner's intent to create a sizable marketing department of its own is genuine. Counsel adds that a closer review of the job duties reveal that the beneficiary's actions and decisions will not be limited to marketing but will include business administrative functions. In that regard, counsel contends that although the proffered position is titled "marketing manager," the duties more closely resemble the duties of a "top executive." Counsel asserts that the beneficiary's master's degree in business administration qualifies him to perform the duties of a top executive.

As a preliminary matter, it must be noted that the petitioner's claimed entry requirement of at least a bachelor's degree in "business administration, marketing, or a related field" for the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business 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). The petitioner's claim that the position may be performed by an individual with a bachelor's degree or a bachelor's degree in business administration or marketing is tantamount to an admission that the proffered position is not in fact a specialty occupation. The director's decision must therefore be affirmed and the petition denied on this basis alone.

However, the AAO will briefly discuss the alternative criteria necessary to establish a position as a specialty occupation as those criteria apply to the proffered position. 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 duties of the position, the duties described closely resemble the duties outlined in the *Handbook's* chapter on advertising, marketing, promotions, public relations, and sales managers found in the DOL *Handbook*, 2010-11 online edition. The *Handbook* indicates in pertinent part:

For marketing, sales, and promotions management positions, employers often prefer a bachelor's or master's degree in business administration with an emphasis on marketing. Courses in business law, management, economics, accounting, finance, mathematics, and statistics are advantageous. In addition, the completion of an internship while the candidate is in school is highly recommended. In highly technical industries, such as computer and electronics manufacturing, a bachelor's degree in engineering or science, combined with a master's degree in business administration, is preferred.

For advertising management positions, some employers prefer a bachelor's degree in advertising or journalism. A relevant course of study might include classes in marketing, consumer behavior, market research, sales, communication methods and technology, visual arts, art history, and photography.

Most advertising, marketing, promotions, public relations, and sales management positions are filled through promotions of experienced staff or related professional personnel. For example, many managers are former sales representatives; purchasing agents; buyers; or product, advertising, promotions, or public relations specialists. In small firms, in which the number of positions is limited, advancement to a management position usually comes slowly. In large firms, promotion may occur more quickly.

Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-11 ed., available at <http://www.bls.gov/oco/ocos020.htm> (last accessed December 2011). Therefore, although a bachelor's degree in business administration may be preferred for marketing, sales, and promotion managers, the *Handbook* does not indicate that at least a bachelor's degree in a specific specialty is required for marketing, advertising, or promotion managers. As explained above, USCIS interprets the supplemental degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) as requiring a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor'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).

As the *Handbook* indicates no specific degree requirement for employment as a marketing manager, and as it is not self-evident that, as described in the record of proceeding, the proposed duties comprise a position for which the normal entry requirement would be at least a bachelor's degree, or its equivalent, in a specific specialty, the AAO concludes that the performance of the proffered position's duties does not require the beneficiary to hold a baccalaureate or higher degree in a specific specialty.

The AAO acknowledges the petitioner's reference to the Department of Labor's Online (*O*NET*) summary report for the occupation of marketing manager. However, the AAO does not consider the *O*NET* to be a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. The *O*NET* provides only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. Its rating does not describe how the years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require.

Further, the AAO observes that counsel's claim on appeal that the proffered position is that of a top executive does not establish the proffered position as a specialty occupation. As counsel notes the *Handbook* reports that the formal education and experience of top executives vary extensively and although the qualifications for a top executive may include a bachelor's or master's degree in business administration, liberal arts or a more specialized discipline, there is no specific requirement of a bachelor's or higher degree in a specific discipline. Moreover, USCIS will only consider the visa classifications that the petitioner annotates on the petition. The Ninth Circuit has determined that once USCIS concludes that an alien is not eligible for the specifically requested classification, the agency is not required to consider, *sua sponte*, whether the alien is eligible for an alternate classification. *Brazil Quality Stones, Inc., v. Chertoff*, 531 F.3d 1063 (9th Cir. 2008).

Accordingly, the AAO finds that the petitioner has not established its proffered position as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

As stated earlier, in determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms

“routinely employ and recruit only degreed individuals.” See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

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. The advertisements submitted demonstrate at best that a bachelor’s degree generally is required, but not at least a bachelor’s degree or the equivalent in a *specific specialty*. The three advertisements that list a preference for a degree include a variety of possible disciplines suitable to perform the duties of their proffered positions and one of those advertisements notes that experience and a lesser degree may be sufficient to obtain the position. In addition, the general descriptions of the advertised positions do not allow an adequate comparison to the proffered position to determine if the positions are indeed parallel. Upon review of the advertisements submitted the petitioner has not established that similar organizations routinely require at least a bachelor’s degree in a *specific specialty* for parallel positions.

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that “an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree.” The evidence of record does not refute the *Handbook’s* information to the effect that there is a spectrum of degrees acceptable for marketing manager positions, including degrees not in a specific specialty. Although counsel on appeal asserts that the duties of the proffered position are unique and specialized and complex, the record does not support the assertion. 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). To begin with and as discussed previously, the petitioner itself does not require at least a baccalaureate degree or its equivalent in a specific specialty. In addition, the petitioner failed to credibly demonstrate exactly what the beneficiary will do on a day-to-day basis such that complexity or uniqueness may 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 manager 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. Even when considering the petitioner’s desire to create a marketing department because of its growth, the record does not include the necessary evidence to distinguish the proffered position as unique from or more complex than a marketing manager or other positions that can be performed by persons without at least a bachelor’s degree in a specific specialty or its equivalent.

As the record has not established a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor’s degree in a specific specialty, 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, to the extent that they are described in the record of proceeding, the duties of the proffered position do not appear more specialized and complex than marketing manager positions not associated with the attainment of at least a bachelor's degree in a specific specialty. Again, the AAO acknowledges that the petitioner is expanding and desires to create and develop a marketing department, but again the petitioner has not provided the necessary documentation to establish that the proffered position requires the theoretical and practical application of a body of highly specialized knowledge attained through a course of specialized study resulting in a bachelor's degree in a specific discipline. The AAO reiterates that the petitioner's statement that its proffered position may be performed by an individual who possesses a bachelor's degree or a bachelor's degree in business administration is an acknowledgment that the proffered position is not a specialty occupation. 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 under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petition will be denied and the appeal dismissed. 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.