

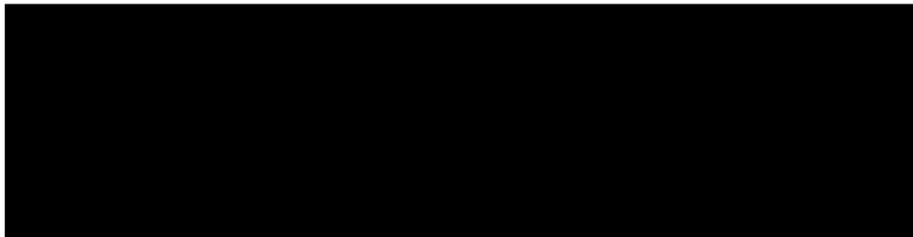
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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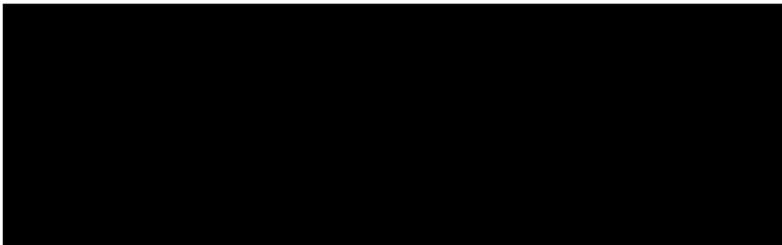
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Date: **JAN 24 2013** Office: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

On the Form I-129 the petitioner stated that it is in the life insurance sales business. Established in 1974, the petitioner's business employs 63 worker and claims over \$20 million in gross annual income. The record of proceeding establishes that the petitioner filed this visa petition in order to obtain H-1B classification for the beneficiary as a nonimmigrant worker in a specialty occupation, pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b), so that the petitioner may employ her as a senior life insurance underwriter at an annual salary of \$67,500 from January 1, 2010 until October 14, 2012.

The director denied the petition finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. On appeal, counsel asserted that the director's basis for denial was erroneous, and contended that the petitioner satisfied all evidentiary requirements. In support of these contentions, counsel submitted a brief and additional evidence.

As will be discussed below, the AAO finds that the director did not err in denying the petition. The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and supporting documentation, (2) the service center's request for additional evidence, (3) the response to the request for evidence, (4) the director's denial letter, and (5) the Form I-290B and counsel's brief and attached exhibits in support of the appeal.

In a December 4, 2009 letter appended to the petition, the petitioner described the proffered position of senior life insurance underwriter as follows:

The [senior life insurance underwriter is] primarily responsible for performing as well as analyzing and advising on underwriting best practices and processes to increase efficiency and accuracy of the underwriting practices. She will study our current approach, examine our existing practices, outline a proposed master plan for process mapping, measuring accuracy, training and development relating to the underwriting team, and education for our clients, both internal and external, and then implement the proposed plan. This will be accomplished through the analysis of existing business practices and data, the development of recommended future plans including: process mapping, best practices, education and measurable achievement.

The petitioner further states that the position "involves taking a top down approach to what we have been doing and reengineering the process to ensure they are most effective and efficient as possible." The petitioner indicates that a bachelor's degree is required for the proffered position. The petitioner claims that the beneficiary's education and experience are equivalent to a U.S. bachelor's degree.

The director issued a request for evidence on December 29, 2009 requesting, in relevant part, a

more detailed job description and an explanation of why the duties to be performed require the services of a person who has a bachelor's degree in a specific specialty. The petitioner responded to the request on January 27, 2010.

On February 8, 2010 the director denied the petition finding that the proffered position is not in a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Act defines an H-1B nonimmigrant in pertinent part as an alien:

subject to section 212(j)(2), who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . . , who meets the requirements for the occupation specified in section 214(i)(2) . . . , and with respect to whom the Secretary of Labor determines and certifies to the [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1)

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 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 regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

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

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed 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) (hereinafter *Defensor*). 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), 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 the beneficiary will work as senior life insurance underwriter. The U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* describes the position of "underwriter" as follows:

Underwriters decide whether insurance is provided and, if so, under what terms. They identify and calculate the risk of loss from policyholders, establish who receives a policy, determine the appropriate premium, and write policies that cover this risk. An insurance company may lose business to competitors if risk

underwriting is too conservative, or it may have to pay excessive claims if the underwriting actions are too liberal.

Using sophisticated computer software, underwriters analyze information in insurance applications to determine whether a risk is acceptable and will not result in a loss. Insurance applications often are supplemented with reports from loss-control representatives, medical reports, reports from data vendors, and actuarial studies. Underwriters then must decide whether to issue the policy and, if so, determine the appropriate premium. In making this determination, underwriters consider a wide variety of factors about the applicant. For example, an underwriter working in health insurance will consider age, family history, lifestyle, and current health, whereas an underwriter working for a property-casualty insurance company is concerned with the causes of loss to which property is exposed, such as hurricanes or earthquakes, and the safeguards taken by the applicant. Therefore, underwriters serve as the main link between the insurance carrier and the insurance agent.

The duties described by the petitioner for the position of senior life insurance underwriter within its organization are not akin to those of "underwriters" as described in the *Handbook*. Rather, they fit within the *Handbook's* description of "management analyst."¹

While the duties described by the petitioner in response to the director's request for evidence and on appeal include some typical underwriting responsibilities, the duties listed in the petitioner's letter in support of the Form I-129 include only the following:

- Provide technical expertise to the underwriting team, including training and mentoring of junior underwriting staff;
- Identify recommended areas for training and development of the underwriting team and advise and outline training tools available;
- Study the quality and production of work by underwriting department and documenting and communicating recommended best practices;
- Advise on method to track carrier underwriting guideline updates and changes ;
- Advise on and implement new audit procedures;
- Asses the strength and weakness of current approach and outline short term benchmarks for change;
- Introduce medical underwriting best practices;
- Perform risk evaluation assessments on Informal Inquiries, Quick Quotes and Referrals; draft client risk summaries for carrier review;

¹ According to the *Handbook*, management analysts and consultants "analyze and propose ways to improve an organization's structure, efficiency, or profits." The *Handbook* further states that the "work of management analysts and consultants varies with each client or employer and from project to project. Some projects require a team of consultants, each specializing in one area. In other projects, consultants work independently with the organization's managers. In all cases, analysts and consultants collect, review, and analyze information in order to make recommendations to managers."

- Assess information provided by the actuarial group and interpret results for future policy underwriting;
- Assess the need and level of training sessions on various topics; and
- Lead training sessions.

In its response to the director's request for evidence, the petitioner lists the following duties and percentage of time to be spent in each duty of the proffered position:

- Evaluate life insurance applications to determine insurability (60%);
- Underwriting staff training and development (20%);
- Best practices and process improvement (15%); and
- Additional special projects (5%).

None of the specific duties listed within the first category above, encompassing 60% of the duties of the proffered position, were listed in the original petition. These duties include typical underwriter duties such as assessment of medical, financial and pertinent data to determine insurance risk.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 ('Reg. Comm'r 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for evidence did not clarify or provide more specificity to the original duties of the position, but rather added new duties to the job description. For purposes of the AAO's review, the duties of the proffered position are those described in the petition and not in response to the request for evidence or on appeal.

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

The *Handbook* does not support the proposition that management analyst positions require a minimum of a bachelor's degree or the equivalent in a specific specialty. The petitioner cannot, therefore, demonstrate that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the proffered position and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The *Handbook*, as was noted above, does not support the position that a minimum of a bachelor's degree in a specific specialty or the equivalent is common to management analyst positions. The record contains no evidence from professional associations stating that a bachelor's degree in a specific specialty is required for admission into the proffered occupation. The selected vacancy announcements submitted with the response to the request for evidence relate to underwriters, and in any event, do not establish that a bachelor's degree in a specific specialty is required for entry into the occupation. The petitioner has not demonstrated that a requirement of a minimum of a bachelor's degree in a specific specialty or the equivalent is common to the petitioner's industry in parallel positions among similar organizations, and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of the first clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

On appeal, the petitioner cites the *O*Net* Summary Reports and notes that the proffered position is assigned a Job Zone "Four" rating. The *O*Net* does not state a requirement for a bachelor's degree. Indeed, according to the *O*Net*, "most," but not all, Job Zone "Four" occupations "require a four-year bachelor's degree." Further, the *O*Net Online* 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. Therefore, the *O*Net Online* information is not probative of the proffered position being a specialty occupation.

Likewise, an SVP rating of 8 does not indicate that at least a four-year bachelor's degree is required, or more importantly, that such a degree must be in a specific specialty closely related to the requirements of that occupation. Therefore, the *DOT* information is not probative of the proffered position being a specialty occupation.

The AAO will also consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This alternative requirement would be satisfied if the petitioner demonstrated that, although similar positions may not require a minimum of a bachelor's degree or the equivalent in a specific specialty, the position proffered in the instant case is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty.

The AAO notes, again, that if a degree in business administration, without further specification, is a sufficient educational qualification for the proffered position, then the proffered position is not a position in a specialty occupation. The petitioner provided no evidence that the nature of the specific duties is so specialized and complex that knowledge required to perform those duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The petitioner has not, therefore, demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant 8 C.F.R. § 214.2(h)(4).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO finds the record does not establish that the proffered position is in a specialty occupation, whether the duties as described fit within the description of underwriter or management analyst. The record indicates that a bachelor's degree in a specific specialty is not required for entry into the proffered position.²

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

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

² Indeed, the beneficiary does not hold the academic equivalent of a bachelor's degree. The beneficiary's qualifications, however, need not be addressed in this decision given the finding that the proffered position is not in a specialty occupation.