

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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



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Date: JUN 12 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 nonimmigrant visa petition was denied by the service center director, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner claims to be engaged in international trade and seeks to employ the beneficiary as a marketing analyst. The petitioner, therefore, endeavors to classify 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).

The director denied the petition, finding that the proffered position was not a specialty occupation. On appeal, counsel for the petitioner contends that the director's findings were erroneous, and submits a brief and additional evidence in support of this contention.

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

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

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

Specialty occupation means 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 record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director’s request for additional evidence (RFE); (3) the petitioner’s response to the director’s RFE; (4) the director’s decision denying the petition; and (5) the petitioner’s Form I-290B and supporting documents. The AAO reviewed the record in its entirety before issuing its decision.

In a letter dated June 30, 2010, counsel for the petitioner claims to be a new company, established in 2009, and claims to be pursuing international trade. Specifically, the petitioner states that it will be engaged in the import and distribution of wedding gowns, evening dresses, and storage media. It

claims to require the services of the beneficiary as a marketing analyst to assist with its expansion plans and to analyze sales and purchasing opportunities in the United States.

Regarding the proffered position of marketing analyst, counsel claimed that the primary duties of the position would be as follows:

- Be responsible for market analysis of sales and purchasing opportunities in USA market as well as the overseas market for our company;
- Designs and formulates marketing strategies and operation plans;
- Collects data and conducts research on current market needs and customer preferences.¹

Counsel concluded by stating that the position required the potential employee to have at least a bachelor's degree in business administration, economics, or other related fields.

On July 20, 2010, the director issued an RFE, which requested a more detailed description of the work to be performed by the beneficiary as well as information pertaining to the petitioner's business. The director requested information pertaining to the beneficiary's specific job duties and the percentage of time devoted to such duties, as well as an organizational chart demonstrating the composition of the petitioner's company. The director also requested evidence such as documentation showing that similar businesses in the petitioner's industry imposed the same requirements for marketing analysts.

In response, counsel for the petitioner submitted a letter dated July 27, 2010 that addressed the director's queries. Counsel provided the following expanded description of the duties of the proffered position:

[The petitioner] is in need of a professional Marketing Analyst to constantly keep an eye on marketing situations in our business and the factors that affect it. This person will study and analyze economic and statistical data in the industry of wedding gowns, evening dresses and storage media, collect data and conducts research on current situation of the industry to look for the sales and purchasing opportunities in

¹ It is noted that the second and third bullets of this job description are not in the Form I-129 and appear to have been provided by counsel. 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).

USA market as well as the overseas market for our company, formulate recommendations or plans to help in solution of problems, prepare reports on the results of the studies and research, present his/her findings to his/her supervisors and peers. This amounts to 80% of his/her work time (approximately 32 hrs/wk).

He/she will need to work closely with the marketing manager who we are going to hire in the near future in helping to understand current changes of consumer. This amounts to 10% of her work time (approx. 4 hrs/week).

We demand in our company a high infiltration rate of understanding amongst our various departments and he/she is being placed in a position to specifically address such a need. Each of his/her specific skills is aimed at enhancing her communication skills with the rest of the organization. His/her bi-lingual nature enhances her ability to effectively report her understanding vis-à-vis th[r]ough an Asian business culture perspective, one in which both the president and vice-president of [the petitioner] would relate to, but also include the impacts of which doing business in the United States entails. This amounts to 10% of her work time (approx. 4 hrs/wk).²

Counsel reiterated the requirement that the incumbent hold at least a bachelor's degree, but did not specify the subject area in which the degree should be attained. In addition, counsel provided excerpts from three job postings for positions it claimed were similar to that of the proffered position, and concluded by stating that, since the company is a new company, it had not previously hired any individual in the position of marketing analyst.

On August 17, 2010, the director denied the petition. Specifically, the director concluded that the record did not establish that the proffered position met any of the four alternative criteria under 8 C.F.R. § 214.2(h)(4)(iii)(A). The director acknowledged that the duties of the proffered position appeared akin to those of a market research analyst as described in the section entitled "Market and Survey Researchers" in the 2010-2011 edition of the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)*, but concluded that the *Handbook*, upon which USCIS routinely relies in determining whether a position qualifies as a specialty occupation, did not require a degree in a specific specialty.

On appeal, counsel contends that the director's findings were erroneous, and asserts that the director disregarded the *Handbook's* statements which indicate the proffered occupational category requires

² Again, this description of the beneficiary's proposed job duties has been provided by counsel, not the petitioner. As such, these unsupported assertions do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. at 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

at least a bachelor's degree. Counsel asserts that the *Handbook* requires at least a bachelor's degree, but often a higher degree, for performance of the duties of a marketing analyst.

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, economics, or other related fields" 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. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

To prove that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's 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).³

The AAO will first address the requirement under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1): A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. The *Handbook* describes the occupation of market research analyst as follows:

³ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. *See, e.g., Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; *cf. Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: otherwise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

Id.

Market research analysts study market conditions in local, regional, or national areas to examine potential sales of a product or service. They help companies understand what products people want, who will buy them, and at what price.

Duties

Market research analysts typically do the following:

- Monitor and forecast marketing and sales trends
- Measure the effectiveness of marketing programs and strategies
- Devise and evaluate methods for collecting data, such as surveys, questionnaires, or opinion polls
- Gather data about consumers, competitors, and market conditions
- Analyze data using statistical software
- Convert complex data and findings into understandable tables, graphs, and written reports
- Prepare reports and present results to clients or management

Market research analysts perform research and gather data to help a company market its products or services. They gather data on consumer demographics, preferences, needs, and buying habits. They collect data and information using a variety of methods, such as interviews, questionnaires, focus groups, market analysis surveys, public opinion polls, and literature reviews.

Analysts help determine a company's position in the marketplace by researching their competitors and analyzing their prices, sales, and marketing methods. Using this information, they may determine potential markets, product demand, and pricing. Their knowledge of the targeted consumer enables them to develop advertising brochures and commercials, sales plans, and product promotions.

Market research analysts evaluate data using statistical techniques and software. They must interpret what the data means for their client, and they may forecast future trends. They often make charts, graphs, or other visual aids to present the results of their research.

analysts.htm#tab-2 (last visited May 22, 2012).⁴ The AAO agrees with the director's classification of the proffered position into this occupational category.

A review of the *Handbook's* education and training requirements for this occupation, however, indicates that it does not require a bachelor's degree in a specific specialty or its equivalent for entry into the position:

Market research analysts typically need strong math and analytical skills. Most market research analysts need at least a bachelor's degree, and top research positions often require a master's degree.

Education

Market research analysts need a bachelor's degree in market research or a related field. Many have degrees in fields such as statistics, math, or computer science. Others have a background in business administration, one of the social sciences, or communications. Courses in statistics, research methods, and marketing are essential for these workers; courses in communications and social sciences—such as economics, psychology, and sociology—are also important.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Market Research Analysts, <http://www.bls.gov/ooh/Business-and-Financial/Market-research-analysts.htm#tab-4> (last visited May 22, 2012). In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as business management and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty."⁵ Section 214(i)(1)(b) (emphasis added).

On appeal, counsel contends that the *Handbook* clearly indicates that a bachelor's or higher degree is required for entry into the occupational category, and asserts that the director's findings to the contrary were erroneous. However, although the *Handbook* indicates that a bachelor's or higher degree is required, it also indicates that baccalaureate degrees in various fields are acceptable for

⁴ Since the issuance of the director's decision, an updated version of the *Handbook* has become available.

⁵ Whether read with the statutory "the" or the regulatory "a," both readings denote a singular "specialty." Section 214(i)(1)(b) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Still, the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty.

entry into the occupation. In addition to recognizing degrees in disparate fields, i.e., social science and computer science as acceptable for entry into this field, the *Handbook* also states that "others have a background in business administration." As noted above, 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 at 147. Therefore, the *Handbook's* recognition that a general, non-specialty "background" in business administration is sufficient for entry into the occupation strongly suggests that a bachelor's degree *in a specific specialty* is not a normal, minimum entry requirement for this occupation. Accordingly, as the *Handbook* indicates that working as a market research analyst does not normally require at least a bachelor's degree in a specific specialty or its equivalent for entry into the occupation, it does not support the proffered position as being a specialty occupation. The petitioner, therefore, has failed to satisfy 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 response to the RFE, counsel for the petitioner included three summaries of job postings for positions it claimed were similar to that of the proffered position in this matter. The excerpts, allegedly acquired from www.monster.com, are insufficient to establish eligibility under this criteria. First, they fail to identify the title of the position for which they are posting a vacancy announcement. Additionally, there is virtually no information regarding the employers or the nature of their businesses. Finally, these excerpts are accompanied by no additional evidence demonstrating that they are, in fact, actual job postings advertised online, and not simply statements created by counsel in support of the petition. 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)). Since there is insufficient evidence to demonstrate that these postings are for parallel positions in similar organizations, and since the petitioner submits no additional evidence, such as letters from organizations within the petitioner's industry attesting to general hiring standards for marketing analysts, the petitioner has failed to satisfy the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

In the alternative, the petitioner may submit evidence to establish that the duties of the position are so complex or unique that only an individual with a degree in a specific specialty or its equivalent can perform the duties associated with the position. The AAO observes that the petitioner has indicated that the beneficiary's educational background, bi-lingual abilities, and experience in the industry will assist her in carrying out the duties of the proffered position; however, the test to establish a position as a specialty occupation is not the skill set or education of a proposed

beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. Counsel does not address this prong on appeal, nor does counsel explain or clarify at any time in the record which of the duties, if any, of the proffered position are so complex or unique as to be distinguishable from those of similar but non-specialty-degreed employment. The petitioner has thus failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. In response to the RFE, counsel claimed that, since the petitioner is a new company, it has not previously employed any individuals in the position of marketing analyst. Therefore, since the petitioner acknowledges that it has not previously hired degreed individuals to fill the proffered position in the past, the petitioner cannot satisfy this criterion.

On appeal, however, counsel for the petitioner now specifically contends that it has satisfied this criterion. Specifically, counsel claims that this criterion is satisfied by virtue of the petitioner's allegation in its petition that it requires someone with at least a baccalaureate degree to perform the duties of the position. This assertion, however, is not sufficient.

Although counsel claims that the proffered position requires the incumbent to possess at least a bachelor's degree in business administration, economics, or a related field, this claim is not persuasive, since the record does not document that the duties of the proffered position require a baccalaureate or higher level of education to perform them. First and as noted above, a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring 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 at 147. Second, even if a petitioner may believe or otherwise assert that a proffered position requires a specialty degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's or higher degree in a specific specialty or its equivalent could be brought to the United States to perform any occupation as long as the employer required the individual to have such a degree. *See Defensor v. Meissner*, 201 F. 3d at 384. Accordingly, 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. Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. In other words, the proposed duties have not been described with sufficient specificity to show that they are more

specialized and complex than market research analyst positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent. The petitioner, through counsel, simply provides its own unsupported opinions with regard to the qualifications necessary for an individual to perform the duties of the proffered position. Moreover, the description of the duties of the proffered position does not specifically identify any tasks that are so specialized or complex that only a degreed individual could perform them. The fact that the beneficiary is bi-lingual and that her educational background has prepared her for the duties of the proffered position does not establish that the position is inherently more specialized or complex than other similar but non-specialty-degreed employment.⁶

Consequently, to the extent that they are depicted in the record, the duties have not been demonstrated as being so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition. The appeal shall be dismissed, and the petition will be denied.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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

⁶ Moreover, the petitioner has designated the proffered position as a Level I position on the submitted Labor Condition Application (LCA), indicating that it is an entry-level position for an employee who has only basic understanding of the occupation. See Employment and Training Administration (ETA), *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009). Therefore, it is simply not credible that the position is one with specialized and complex duties, as such a higher-level position would be classified as a Level IV position, requiring a significantly higher prevailing wage. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).