



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JUN 21 2013 OFFICE: VERMONT SERVICE CENTER

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 in accordance with the instructions on 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,


Ron Rosenberg
Acting 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 be denied.

In the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as an exporter of frozen foods with fifteen employees. To employ the beneficiary in what it designates as a "Research Analyst" position, the petitioner endeavors to classify her 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 record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial decision; and (5) the Form I-290B and brief submitted by counsel. The AAO reviewed the record in its entirety before issuing its decision.

The issue on appeal is whether the 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 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 which [(2)] 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 a particular position 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. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing “a degree requirement in a specific specialty” as “one that relates directly to the duties and responsibilities of a particular 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 directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. See *generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

Counsel for the petitioner submitted the following documents with the Form I-129: (1) the petitioner's support letter dated March 28, 2011; (2) a Labor Condition Application (LCA) certified for a research analyst under the occupation title "Economists" (SOC (ONET/OES) code 19-3011.00); (3) a letter from the Acting Registrar of [REDACTED] (4) a copy of the beneficiary's [REDACTED] diploma; and (5) a copy of the beneficiary's passport data page.

In the March 28, 2011 support letter, the petitioner's president stated that the petitioner is "engaged in the export to Central and South America, the Caribbean and Mexico, primarily of frozen foods such as poultry, pork, beef, lamb and veal" and that it is also a "consolidator[] meaning [it] receive[s] and sell[s] not only [its] cargo but also allow[s] customers to buy from other suppliers and ship to [the petitioner] to consolidate into [the petitioner's] containers." The petitioner's president also provided the following list of duties of the proffered position in the support letter:

- Conduct research, prepare reports, and formulate plans to assist the company management in finding solutions of economic problems arising from the distribution of goods and services.
- Collect and process economic and statistical data using econometric and sampling techniques.
- Study economic and statistical data.
- Provide advice and consultation on economic relationships to the company.
- Compile, analyze, and report data to forecast market trends, applying mathematical models and statistical techniques.
- Formulate recommendations, policies, or plans to solve economic problems and to interpret markets.
- Develop economic guidelines and standards and prepare points of view used in forecasting trends and formulating economic policy.

The petitioner's president also stated that the proffered position requires a "Bachelor's degree, or equivalent, in Economics."

On April 18, 2011, the director issued an RFE in this matter. The petitioner was asked to submit additional evidence to establish that the proffered position qualifies for classification as a specialty occupation. The director outlined the specific evidence to be submitted.

In response to the director's RFE, counsel for the petitioner submitted, *inter alia*, the following: (1) a letter from counsel, dated June 15, 2011; (2) a "STATEMENT OF INTRODUCTION"; (3) five letters from the petitioner's president dated June 13, 2011; (4) a copy of the petitioner's organizational chart; (5) job descriptions and corresponding educational requirements for other positions within the petitioner's company; (6) a copy of the Occupational Information Network's (O*NET) Summary Report for 19-3011.00 – Economists; (7) a copy of the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook's (Handbook)* chapter on Economists; and (8) an evaluation of the educational requirements of the proffered position by [REDACTED]

In one of her five letters, the petitioner's president stated that due to the 2010 earthquake in Haiti, the petitioner's sales to Haiti have "more than doubled" and therefore, the petitioner requires someone "with expertise in the Haitian market and economics to provide research analysis to guide [the petitioner] in economic approaches to the Haitian market." In another letter, the petitioner's president stated that the petitioner has "never previously employed, nor [does it] currently employ, individuals in the position of *Research Analyst*" and that as a result of the earthquake in Haiti, the petitioner's "need for this position has arisen at this time."

The evaluation of the proffered position by [REDACTED] states that the proffered position requires the "services of someone with advanced training through a Bachelor's program in Economics or a closely related field."

The director denied the petition on July 1, 2011, finding, as was noted above, that the petitioner had not demonstrated that the proffered position qualifies as a position in a specialty occupation by virtue of requiring a minimum of a bachelor's degree in a specific specialty or its equivalent. In his decision, the director stated that it is "not clear given the size of [the petitioner] and [its] organizational structure [that] the beneficiary would be performing predominately H1B caliber duties." The director also noted that the petitioner failed to submit evidence substantiating its claims that it needs to fill the proffered position due to its increased sales to Haiti.

On appeal, counsel asserts that the evidence submitted shows that the proffered position qualifies as a specialty occupation position. Counsel contends that while the petitioner is "relatively small in terms of its organizational structure," it has "extensive operations with international reach and significant gross income." Counsel also asserts that "[g]iven [the petitioner's] high income level and large scale of operations, [it] clearly has the need for the Beneficiary to perform H-1B caliber duties as a Research Analyst." Counsel also reiterates the petitioner's claim that the petitioner's need to fill the proffered position arose due to the "business opportunity" created by the 2010 earthquake in

Haiti. Counsel also cites the *Handbook* as evidence that the proffered position requires a minimum of a bachelor's degree in a specific specialty or its equivalent.

Counsel also submitted the following on appeal: (1) Internet print-outs of general facts regarding the 2010 earthquake in Haiti; (2) copies of previously submitted letters from the petitioner; (3) a previously submitted copy of the *Handbook's* chapter on Economists; and (4) the previously submitted evaluation by [REDACTED]

Preliminarily and contrary to counsel's assertion, the AAO notes that it is reasonable to assume that the size of an employer's business has or could have an impact on the duties of a particular position. See *EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the duties of a particular position.

The AAO finds that despite the director's request for additional evidence demonstrating that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), the record is devoid of substantial documentary evidence as to the specific duties of the proffered position. Given the lack of detail and corroborating evidence, the AAO cannot determine that the proffered position substantially reflects the duties of a research analyst. The AAO notes that the petitioner claims that it has never hired anyone as a research analyst and that as a result of the business opportunity created by the earthquake in Haiti, it now needs someone that has "expertise in the Haitian market and economics to provide research analysis to guide [the petitioner] in economic approaches to the Haitian market." However, while the petitioner claims that the duties of the proffered position are directly related to the petitioner's increased sales to Haiti, the record is devoid of any evidence that the petitioner exported food to Haiti prior to the earthquake, currently exports food to the Haitian market, and that its sales to Haiti "more than doubled" after the earthquake. The record lacks such evidence as contracts, invoices, bills of lading, and other documents demonstrating that it is exporting food to Haiti. Furthermore, despite the director's specific request, the record contains no documentary evidence supporting the petitioner's claims regarding the nature and scope of its business.

Thus, the record, as constituted, precludes a determination that the duties of the proffered position are those of a research analyst that would perform the duties of an economist as described in the *Handbook*. Based on the lack of documentary evidence, the AAO has determined that the petitioner has failed to distinguish the proffered position from a position that does not qualify as a specialty occupation. Thus, there is no basis upon which it can be determined that the petitioner has demonstrated a need for a research analyst and that the beneficiary will be performing the claimed duties of an economist on a full-time basis here in the United States. 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)). Furthermore, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in

support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that “[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation.” Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Furthermore, there must be sufficient, corroborating evidence in the record that demonstrates not only actual, non-speculative employment for the beneficiary, but also enough details and specificity to establish that the work the beneficiary will perform for the petitioner will more likely than not be in a specialty occupation. While the petitioner provides a description of the proffered position's claimed duties, there is insufficient evidence in the record that the petitioner, a small fifteen-employee firm, requires a full-time research analyst requiring the “theoretical and practical application of a body of highly specialized knowledge” to perform these claimed duties on a full-time basis. *See* INA § 214(i)(1).

USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1) and 103.2(b)(12). The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

As the petitioner has failed to present sufficient, credible evidence of the actual job duties the beneficiary will perform, it has therefore failed to demonstrate that the occupation more likely than not requires a bachelor's or higher degree in a specific specialty or its equivalent as a minimum for entry. *See* INA § 214(i)(1). The petitioner also has not shown through submission of documentary evidence, that it meets any of the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Rather, while the petitioner claims that it requires a research analyst and that it requires a “Bachelor's degree, or equivalent, in Economics,” it has not credibly shown that it requires a research analyst and that the work requires such a degree. Thus, the petitioner has not met its burden of proof in this regard, and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner did

not submit sufficient evidence regarding the proffered position to determine that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications.

Lastly, the AAO will briefly address the evaluation by [REDACTED]. The AAO finds no probative value in the opinion rendered as it is not based upon sufficient information about the research analyst position proposed here. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988).

Specifically, the content of [REDACTED] letter does not demonstrate that his opinion is based upon sufficient information about the particular position at issue. First, there is no indication that Mr. [REDACTED] has any experience as a research analyst or economist. Second, the letter reveals that his knowledge of the position is limited to the duties provided to him by the petitioner. Third, he does not relate any personal observations of the petitioner's operations or of the work that the beneficiary would perform, nor does he state that he has reviewed any projects or work products related to the proffered position. Fourth, the opinion does not relate his conclusions to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for his conclusion about the educational requirements for the particular position here at issue. Fifth, as the director noted, the evaluation was not accompanied by any supporting evidence to establish a sufficient factual basis upon which it could be determined that the proffered position requires a bachelor's degree in economics or a closely related field.

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 is denied.