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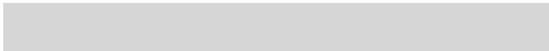


U.S. Citizenship
and Immigration
Services



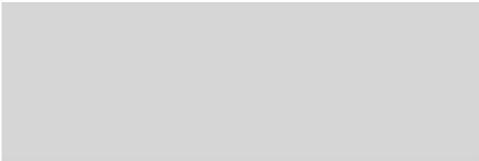
DATE: **JUN 03 2015**

PETITION RECEIPT #: 

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 is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

I. PROCEDURAL BACKGROUND

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a 12-employee "Shipping and Retail" firm established in [REDACTED]. In order to employ the beneficiary in what it designates as a "Marketing and Promotion Manager" position, the petitioner seeks 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 Director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a Request for Evidence (RFE). Thereafter, the petitioner responded to the Director's RFE. The Director reviewed the information and determined that the petitioner did not establish eligibility for the benefit sought. The Director denied the petition, finding that the evidence of record did not establish that the petitioner would employ the beneficiary in a specialty occupation position. On appeal, the petitioner asserts that the Director's basis for denial was erroneous and contends that the petitioner satisfied all evidentiary requirements.

We base our decision upon our review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation; (2) the service center's RFE; (3) the petitioner's response to the RFE; (4) the Director's denial letter; and (5) the Notice of Appeal or Motion (Form I-290B) and the petitioner's submissions on appeal. We reviewed the record in its entirety before issuing our decision.¹

As will be discussed below, we have determined that the Director did not err in her decision to deny the petition on the specialty occupation issue. Accordingly, the Director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

II. THE PROFFERED POSITION

In a letter dated April 23, 2014, the petitioner provided the following description of the duties of the proffered position:

- Monitor and forecast marketing and sales trends; (about 15% of working time)
- Plan advertising and promotional campaign, direct promotion programs with purchasing incentives to increase sales; (about 15% of working time)

¹ We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

- Direct sales and pricing strategies for the company's on-line marketing and delivery services marketed to the target customers; (about 15% of working time)
- Work with sales, public relations and product development staff to monitor budgets, marketing promotion and sales, estimate the demand for products and services that our company and our company's competitors offer; (about 15% of working time)
- Initiate market research studies, analyze findings to understand customer's needs, and maintain good relationship with customers. (about 10% of working time)
- Training new team members to make sure they know their job duties in the shortest period of time. (about 10% of working time)
- Make plans to explore market opportunities for business and measure the effectiveness of marketing programs and strategies; (about 10% of working time)
- Devise methods for collecting data, such as surveys, questionnaires, and opinion polls, gather data about consumers, competitors, and marketing conditions, and analyze data by using statistical software, prepare reports and present results to clients and management; (about 10% of working time)²

The petitioner further stated that the proffered position requires, "at least a Bachelor's Degree with a major in Business Administration or a closely related field."

The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is a Marketing and Promotions Manager position, and that it corresponds to Standard Occupational Classification (SOC) code and title 11-2011, Advertising and Promotions Managers, from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a wage Level I, entry-level position, and that the beneficiary will be employed at [REDACTED] Massachusetts.

² In response to the RFE, the petitioner provided a different percentage breakdown for the proposed duties. For example, "devise methods for collecting data..." is changed from 10% to 25%, and "make plans to explore market opportunities..." is changed from 10% to 20%. The petitioner did not explain the changes. 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).

III. SPECIALTY OCCUPATION

The issue is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position.

A. The Law

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.

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 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 result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and 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.

B. Analysis

When determining whether a position is a specialty occupation, we must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. To ascertain the intent of a petitioner, USCIS looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, 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."

For H-1B approval, the petitioner must demonstrate a legitimate need for an employee exists and to substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. It is incumbent upon the petitioner to demonstrate it has sufficient work to require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent, to perform duties at a level that requires the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty for the period specified in the petition.

In a letter dated April 23, 2014, the petitioner asserted that the proffered position requires, "at least a Bachelor's Degree with a major in Business Administration or a closely related field." We note that the petitioner's claim that a bachelor's degree in "Business Administration" is a sufficient minimum requirement for entry into 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 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). 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

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

[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

Here, the petitioner in this matter claims that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree, i.e., a bachelor's degree in business administration. The Director's decision must therefore be affirmed and the petition denied on this basis alone.

Further, we find that the evidence of record does not sufficiently establish the substantive nature of the proffered position. In establishing the position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in the context of the petitioner's business operations. Here, the petitioner did not convey the substantive work that the beneficiary will perform within the petitioner's business operations.

Specifically, we note that the petitioner's description of the beneficiary's job duties are recited verbatim from the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* and Occupational Information Network (O*NET) Code Connector.⁴ For example, the *Handbook* states that market research analysts "monitor and forecast marketing and sales trends," "devise and evaluate methods for collecting data, such as surveys, questionnaires, and opinion polls," "gather data about consumers, competitors, and market conditions," "analyze data using statistical software," and "present results to clients and management." The *Handbook* also states that advertising, promotions, or marketing managers "'plan advertising and promotional campaigns" "direct programs that combine advertising with purchasing incentives to increase sales," and "estimate the demand for products and services that an organization and its competitors offer."

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.

⁴ For more information, see U.S. Dep't of Labor, Emp't & Training Admin., Occupational Information Network (O*NET) Code Connector, "Market Research Analysts and Marketing Specialists – SOC (ONET/OES Code) 13-116," <http://www.onetonline.org/link/summary/13-1161.00> and "Advertising and Promotions Managers" –SOC (ONET/OES Code) 11-2011, <http://www.onetonline.org/link/summary/11-2011.00> (last visited May 29, 2015). Also see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Advertising, Promotions, and Marketing Managers," <http://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm#tab-4>, and "Market Research Analysts," <http://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm#tab-4> (last visited May 29, 2015).

This type of generalized description may be appropriate when defining the range of duties that may be performed within an occupational category, but it fails to adequately convey the substantive work that the beneficiary will perform within the petitioner's business operations and, thus, generally cannot be relied upon by a petitioner when discussing the duties attached to specific H-1B employment. In establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in the context of the petitioner's business operations, demonstrate that a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition

Moreover, the petitioner also has not sufficiently corroborated the duties of the proffered position and has not demonstrated that it has sufficient work to employ a marketing and promotions manager for 29 hours per week. For example, the petitioner asserts in its April 23, 2014 letter that the beneficiary will work with "sales, public relations and product development staff to monitor budgets, marketing promotion and sales, estimate the demand for products and services." However, there is insufficient evidence in the record of sales, public relations, and product development staff. The organizational chart only indicates that there are two employees in its [REDACTED] marketing branch and two employees in its [REDACTED] marketing branch. The organizational chart does not mention any sales, public relations, and product development staff.

These omissions cast doubt on the assertion that the beneficiary would work solely as a marketing and promotions manager; therefore, we find that the record does not establish, by a preponderance of the evidence, the substantive nature of the duties the beneficiary would perform if the visa petition were approved. We note that it is reasonable to assume that the size of an employer's business has or could have an impact on the claimed 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 actual duties of a particular position.

The petitioner did not provide sufficient consistent details regarding the nature and scope of the beneficiary's employment or any substantive evidence regarding the specialty occupation work that the beneficiary would perform. Without a meaningful job description, the record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree in the specific specialty, or its equivalent, as a minimum for entry into the occupation. The tasks as described fail to consistently communicate (1) the substantive nature and scope of the beneficiary's employment within the petitioner's business operations; (2) the actual work that the beneficiary would perform; (3) the complexity, uniqueness and/or specialization of the tasks; and/or (4) the correlation between that work and a need for a particular educational level of highly specialized knowledge in a specific specialty.

Therefore, we are precluded from 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 4.⁵

The petitioner has not satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) 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.

IV. ADDITIONAL ISSUE

In the Form I-129 and the LCA, the petitioner indicated that the beneficiary will be placed at ██████████ Massachusetts. In response to the RFE dated July 30, 2014, the petitioner stated that the beneficiary has been working in its ██████████ office; however, the petitioner noted that its address has changed to ██████████ Massachusetts. Further, the petitioner indicated that "although the beneficiary is assigned to the ██████████ office, the work she is performing is not limited to that specific location but to the company as a whole." The petitioner also added that the "beneficiary's assignment in ██████████ office is temporary, and our company may transfer her to our ██████████ Office or other locations depending on the progress of our business expansion and upon the Services' permission." In support, the petitioner submitted an amended LCA certified on July 29, 2014 for ██████████ Massachusetts.⁶

⁵ We also observe that, if the petitioner had established that the beneficiary would work as an "Advertising and Promotions Manager," as claimed on the LCA, that would be insufficient to establish the proffered position as a specialty occupation position, as the *Handbook* does not indicate that such positions require a minimum of a bachelor's degree in a specific specialty or its equivalent. See U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Advertising, Promotions, and Marketing Managers," <http://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm#tab-4> (last visited May 29, 2015).

⁶ While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. See 20 C.F.R. § 655.705(b), which states, in pertinent part:

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit*

We note that the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B) states the following:

Service or training in more than one location. A petition that requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with USCIS as provided in the form instructions. The address that the petitioner specifies as its location on the Form I-129 shall be where the petitioner is located for purposes of this paragraph.

The itinerary language at 8 C.F.R. § 214.2(h)(2)(i)(B), with its use of the mandatory "must" and its inclusion in the subsection "Filing of petitions," establishes that the itinerary as there defined is a material and necessary document for an H-1B petition involving employment at multiple locations, and that such a petition may not be approved for any employment period for which there is not submitted at least the employment dates and locations.⁷

In this case, the petitioner did not indicate how the beneficiary's time would be allocated between its offices or the frequency with which the beneficiary would be physically at either location.⁸ The

and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

[Italics added]. As 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary, this regulation inherently necessitates the filing of an amended H-1B petition to permit USCIS to perform its regulatory duty to ensure that the new LCA actually supports the H-1B petition filed on behalf of the beneficiary. In addition, as 8 C.F.R. § 103.2(b)(1) requires eligibility to be established at the time of filing, it is factually impossible for an LCA approved by DOL after the filing of an initial H-1B petition to establish eligibility at the time the initial petition was filed. Therefore, in order for a petitioner to comply with 8 C.F.R. § 103.2(b)(1) and for USCIS to perform its regulatory duties under 20 C.F.R. § 655.705(b), a petitioner must file an amended H-1B petition with USCIS whenever a beneficiary's job location changes such that a new LCA is required to be filed with DOL.

⁷ The instructions to the Form I-129 also state that a petition for a beneficiary to perform services, labor, or training in more than one location must include an itinerary with the dates and locations where the services or training will take place. See Instructions for Form I-129, Petition for a Nonimmigrant Worker, on the Internet at <http://www.uscis.gov/sites/default/files/files/form/i-129instr.pdf>. The H-1B petition must be executed and filed in accordance with the form instructions, with the instructions being incorporated into the regulations. 8 C.F.R. § 103.2(a)(1).

⁸ In response to the RFE, the petitioner submitted copies of the beneficiary's pay statements. The petitioner indicated that the beneficiary started working on April 28, 2014. Notably, the tax deductions on the pay statement from May and June 2014 include "[REDACTED]" The petitioner did not provide further evidence to substantiate that the beneficiary is working in Massachusetts.

petitioner did not submit an itinerary with the dates and places of the beneficiary services as required by 8 C.F.R. § 214.2(h)(2)(i)(B).

V. CONCLUSION

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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