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



U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: DEC 03 2010

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:

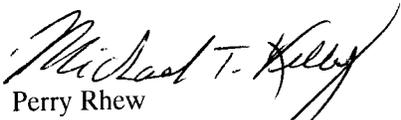
[Redacted]

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,

for 
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 be denied.

To employ the beneficiary in what it designates as a market research analyst position, the petitioner endeavors to classify him 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 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.

The AAO bases its decision upon its review of the entire record of proceedings, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief in support of the appeal.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation. The issue before the AAO is whether the petitioner has provided evidence sufficient to establish that it would be employing the beneficiary in a specialty occupation position.

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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a 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, 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, 8 U.S.C. § 1184(i)(1), 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. 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 professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry

into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

The visa petition states that the petitioner is a cleaning supply and equipment firm with 13 employees. It further states that the proffered position is full-time and that the petitioner would pay the beneficiary \$20.10 per hour. That wage equates to \$41,808 annually.

In a letter, dated March 13, 2009, that accompanied the visa petition, the petitioner's president described the duties of the proffered position as follows:

1. Research market conditions in local, regional, national and international areas to identify potential commercial clients (approximately 15% of daily work time);
2. Apply theories and principles from marketing and management or business administration in establishing research methodology and designing format for data collection such as surveys, opinion polls or questionnaires (approximately 15% of daily work time);
3. Facilitate the further development and implementation of market strategies (approximately 15% of daily work time);
4. Develop, maintain and communicate competitive intelligence based on analysis of research on market conditions (approximately 15% of daily work time);
5. Interface with domestic and international customers to ascertain customer satisfaction in order to improve products (approximately 10% of daily work time);
6. Collect data on customer preference and identify their needs. Based on this research, prepare reports to the management in order to formulate the company policies in response to the market conditions (approximately 10% of daily work time);
7. Identify customer and negotiate and market [the petitioner's] products using various marketing strategies based on analysis of market research (approximately 10% of work time);
8. Design, develop and improve sales-forecasting modules based on sales and inventory;
9. [C]onsolidation and analysis, and project sales, forecast weekly and monthly orders to maintain adequate inventory (approximately 10% of daily work time);
10. Use various computer technologies, languages and environments including MS Office, Windows, and others as necessary (approximately 10% of daily work time).

[Errors in numbering and arithmetic in the original.]

In a request for evidence issued on April 18, 2009, the service center observed that the petitioner has only 13 employees and is a cleaning supply and equipment business, and that those facts, taken together, suggest that it might have insufficient work to employ the beneficiary in a professional market research analyst position. The service center requested additional evidence that the petitioner would employ the beneficiary in a specialty occupation position.

In response, counsel submitted, *inter alia*, the petitioner's organizational chart, an evaluation of the proffered position by a college professor, and printouts of job website vacancy announcements for similar positions.

One of the vacancy announcements submitted was placed by a recruitment company seeking a marketing strategy consultant for a company that was not identified by name. It states that the company seeking to hire a marketing strategy consultant is a marketing consulting firm with approximately 4,500 employees and that the position pays \$250,000 per year. That announcement states that the position requires a bachelor's degree, but does not specify in what field.

Another vacancy announcement was placed by a recruiting company seeking a market research manager for an unidentified pharmaceutical company. The position pays \$100,000 to \$150,000. The size of that pharmaceutical company is not revealed. That announcement states that the position requires a bachelor's degree, but does not specify in what field.

The third vacancy announcement is for a marketing communications specialist for a company that manufactures clothes for outdoor pursuits such as mountain climbing, flight operations, and firefighting. The salary is stated as \$45,000 to \$70,000 per year. The size of the company is unstated. That announcement states that the position requires a bachelor's degree, but does not specify in what field.

None of the vacancy announcements were placed by companies in the petitioner's industry. There is not indication that any of the companies are of the same approximate size of the petitioner. Further, none of those vacancy announcements claims that the position announced requires a degree in any specific specialty. Finally, even if all three vacancy announcements were placed by similarly-sized companies in the petitioner's industry and stated that the position offered required a minimum of a bachelor's degree or the equivalent in a specific specialty, three announcements would be insufficient to show an industry-wide requirement. As such, those vacancy announcements are poor evidence for the proposition that the proffered position with the petitioner requires a minimum of a bachelor's degree or the equivalent in a specific specialty and qualifies as a specialty occupation.

The evaluation submitted was prepared by an associate professor of management science at the University of Maryland. That evaluation provides a description of duties that is very similar to that provided in the petitioner's president's March 13, 2009 letter and states that completion of at least a bachelor's degree program in marketing, business administration, or a related area is ordinarily necessary for the performance of those duties.

In his own response to the RFE, counsel cited the evaluation, the vacancy announcements, and a portion of the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)* as evidence that the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty.

The director denied the visa petition on June 2, 2009. On appeal, counsel renewed his argument that the evidence in the record demonstrates that the proffered position qualifies as a position in a specialty occupation.

The petitioner's organizational chart shows that the petitioner does not employ any interviewers who would gather data for the petitioner to analyze. The duties of the proffered position would include not only analysis of data, but the actual gathering of that data. The AAO accepts that the proffered position essentially corresponds to the Market Research Analysts occupational classification as described in the *Handbook*.

The AAO recognizes DOL's *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹ The 2010-2011 *Handbook's* chapter "Market and Survey Researchers" indicates that employers normally require that people employed as market research analysts possess at least a bachelor's degree – but not that the degree be in a specific specialty directly related to market research analysis. This fact is clear in the following excerpt from the "Market and Survey Researchers" chapter's "Training, Other Qualifications, and Advancement" section, which indicates that a major or concentration in a specific specialty is not a normal aspect of the baccalaureate threshold for entry into the market-research-analyst occupation:

While a bachelor's degree is often sufficient for entry-level market and survey research jobs, higher degrees are usually required for advancement and more technical positions. Strong quantitative skills and keeping current with the latest methods of developing, conducting, and analyzing surveys and other data also are important for advancement.

Education and training. A bachelor's degree is the minimum educational requirement for many market and survey research jobs. However, a master's degree is usually required for more technical positions.

In addition to completing courses in business, marketing, and consumer behavior, prospective market and survey researchers should take social science courses, including economics, psychology and sociology. Because of the importance of quantitative skills to market and survey researchers, courses in mathematics, statistics, sampling theory and survey design, and computer science are extremely helpful. Market and survey researchers often earn advanced degrees in business administration, marketing, statistics, communications, or other closely related disciplines.

While in college, aspiring market and survey researchers should gain experience gathering and analyzing data, conducting interviews or surveys, and writing reports on their findings. This experience can prove invaluable toward obtaining a full-time

¹ All references herein are to the 2010-2011 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

position in the field, because much of the work may center on these duties. Some schools help graduate students find internships or part-time employment in government agencies, consulting firms, financial institutions, or marketing research firms prior to graduation.

As the *Handbook* indicates that entry into the market-research-analyst occupation may occur with a bachelor's degree with coursework in the listed subjects but without a specific course of study leading to a specific degree in the field, market research analyst positions do not categorically qualify under the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) as read in the context of the statutory and regulatory definitions of specialty occupation. This information from the *Handbook* does not by itself preclude a particular market-research-analyst position from qualifying as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). However, it is incumbent on the petitioner to establish that its particular position is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties. This the petitioner has failed to do.

The petitioner describes the proffered position exclusively in generalized statements of broad generic functions. These descriptions do not convey the substantive nature of whatever specialized knowledge the beneficiary would have to apply in the actual performance of those functions. For example, the petitioner does not describe "the research methodology" that the beneficiary would establish, identify the analytical methods that the beneficiary would employ, or convey the substantive level of marketing research and analysis that would be required for the reports that the beneficiary would be expected to develop.

Under the relevant statutory and regulatory standards, outlined earlier, specialty occupation status is determined by what the evidence of record conveys about the level of knowledge in a specific specialty that the beneficiary must theoretically and practically apply in order to perform the particular job that is the subject of the H-1B petition under review. Therefore, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. Nor will USCIS base a favorable determination on generalized descriptions of duties that do not relate actual performance that is indicative of the theoretical and practical application of at least bachelor's degree level of knowledge in a particular specialty. USCIS must focus on the actual employment of the alien. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position, an employer's standards that are not dictated by actual performance requirements of the position, or the extent to which the record's duty descriptions mirror those that the *Handbook* uses to generally describe an occupational category. Rather, the decisive issue is whether the evidence of record establishes that, as required by the Act, the particular position that is the subject of the petition actually requires the theoretical and practical application of a body of highly specialized knowledge in a specific specialty, and the attainment of a baccalaureate or higher degree in that specialty.

The AAO notes that the generic statements about the proffered position and its duties are sufficient to align the position with the broad occupational category of market research analysts as discussed in the *Handbook's* "Market and Survey Researchers" chapter. However, these generalized statements

are not sufficiently specific to distinguish the proffered position as a unique, complex, or specialized market research analyst position.

Next, as will now be discussed, the AAO finds that the evaluation letter produced by Zhi-Long Chen, Ph.D. for the petitioner is not probative of the proffered position's qualifying as a specialty occupation.

The AAO first notes that neither [REDACTED] Curriculum Vitae (CV) attached to the letter, nor any other evidence in the record of proceeding provides a substantive basis for [REDACTED] self-endorsement as "eminently qualified" to render opinions upon the educational requirements and specialty-occupation status of the proffered position. Whatever expertise [REDACTED] may have in the area of market research analysis is not apparent in this professor's letter, CV, his position as an Associate Professor of Management Science, or his degrees and publications, all of which appear to be in Operations Research. Further, [REDACTED] holds a position as an Associate Professor in Management Science – not Marketing Research. Also, while [REDACTED] asserts that he has "had the opportunity to become familiar with the qualifications required to attain the position of Market Research Analyst and similar professional positions, and the specialized and unique needs of the companies that recruit for graduates for this position," nothing in the record of proceeding provides documentary support for these claim. Likewise, there is no evidence in the record of proceeding that USCIS has recognized [REDACTED] as a person whose opinion merits any deference on the issue of whether a proffered position qualifies as a specialty occupation.

Next, the AAO finds that the content of [REDACTED] evaluation letter does not provide a substantive foundation for his conclusions. The AAO notes that, while [REDACTED] asserts having reviewed the proffered position "in detail," the evaluation letter does not state any specific details about any particular performance requirements that the petitioner's operations would generate for its market research analyst. Rather, the evaluation letter bases its conclusions upon the substantially the same generalized and generic functional descriptions which the AAO finds not indicative of a necessary application of any particular level of educational attainment in a specific specialty; and the evaluation letter, however, does not provide a substantive analysis of why any actual performance requirement(s) of the proffered position would entail the theoretical and practical application of a least a bachelor's degree level of education in a specific specialty.

Further, [REDACTED] discussion of "specialty occupation" reveals a misunderstanding, and misapplication, of the statutory and regulatory standard, as [REDACTED] opines that the proffered position qualifies as a specialty occupation because it "requires a Baccalaureate or higher degree or its equivalent for the particular position" – when the actual standard is a requirement for at least a bachelor's degree, or the equivalent, in a specific specialty. Also, [REDACTED] opines that a wide variety of degrees may equip a person to perform the proffered position, but fails to establish any core similarities between them, or even limit the range of appropriate degrees, stating that "[a] student completing a bachelor's degree in Marketing, Business Administration, or a related area [of] studies and obtains knowledge of the various theories and methods that are necessary to perform these tasks."

The AAO further notes that by including a degree in Business Administration, without a specific major or academic concentration, as among the degrees that would equip the beneficiary for the proffered position, ██████████ has further indicated that the proffered position is not a specialty occupation. In fact, business administration itself is a general term including both professional and nonprofessional activities. A degree in business administration alone is, consequently, insufficient to qualify the holder for a position in a specialty occupation unless the academic courses pursued and the knowledge gained are realistic prerequisites to the particular position in question. *See generally Matter of Ling*, 13 I&N Dec. 35 (Reg. Comm. 1968). In this proceeding, even if the petitioner had demonstrated that the proffered position requires a bachelor's degree in business administration, rather than marketing, business administration, or a related area, that would be insufficient to show that the proffered position qualifies as a position in a specialty occupation, as it would not show that the proffered position requires a minimum of a bachelor's degree or the equivalent **in a specific specialty**.

Incorporating the above discussions into its analysis below, the AAO will now separately address each of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

First, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which assigns specialty occupation status to a position for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties. As the *Handbook* indicates that entry into the position may occur with a degree with coursework in listed subjects, but without a specific course of study leading to a specific degree in the field, market research analyst positions do not categorically qualify under the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). As the record of proceeding contains no evidence establishing that the proffered position is one that normally requires at least a bachelor's degree, or the equivalent, in a specific specialty, the petitioner has not satisfied 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first alternative prong assigns specialty occupation status to a proffered position with a requirement for at least a bachelor's degree, in a specific specialty, that 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 CIS 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)).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for a bachelor's degree in a specific specialty. Also,

there are no submissions from professional associations, individuals, or firms in the petitioner's industry. Further, as already discussed the vacancy announcements submitted by the petitioner do not satisfy this criterion. In short, the record of proceedings does not provide a basis for approving the petition under the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." As evident in the earlier discussion about the generalized descriptions of the proffered position and its duties, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than market research analyst positions that can be performed by persons without a specialty degree or its equivalent.

As the record has not established a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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. As reflected in the earlier discussion of the limited information about the proffered duties, 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 a degree in a specific specialty.

The AAO finds that the director was correct in her determination that the record before her failed to establish that the beneficiary would be employed in a specialty occupation position, and it also finds that the argument submitted on appeal has not remedied that failure. Accordingly, the appeal will be dismissed and the petition denied on this basis.

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 is denied.