

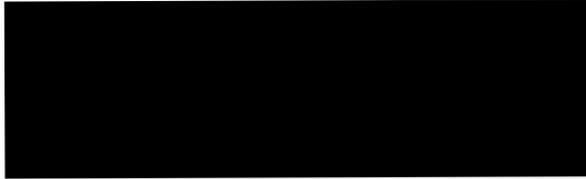


U.S. Citizenship
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FILE: EAC 08 136 50057 Office: VERMONT SERVICE CENTER Date: NOV 03 2009

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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the service center 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.

The petitioner is a media production firm that seeks to employ the beneficiary as a producer. 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 because the proffered position is not a specialty occupation. On appeal, counsel for the petitioner states that the proffered position qualifies as a specialty occupation and submits additional evidence.

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 theoretical and practical application of a body of highly specialized knowledge in field 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 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 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 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 record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director’s request for evidence (RFE); (3) the petitioner’s response to the director’s RFE; (4) the director’s denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary’s services as a producer. Evidence of the beneficiary’s duties includes: the Form I-129; the company support letter dated April 3, 2008; and the petitioner’s response to the director’s RFE. The petitioner claims that the beneficiary’s proposed duties would include the following:

- Coordinate the activities of writers, directors, managers, and other personnel throughout the production process.
- Monitor post-production processes in order to ensure accurate completion of all details.

- Perform management activities such as budgeting, scheduling, planning, and marketing.
- Determine production size, content, and budget, establishing details such as production schedules and management policies.
- Compose and edit scripts, or provide screenwriters with story outlines from which scripts can be written.
- Conduct meetings with staff to discuss production progress and to ensure production objectives are attained.
- Resolve personnel problems that arise during the production process by acting as liaison between dissenting parties when necessary.
- Produce shows for special occasions, such as holidays or testimonials.
- Edit and write news stories from information collected by reporters.
- Write and submit proposals to bid on contracts for projects.

The petitioner stated that it “would never hire anyone who has less than Bachelor’s degree in TV & Radio or Broadcasting.” According to the petitioner, the beneficiary’s bachelor’s degree of arts (TV & Radio) more than satisfies the position’s requirements.

In the RFE issued on May 29, 2008, the director requested additional evidence to determine whether the beneficiary would be performing in a specialty occupation upon arrival in the United States. Specifically, the director requested evidence to support a finding that the petitioner possessed the organizational complexity to employ the beneficiary in a specialty occupation. In a response dated July 3, 2008, counsel for the petitioner addressed the director’s concerns, and claimed again that the minimum degree requirement for the proposed position is a bachelor’s degree of arts (TV & Radio). Counsel provided additional detail regarding the position duties, and indicated that the petitioner currently employs one other individual, [REDACTED] who has a bachelor’s degree in a related field. Specifically, counsel indicated that the individual had a bachelor’s degree in Television and Media Arts.

The director denied the petition, finding the proposed position was not a specialty occupation. On appeal, counsel for the petitioner contends that the proffered position is a specialty occupation, and submits three pieces of evidence in support of this contention. Counsel makes no specific arguments on appeal regarding the basis for the director’s denial.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO first considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors often considered by USCIS when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook* (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.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

In determining whether a position qualifies as a specialty occupation, USCIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations.

As previously mentioned, USCIS 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. The *Handbook* discloses that a baccalaureate degree in a specific specialty is not required for a producer. The *Handbook* reports:

There are no specific training requirements for producers. They come from many different backgrounds. Actors, writers, film editors, and business managers commonly enter the field. Producers often start in a theatrical management office, working for a press agent, managing director, or business manager. Some start in a performing arts union or service organization. Others work behind the scenes with successful directors, serve on the boards of art companies, or promote their own projects. Although there are no formal training programs for producers, a number of colleges and universities offer degree programs in arts management and in managing nonprofit organizations.

Based on the *Handbook's* information, employers do not require a bachelor's degree in a specific specialty for a producer. Accordingly, the petitioner cannot establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the particular position, producer.

The petitioner's contention that it requires a bachelor's degree as a minimum for entry into the position is not sufficient for purposes of this analysis. As stated above, the position of producer proffered by the petitioner does not require a degree in a *specific specialty*; in fact, no baccalaureate degree is necessary for entry into the field. The lack of a requirement of a degree in a specific specialty for this position, both by the petitioner and by the *Handbook*, indicate that the profession of producer is not one that Congress contemplated when it created the H-1B visa category.

On appeal, the petitioner submits an expert opinion evaluation in support of the contention that a specific degree requirement is common to the industry in parallel positions among similar organizations. However, the evaluation by [REDACTED] of the University of California, Santa Cruz, is not persuasive in establishing eligibility in this matter. While the evaluation concludes that the position of producer routinely requires a bachelor's degree for entry into such a position, the letter does not indicate that a bachelor's degree in a specific specialty is required.

To establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations - the record of proceeding contains no evidence to support this contention. Generally, petitioners submit copies of job announcements for similar positions offered by similar companies in the industry. In this matter, the petitioner has failed to submit such postings. The AAO notes that a copy of an approval notice for an H-1B employee for Seoul Broadcasting Systems is submitted. Although counsel asserts that this approval notice represents an approved H-1B petition for a producer in a similar organization, no independent evidence to support this claim is submitted. 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). The petitioner, therefore, has failed to establish that a specific degree requirement is common to the industry in parallel positions among similar organizations.

Nor is there sufficient evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position. While the AAO notes that the petitioner has submitted evidence of its hiring practices in the form of one certificate of employment and resume for another employee, the issue again is that insufficient evidence exists to demonstrate that a degree in a *specific specialty* is normally required by the petitioner. The hiring of one employee with a similar degree as a producer is insufficient to demonstrate that the employer normally required a degree or its equivalent in a specific specialty for this position.

Finally, there is no evidence in the record to establish the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. No evidence in the record shows that the proffered position is so complex or unique that it can be performed only by an individual with a degree. Again, the *Handbook* reveals that the beneficiary's duties are performed by a producer, an occupation that does not require a bachelor's degree in a specific specialty.

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 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.