

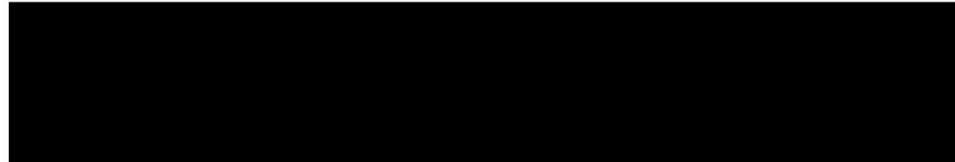
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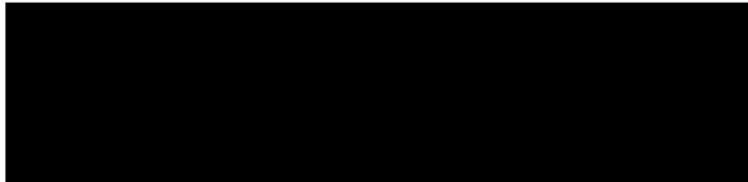
FILE: WAC 04 060 50397 Office: CALIFORNIA SERVICE CENTER Date: MAY 02 2006

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:

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.

A handwritten signature in black ink, appearing to read "Julie" above "Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The director of the California 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 private post-secondary educational institution and was established in 1945. It seeks to employ the beneficiary as an assistant manager 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 based on his determination that the proffered position was not a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) the petitioner's response to the director's request for evidence, dated March 8, 2004; (4) the director's denial letter; and (5) Form I-290B, with counsel's brief and new and additional evidence.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, a petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which 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 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 meet one of the following criteria:

- (I) 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.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS 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. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F.3d 384 (5<sup>th</sup> Cir. 2000). 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.

The petitioner states that it is seeking the beneficiary's services as an assistant manager for film and video equipment to work under the direct supervision of the manager of film and video equipment.

At the time of filing, and in response to the RFE, the petitioner stated that the duties of the proffered position as follows:

- Instruct students in the operation and maintenance of photographic and video equipment, including safety, troubleshooting and repair;
- Assist students in video & photographic productions, including instruction in writing, direction, editing and use of photographic software;
- Maintain, schedule and check out video and photographic equipment;
- Maintain equipment inventory database; and
- Maintain order and compliance from working staff and over students who checkout equipment.

The petitioner stated that it requires a bachelor's degree; that in the past the position was filled with students who had completed required technical courses, or former students who had graduated; and that students who have not graduated lacked the clarity and confidence of graduates.

The director found that the proffered position was not a specialty occupation because the duties are not so specialized and complex as to require a bachelor's degree in a specific field of study. Citing to the Department of Labor's (DOL) *Occupational Outlook Handbook* (*Handbook*), the director noted that the title of assistant manager for film and video equipment is not listed as a specialty occupation. The director further concluded that the petitioner had failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel asserts that the assistant manager position has duties similar to those of a post-secondary teaching assistant, or a graduate assistant, and requires a bachelor's degree, referencing the *Handbook's* section on education and training for graduate assistants and the specific vocational preparation (SVP) code in the Department of Labor's *Dictionary of Occupational Titles* (*DOT*).

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.

To determine whether the duties just described are those of 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; and 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 considered by the AAO when determining these criteria include: whether the Department of Labor's *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, 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)).

The AAO first turns to a consideration of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

Counsel contends that the duties of the proffered position reflect the employment of a graduate teaching assistant in charge of equipment at a college or university scientific laboratory. While the AAO notes the instructional responsibilities associated with the proffered position, it does not find them to establish the proffered position as that of a graduate teaching assistant.

As discussed by the 2006-2007 edition of the *Handbook*, at <http://www.bls.gov/oco/ocos066.htm>, graduate teaching assistants:

assist faculty, department chairs, or other professional staff at colleges and universities by performing teaching or teaching-related duties. In addition to their work responsibilities, assistants have their own school

commitments, as they are also students who are working towards earning a graduate degree, such as a Ph.D. Some teaching assistants have full responsibility for teaching a course—usually one that is introductory in nature—which can include preparation of lectures and exams, and assigning final grades to students. Others provide assistance to faculty members, which may consist of a variety of tasks such as grading papers, monitoring exams, holding office hours or help-sessions for students, conducting laboratory sessions, or administering quizzes to the class. Teaching assistants generally meet initially with the faculty member whom they are going to assist in order to determine exactly what is expected of them, as each faculty member may have his or her own needs. . . . Graduate teaching assistants may work one-on-one with a faculty member or, for large classes, they may be one of several assistants.

The AAO finds that the petitioner's description of the proffered position's duties lacks the specificity and detail needed to determine the actual teaching duties that the beneficiary would perform. Although the job description states that the beneficiary would instruct undergraduate students in the operation and maintenance of photographic and video equipment, and would assist students in photographic productions, it offers no information regarding the day-to-day tasks the beneficiary would perform. The petitioner has not indicated the type, extent, or format of the instruction that the beneficiary would provide in instructing undergraduates. The record does not establish whether the beneficiary, like graduate teaching assistants, would be responsible for evaluating or reporting on student performance following instruction. In that the petitioner stated that in the past it filled the position with non-degreed as well as degreed individuals, the AAO concludes that the level of instructional responsibilities associated with the proffered position is not similar to those of graduate teaching assistants who, the *Handbook* reports, must be enrolled as graduate students to obtain their positions. The AAO also notes that although the proffered position is subordinate to the Equipment Check-out Manager, there is no indication that the Equipment Check-out Manager's position is a teaching position that would warrant the assistance of a graduate teaching assistant. Therefore, the record offers no meaningful description of the teaching duties the petitioner has indicated establish the proffered position as a graduate teaching assistant.

As previously discussed, the AAO requires information regarding the actual duties of a proffered position in order to judge whether it may be classified as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F.3d 384 (5<sup>th</sup> Cir. 2000). Without such information, the AAO is unable to determine the tasks to be performed on a day-to-day basis and whether they are of sufficient complexity to require the minimum of a baccalaureate degree or its equivalent.

As the record in the instant case does not describe the specific teaching duties to be preformed by the beneficiary, it fails to establish either that the duties of the position are those of a teaching or graduate assistant or that their performance would normally require a baccalaureate or higher degree (or its equivalent) in a directly related field for entry-level employment, as required to satisfy the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

On appeal, counsel points to the *Dictionary of Occupational Titles (DOT)* and *Occupational Information Network (O\*NET)*, as proof of the degree requirement for graduate assistants. The record does not, however, establish the proffered position as a graduate teaching assistant. Further, the *DOT* and the *O\*NET* are not persuasive sources of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. They provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training and experience required to perform the duties of that occupation. The SVP rating of 8 given to the employment of graduate assistants by the *DOT* does not indicate that a particular occupation requires the attainment of a baccalaureate or higher degree, or its equivalent, in a specific specialty as a minimum for entry into the occupation. It refers only to the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience, nor specifies the particular type of degree, if any, that a position would require. The Job Zone rating of 5 assigned to graduate teaching assistants by the *O\*NET* also fails to indicate that a bachelor's degree in a specialty is required.

The AAO now turns to a consideration of whether the proffered position may qualify as a specialty occupation under either of the prongs of the second criterion at 8 C.F.R. § 214.2(h)(4)(ii)(A)(2) – the petitioner must establish that a degree requirement is common to the industry in parallel positions among similar organizations, or that the proffered position is so complex or unique that it can be performed only by an individual with a degree.

Regarding parallel positions in the petitioner's industry, with the appeal brief, counsel submits a prevailing wage determination for the proffered position as well as materials from the *DOT*, *O\*NET*, and the *Handbook* describing the work of teaching and graduate assistants. The petitioner claims that the proffered position has a similar level of responsibility as teaching and graduate assistants. However, the record does not establish the proffered position as a teaching assistant. Further, the prevailing wage determination does not establish that the proffered position is similar to the employment of graduate teaching assistants. Its finding regarding the prevailing wage for graduate teaching assistants in Santa Barbara, California is based on the occupational code identified by the petitioner in the Labor Condition Application (LCA) it submitted to the Department of Labor prior to filing the instant petition. In the LCA, the petitioner classified the proffered position under the occupational code "090", i.e., "occupations in college and university education." **Therefore, the prevailing wage determination reflects the petitioner's own estimation of the educational nature of the proffered position, rather than an independent evaluation performed by the Department of Labor.<sup>1</sup>** The *DOT* and *O\*NET* materials, as previously discussed, are not persuasive sources of information regarding whether a particular job requires the

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<sup>1</sup> Where all items on the Form ETA 9035 or ETA 9035E have been completed, the form is not obviously inaccurate, and in the case of Form ETA 9035, it contains the signature of the employer or its authorized agent or representative, the regional certifying officer shall certify the labor certification application. 20 C.F.R. § 655.740(a)(1). DOL is not the guarantor of the accuracy, truthfulness or adequacy of a certified labor condition application. 20 C.F.R. § 655.740(a)(3)(c).

attainment of a baccalaureate degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation.

Thus, the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations.

The record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. Therefore, the petitioner has failed to establish that a specific degree requirement is common to the industry in parallel positions among similar organizations.

Therefore, the record also fails to establish that the position qualifies as a specialty occupation under the second prong of the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) – the position is so complex or unique that it can be performed only by an individual with a degree.

Accordingly, the petitioner has not established its position as a specialty occupation under either prong of the second criterion.

The AAO next considers the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(3) and (4): the employer normally requires a degree or its equivalent for the position; and the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree.

To determine the petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. The petitioner has confirmed that in the past it has filled the position with both non-degreed and degreed individuals. The Equipment Check-out Manager emphasized that the petitioner now seeks to fill the proffered position with a degreed individual because non-degreed individuals tend to lack the clarity and confidence of degreed individuals, and that "the Assistant Manager must have the presence and maturity to be able to maintain order and compliance...[and] ... students have a tendency to view anyone who has not graduated also as a student and therefore, as someone who lacks authority." Accordingly, the petitioner has not established that it normally requires a degree or its equivalent for the proffered position as required to establish it as a specialty occupation under the third criterion.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) requires that a petitioner establish that the nature of the specific duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree.

On appeal, counsel contends that the duties of the proffered position satisfy the criterion's requirements as the beneficiary will perform duties similar to those of graduate or teaching assistants. However, the record in the instant case does not establish the proffered position as a teaching assistant. Moreover, as the record offers no meaningful description of the proffered position's duties, the AAO cannot determine

whether they are so specialized or complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. Therefore, the proffered position has not been established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position meets the requirements for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). 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.