

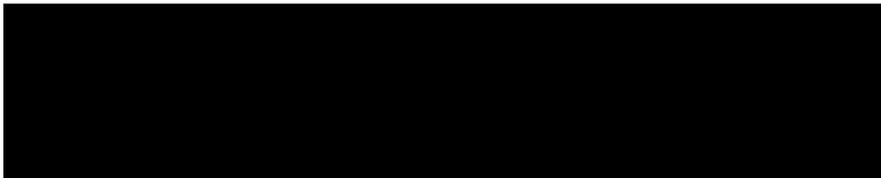
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2000
Washington, DC 20529-2090



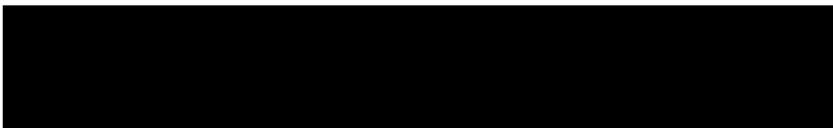
U.S. Citizenship
and Immigration
Services



Dr.

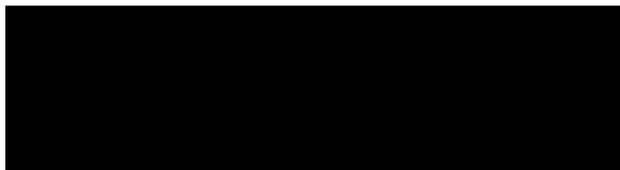
FILE: WAC 09 144 51014 Office: CALIFORNIA SERVICE CENTER Date: APR 01 2011

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

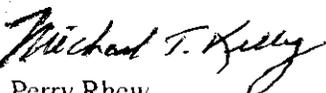


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the 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 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 mattress retail and wholesale business with five employees. It seeks to employ the beneficiary as a store 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 concluding that the petitioner failed to establish that the proffered position is a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE) and the petitioner's response to the RFE; (3) the director's denial letter; and (4) Form I-290B, with counsel's brief and supporting materials. The AAO reviewed the record in its entirety before reaching its decision.

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

Section 214(i)(1) of the 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 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 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, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

In this matter, the petitioner seeks the beneficiary’s services as a store manager. The initial letter from the petitioner submitted with the petition stated that the beneficiary would:

- Analyze business procedures of the company’s operations in the area of mattress, bedding and home furnishings (20% of the beneficiary’s time);

- Analyze and make proposals on how to improve problems and procedures regarding targeting customers and demographics, contribution of domestic sales teams, manufacturing timelines, qualification and channels of distribution, and effective methods of communications information flow, integrated production methods and cost analysis (20% of time);
- Gather and organize information on operating procedures (15% of time);
- Analyze data on sales objectives versus overhead and production costs (15% of time);
- Organize and document findings of studies and prepare recommendations for company management (10% of time);
- Develop and maintain functional and operational manuals (10% of time); and
- Ensure smooth communication between divisions (10% of time).

The AAO finds that the duties are described in terms of generic and generalized functions – for example, analyzing business procedures, analyzing and making proposals, and gathering and organizing information - that convey neither the substantive nature of the work that the beneficiary would actually perform nor a need for a particular level of education, or educational equivalency, in a specific specialty in order to perform that work. Consequently, the record of proceeding lacks an evidentiary foundation that would satisfy any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner stated that the proffered position requires someone who holds at least a Bachelor's degree in Business Administration, Management, or a related field. The petitioner included a copy of the Summary Report for Sales Managers from the Occupational Information Network *O*Net On-line* Summary Report (*O*Net On-line*).

The petitioner submitted copies of the beneficiary's credentials indicating that he has a U.S. Bachelor of Science degree in Business Administration with a concentration in Sales and Marketing.

On May 13, 2009, the director issued an RFE requesting additional evidence that the proffered position is a specialty occupation. The RFE specifically requested a more detailed job description as well as an organizational chart.

In response to the RFE, the petitioner stated that the proffered position is a specialty occupation because it is parallel to the Sales Manager position as described in the *O*Net On-line* Summary Report. The petitioner provided the same job description that was initially submitted with the petitioner and did not provide an organizational chart.

The director denied the petition on July 13, 2009, finding that even though the proffered position is closest to that of a Sales Manager, the petitioner failed to demonstrate that the proffered position of Sales Manager is a specialty occupation.

On appeal, counsel for the petitioner argues as follows:

We would like to point out that the job duties filed in the original petition are that of a Store Manager and not that of a Sales Manager, which the service refers to in

the denial notice. A Store Manager's job duties primarily focus on managing the daily operations and merchandising of the store, implementing customer service programs and operational standards to ensure work fluidity, efficiency and maximization of company potential. The Store Manager also works to improve operating procedures, create merchandise presentation solutions, and manage inventory and merchandising requests. On the contrary, the job duties of a Sales Manager are primarily focused on maximizing sale through management of sales representatives to assure implementation of sales programs. As previously stated, the beneficiary will be analyzing business procedures and fluidity of distribution and production in order to maximize the efficiency of the company as a whole. These are not the job duties of a Sales Manager.

Therefore, even though the petitioner submitted a copy of the *O*NET Online* Summary Report for Sales Managers, counsel argues that the proffered position is not actually a Sales Manager. The AAO agrees with counsel that the proffered position is not that of a Sales Manager and so withdraws the director's finding that the proffered position is closest to that of a Sales Manager. However, the AAO affirms the director's decision that the proffered position is not a specialty occupation.

Counsel argues that the petitioner's business is undergoing an expansion to three new locations within the Los Angeles metropolitan area, which is why it requires someone to fill the proffered position.

On appeal, counsel submits copies of advertisements for both Store Managers and Sales Managers. However, only the advertisements for Store Managers will be addressed in this decision as the AAO agrees with counsel that the proffered position is not that of a Sales Manager.

To make its determination whether the employment described qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty 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 in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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 discussed previously, the AAO agrees with counsel that the proffered position is not that of a Sales Manager. Instead, the AAO finds that the proffered position is closest to Sales Worker Supervisors as described in the *Handbook*, 2010-11 online edition, as follows:

Sales worker supervisors oversee the work of sales and related workers, such as retail salespersons, cashiers, customer service representatives, stock clerks and order fillers, sales engineers, and wholesale sales representatives. Sales worker supervisors are responsible for interviewing, hiring, and training employees. They also may prepare work schedules and assign workers to specific duties. Many of these supervisors hold job titles such as sales manager, department manager, or shift supervisor.

In retail establishments, sales worker supervisors ensure that customers receive satisfactory service and quality goods. They also answer customers' inquiries, deal with complaints, and sometimes handle purchasing, budgeting, and accounting.

Responsibilities vary with the size and type of establishment. As the size of retail stores grows and the variety of goods and services increases, supervisors tend to specialize in one department or one aspect of merchandising. Sales worker supervisors in large retail establishments are often referred to as department supervisors or managers. They provide day-to-day oversight of individual departments, such as shoes, cosmetics, or housewares in department stores; produce or meat in grocery stores; and car sales in automotive dealerships. Department supervisors establish and implement policies, goals, and procedures for their specific departments; coordinate activities with other department heads; and strive for smooth operations within their departments. They supervise employees whose responsibilities may include pricing and ticketing goods and placing them on display; cleaning and organizing shelves, displays, and inventories in stockrooms; and inspecting merchandise to ensure that nothing is outdated. *Sales worker supervisors review inventory and sales records, develop merchandising techniques, and coordinate sales promotions.* In addition, they may greet and assist customers and promote sales and good public relations.

Sales worker supervisors in non-retail establishments oversee and coordinate the activities of sales workers who sell industrial products, insurance policies, or services such as advertising, financial, or Internet services. *Sales worker supervisors may prepare budgets, make personnel decisions, devise sales-incentive programs, and approve sales contracts.*

In small or independent companies and retail stores, sales worker supervisors not only directly supervise sales associates, but they also are responsible for the operation of the entire company or store. Some are self-employed business or store owners.

(Emphasis added.) As stated by counsel on appeal, the beneficiary will focus on managing the daily operations and merchandising of a mattress retail store with five employees, implementing customer service programs and operational standards to ensure work fluidity, efficiency and maximization of company potential as well as working to improve operating procedures, creating merchandise presentation solutions, and managing inventory and merchandising requests.

The training and qualifications required for sales worker supervisors are described as follows in the DOL *Handbook*, 2010-11 online edition:

There is no standard educational requirement for sales worker supervisors, and the educational backgrounds of these workers vary widely. For some jobs, a college degree is required. Supervisors who have college degrees often hold associate or bachelor's degrees in liberal arts, social sciences, business, or management. College graduates usually can enter directly into management training programs sponsored by their company, without much experience. Many supervisors, however, are hired without postsecondary education. For these workers, previous experience in a sales occupation is essential. Most sales worker supervisors have retail sales experience or experience as a customer service representative. In these positions, they learn merchandising, customer service, and the basic policies and procedures of the company.

Therefore, the *Handbook* does not indicate that at least a bachelor's degree in a specific specialty is a normal minimum requirement for sales worker supervisors.

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.

As the *Handbook* indicates no specific degree requirement for employment as a store manager, and as it is not self-evident that, as described in the record of proceeding, the proposed duties comprise a position for which the normal entry requirement would be at least a bachelor's degree, or its equivalent, in a specific specialty, the AAO concludes that the performance of the proffered position's duties does not require the beneficiary to hold a baccalaureate or higher degree in a specific specialty. Accordingly, the AAO finds that the petitioner has not established its proffered position as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, 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 USCIS 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 at least a bachelor's degree in a specific specialty. Regarding the advertisements for store managers submitted on appeal, one of the advertisements states that a bachelor's degree is only preferred and not required. The other three advertisements state that a bachelor's degree is required without specifying that the degrees be obtained in a specific specialty. Consequently, the petitioner has not established that parallel firms routinely require at least a bachelor's degree in a specific specialty.

The petitioner also failed to satisfy 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." The evidence of record does not refute the *Handbook's* information to the effect that there is a spectrum of degrees acceptable for store manager positions, including degrees not in a specific specialty. 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 store manager or other positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

As the record has not established a prior history of recruiting and 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).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its position's 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. The AAO here augments its earlier comments regarding the petitioner's failure to establish this criterion. The AAO does not find that the proposed duties, as generically described by the petitioner, reflect a higher degree of knowledge and skill than would normally be required of store managers not equipped with at least a bachelor's degree, or its equivalent, in a specific specialty. Further, the generalized array of proposed duties do not establish a job that would require the beneficiary to possess skills and qualifications beyond those of a store manager. The AAO, therefore, concludes that 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).

Further, even if established by the evidence of record, which it is not, the requirement of a bachelor's degree in business administration is inadequate to establish that a 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 and closely to the position in question. Since there must be a close corollary 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. *See Matter of Michael Hertz Associates*, 19 I&N Dec. 558.

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

The petition will be denied and the appeal dismissed. 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.

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