



U.S. Citizenship
and Immigration
Services

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FILE: WAC 08 139 50234 Office: CALIFORNIA SERVICE CENTER Date: **DEC 03 2009**

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.

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 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 retail store that seeks to employ the beneficiary as an assistant manager. 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 on July 3, 2006, concluding that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation. On appeal, the petitioner contends that the director erred in denying the petition, and that the proposed position in fact qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

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 an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The 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 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.

Moreover, in determining whether a proposed position qualifies as a specialty occupation, USCIS does not rely simply upon the position’s title. The specific duties of the proposed 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 beneficiary and make a determination as to whether the proposed position in fact qualifies for classification 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.

According to the Form I-129 and the petitioner's letter of support, the beneficiary would work as an assistant manager for a retail store of a company that "presently employs approximately 90,000 individuals and in 2007 had a sales volume of approximately \$4 billion." The petitioner described the proposed duties of the position to include the management of: (1) Presentation; (2) Representing the Brand; (3) Stockroom; (4) Store Operations; (5) Recruiting; (6) Performance Management and Development; (7) Scheduling; (8) Customer Experience; and, (8) Loss Prevention and Shrink. The petitioner briefly described the duties that are entailed in each area of responsibility for the assistant manager.

On April 23, 2008, the director sent a request for further information regarding evidence of the proffered position and the qualifications of the beneficiary. In a response letter, dated June 18, 2008, the petitioner included a breakdown of the duties to be performed by the assistant manager as follows:

- 20% - Recruit, interview, hire, train and develop new associates.
- 20% - Prioritize store assignments, delegate duties and organize work flow for the staff.
- 20% - Oversee the sales, customer service, and operation of our store.
- 10% - Manage the flow of merchandise to meet inventory targets and resolve inventory issues as they arise.
- 10% - Develop and draft inventory volume contingency plans.
- 5% - Develop, draft, and communicate flow strategies based on comprehensive analysis.
- 5% - Review and support all current company procedures and policies, including managing the flow of fashion to maximize sales and minimize markdowns.
- 5% - Handle all cash related issues at a managerial level. Participate in management meetings to communicate strategies to merchants and the company's managing team.
- 5% - Review inventory and sales records, develop merchandising techniques and coordinate sales promotions.

The petitioner also stated that the position of assistant manager "requires skills in and knowledge of communications, human relations, math, English, writing and the business of retail fashion," and these requirements are "normally achieved only through training received in a course of study resulting in a Bachelor's degree in a related field." In addition, the petitioner explained that it "always" requires a bachelor's degree for any managerial position, including the proffered position of assistant manager.

The petitioner submitted job openings for managerial positions for the petitioner, and nine managerial positions for different companies.

In his denial, the director looked to information from the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) regarding the duties and educational qualifications for sales worker supervisors. As noted by the director, such positions do not normally require the attainment of a bachelor's degree (or its equivalent). However, the petitioner asserts on appeal that the proposed position is a "highly specialized" position that requires a bachelor's degree.

In determining whether a proposed 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. The AAO has reviewed the record and concludes that the duties of the proposed position are similar to the duties of sales worker supervisors, as described in the *Handbook*.

In its discussion of the occupational grouping Sales Worker Supervisors, the *Handbook* states the following:

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* or *department manager*. Under the occupational classification system used in the *Handbook*, however, workers who mainly supervise workers and who do not focus on broader managerial issues of planning and strategy are classified as *supervisors*.

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 and the types of goods and services increase, 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 who price and ticket goods and place them on display; clean and organize shelves, displays, and inventories in stockrooms; and inspect merchandise to ensure that nothing is outdated. Sales worker supervisors also 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.

As many of the duties of the proposed position appear closely aligned to those of sales worker supervisors, as discussed in the *Handbook*, the AAO next turns to the *Handbook's* discussion of the educational background necessary for a position as a sales worker supervisor.

Sales worker supervisors usually gain knowledge of management principles and practices through work experience. Many supervisors begin their careers on the sales floor as salespersons, cashiers, or customer service representatives. These workers should be patient, decisive, and sales-oriented.

Education and training. The educational backgrounds of sales worker supervisors vary widely. Supervisors who have postsecondary education often hold associate or bachelor's degrees in liberal arts, social sciences, business, or management. Recommended high school or college courses include those related to business, such as accounting, marketing, management, and sales, and those related to social science, such as psychology, sociology, and communication. Supervisors also must know how to use computers because almost all cash registers, inventory control systems, and sales quotes and contracts are computerized. To gain experience, many college students participate in internship programs that usually are developed jointly by schools and businesses.

The above educational requirements do not support a finding that a bachelor's degree is normally required for entry into this occupation. The *Handbook* finds that a sales worker supervisor can gain knowledge through work experience or a 2-year degree or a 4-year bachelor's degree program. A bachelor's degree, much less one in a specific specialty, however, is not a minimum requirement for entry into this occupation. Moreover, the fact that the education background of sales worker supervisors "vary widely" is not synonymous with the standard imposed by the regulation of normally requiring a bachelor's degree, or its equivalent. Therefore, it is clear that a bachelor's degree, or its equivalent, is not the normal minimum requirement.

Also, 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. A position as an assistant manager does not qualify for classification as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires a demonstration that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. As conveyed earlier in this decision, 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 proposed position. A review of the *Handbook's* discussion

regarding the credentials necessary in order to enter this field reveals that a baccalaureate degree *in a specific specialty* is not required. When a range of degrees, e.g., the liberal arts, or a degree of generalized title without further specialization, e.g., business administration, can perform the duties, the position does not qualify as a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). To prove that a job requires the theoretical and practical application of a body of specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specific course of study. This the petitioner has failed to do.

Accordingly, the proposed position does not meet the first criterion required for classification as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Nor does the proposed position qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations.

The AAO has reviewed the three job postings submitted by counsel. Counsel, however, has failed to consider the specific requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) for establishing a baccalaureate degree or higher as an industry norm. To meet the burden of proof imposed by the regulatory language, a petitioner must establish that its degree requirement exists in parallel positions among similar organizations.

The record fails to establish that any of these job postings come from companies that are "similar" to the petitioner. One job posting is for the Department of Residential Facilities, and the position is for the management of residence halls in a college campus. Another posting is for an assistant store manager but the posting has no information about the store. The advertisements do not give details of the companies and thus it is impossible to determine if the companies are similar to the petitioner. There is insufficient evidence to establish that the advertisers are similar to the petitioner in size, scope, and scale of operations, business efforts, and expenditures. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In addition, the petitioner provided four job postings for an assistant manager for AT&T, one job posting for Sears Holding Corporation, and one job posting for REI store. While these companies' retail stores may be similar in size to the petitioner's, the job advertisements require a bachelor's degree but they do not specify a specific field of study. As mentioned above, 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 proposed position. The job announcements do not specify a certain field of study as required under the regulations.

Moreover, even if the AAO were to find that these companies were similar to the petitioner, the job postings are too few to establish an industry-wide standard.

Finally, the information regarding the duties and responsibilities of the advertised positions is general and does not support a meaningful comparison of their actual performance and specialty knowledge requirements to those of the proposed position. In fact, as AT&T's several business operations are in a completely different industry from that of the petitioner, it also cannot be found that the postings are representative of parallel positions among other similar organizations. Thus, while relevant to this proceeding, the job postings submitted by counsel are insufficient to establish the petitioner's degree requirement as an industry norm in parallel positions among similar organizations. The petitioner has not satisfied the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) requires the petitioner to prove that the proposed position is so complex or unique that only an individual with a degree can perform them. Again, the *Handbook* reveals that the proposed position is analogous to those of sales worker supervisors, which are occupations that do not require a degree in a specific specialty. The record contains no evidence that would support a finding that the position proposed here is more complex or unique than that described in the *Handbook*.

Therefore, counsel has not established that the proposed position qualifies for classification as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO next turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires that the petitioner demonstrate that it normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including the names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. In response to the director's request for evidence, the petitioner stated that the individuals currently employed in the position of assistant manager number "in the hundreds" and thus, it was "impractical" to submit the degrees held by all of its employees. The petitioner explained that the petitioner "always" requests a bachelor's degree for any managerial position. As conveyed earlier in this decision, 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 proposed position. A review of the petitioner's specific requirements for the credentials necessary in order to enter this field reveals that a baccalaureate degree *in a specific specialty* is not required.

Accordingly, the proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The fourth criterion, 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), requires the petitioner to establish that the nature of the proposed position's duties or combination of 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 in the specialty. As previously discussed, the *Handbook* indicates that employers do not normally require a baccalaureate degree in a specific specialty for sales worker supervisor, and no evidence has been submitted to demonstrate that the duties of the proposed position are more

specialized and complex than those of the aforementioned positions. Thus, the proposed position does not qualify for classification as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petitioner has failed to establish that the position qualifies for classification as a specialty occupation under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4) and, therefore, the petition was properly denied. As the proposed position is not a specialty occupation, the beneficiary's qualifications to perform its duties are immaterial. Accordingly, the AAO will 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.