



U.S. Citizenship
and Immigration
Services

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FILE: EAC 08 140 52530 OFFICE: VERMONT SERVICE CENTER DATE: **DEC 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 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.

The petitioner is a restaurant that was established in 1994 and has 6 employees. It seeks permission to employ the beneficiary as an administrative restaurant service manager and, 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, finding that the proposed position was not a specialty occupation. On appeal, the petitioner submits a letter and copies of documents already included in the record.

The record includes: (1) the 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 decision; and (5) the Form I-290B, along with documentation submitted in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

When filing the H-1B petition, the petitioner did not submit a letter supporting the filing. Therefore, in an April 28, 2008 RFE, the director asked the petitioner to submit evidence that could establish that the position was a specialty occupation, such as job postings for positions similar to the proffered one or evidence that the petitioner has hired only degreed individuals in the past for this position.

In a July 23, 2008 response, the petitioner submitted a brief letter in which it stated: "In our company we have always looked for Business Administrators who have at least a Bachelor's Degree in similar fields." The petitioner maintained that it has "rigorous training programs for management positions" and that, because the training programs were "complicated," only individuals with bachelor's degrees are considered for the position. The petitioner submitted the Form W-2, Wage and Tax Statement, and resume of a former employee who allegedly was the last person to hold the proffered position.

On August 6, 2008 the director denied the petition. The director likened the proffered position to that of a restaurant service manager and found that, according to the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, a restaurant service manager position did not require a degree at all, and certainly not one in a specific specialty.

On appeal, the petitioner disagrees with the director's findings and presents several arguments in rebuttal. First, the petitioner claims that it has always required a degree or its equivalent for the position. The petitioner claims that in 2007, it hired an individual who possessed a bachelor's degree in accounting for the position; however, this person quit shortly thereafter. Second, the petitioner claims that the position it is offering requires a degree because it is unique. The petitioner states that just because its company has the word "restaurant" in its title does not mean that its position is a routine restaurant manager job. Third, the petitioner states that the position is not one of a restaurant manager but one of an administrative services manager, as that position is described in

the *Handbook*. For the first time, the petitioner provides a list of the duties that the beneficiary would execute, which are:

- Monitor the facility to ensure that it remains safe, secure, and well-maintained.
- Direct or coordinate the supportive services department of the restaurant.
- Set goals and deadlines for the restaurant.
- Prepare and review operational reports and schedules to ensure accuracy and efficiency.
- Analyze internal processes and recommend and implement procedural or policy changes to improve operations, such as supply changes or the disposal of records.
- Acquire, distribute and store supplies.
- Plan, administer and control budgets for contracts, equipment, inventory and supplies.
- Oversee construction and renovation projects to improve efficiency and to ensure that facilities meet environmental, health, and security standards, and comply with government regulations.
- Hire and terminate clerical and administrative personnel.
- Oversee the maintenance and repair of machinery, equipment, and electrical and mechanical systems.

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.

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.

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 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. 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, to determine whether the position qualifies as a specialty occupation. *Defensor v. Meissner*, 201 F. 3d 384.

The AAO routinely consults the *Handbook*¹ for its information about the duties and educational requirements of particular occupations. Although the petitioner states that the proffered position should be likened to an administrative services manager position, the AAO disagrees. According to the *Handbook*, administrative services managers “coordinate and direct the many support services that allow organizations to operate effectively.” The petitioner, however, is a restaurant that employs six persons and, according to its fire marshal posting, has a seating capacity of 38 persons. An establishment like the petitioner does not have multiple support service divisions that need coordinating and, therefore, the petitioner is not offering the beneficiary a position as an administrative services manager. The AAO concurs with the director that the position is akin to a restaurant or food service manager.² With duties that include monitoring the restaurant, ordering supplies, directing employees, and controlling an operating budget, the position is no more unique or complex than a typical restaurant managerial position.

The *Handbook's* information on educational requirements in the restaurant or food service occupation indicates that a bachelor's or higher degree, or the equivalent, in a specific specialty is not a normal minimum entry requirement for this occupational category. Instead, most individuals working in this occupation have prior work experience in the food service industry and not necessarily a bachelor's degree in a specific field of study. Thus, the proposed position does not qualify for classification as a specialty occupation under the criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the position.

The AAO now turns to a consideration of whether the petitioner, unable to establish its proposed position as a specialty occupation under the first criterion set forth at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under one of the three remaining criteria: a degree requirement as the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position; or the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree.

¹ *Occupational Outlook Handbook*, 2008-2009 ed., available at <http://www.bls.gov/oco/ocos086.htm> (accessed November 23, 2009).

² Even if the AAO had agreed with the petitioner that the job resembled an administrative services manager position, the petitioner would not have satisfied the first criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) because the *Handbook* states that the education and experience required for administrative services managers vary widely. Thus, a bachelor's degree in a specific specialty is not normally the minimum requirement for entry into the occupation.

The proposed position does not 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 demonstration that a specific degree requirement is common to the industry in parallel positions among similar organizations. To meet the burden of proof under this prong imposed by the regulatory language, a petitioner must establish that its degree requirement exists in parallel positions among similar organizations. 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 noted previously, the *Handbook* does not report that the industry normally requires a bachelor's degree as a minimum qualification. The petitioner also has not submitted any evidence that the industry's professional associations have made a degree a minimum requirement for entry or that businesses similar to the petitioner require a degree in a specific specialty for their positions that are parallel to the one offered here. Therefore, the petitioner has failed to establish that a degree requirement is an industry standard, and therefore 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 duties of the proposed position are so complex or unique that only an individual with a degree can perform them. No aspect of the proffered position's duties is particularly unique; the duties involve routine oversight tasks that are inherent in most supervisory or managerial positions. The petitioner, therefore, 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 the petitioner to 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. Here, the petitioner states that it has a past hiring practice of requiring only a bachelor's degree in business administration or a related field because in 2007, it hired an individual who held a bachelor's degree in accounting. The AAO notes, however, that the petitioner has been in business since 1994. That the petitioner has hired only one individual with a bachelor's degree during the last 15 years is evidence that there is no "normal" practice of filling the proffered position by an individual with a bachelor's degree in business administration or a related field. Therefore, 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 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. The

AAO notes that in response to the director's RFE, the petitioner claimed that it has "rigorous training programs for management positions which cover our own policies on food preparation, nutrition, sanitation, security, company procedures, personnel management, recordkeeping, and reporting on the restaurant's computer system." The petitioner claimed further that these training were "complicated" and, therefore, only an individual with a bachelor's degree could participate in them. The petitioner has not, however, submitted any evidence of these training programs' existence for USCIS to evaluate. 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)). As the record presently stands, nothing distinguishes the duties of the proposed position as more specialized and complex than those of a typical manager of a six employee, 38 seating capacity restaurant, who possesses on-the-job experience rather than a bachelor's degree in a specific field. As a result, the record fails to establish that the proposed position meets the specialized and complex threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The proposed position does not qualify 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 this petition was properly denied.

Pursuant to section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, the burden of proof is upon the petitioner to establish eligibility for the benefit it is seeking. Here, the petitioner has not met its burden. Accordingly, the AAO affirms the director's decision to deny the petition and dismisses the appeal.

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