



U.S. Citizenship  
and Immigration  
Services

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FILE: EAC 07 124 53136 Office: VERMONT SERVICE CENTER

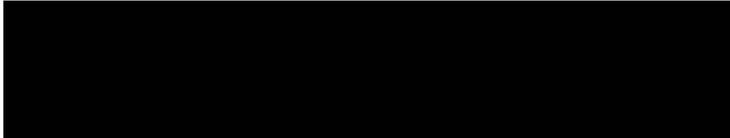
Date: DEC 07 2009

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 of the Vermont 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 wholesale and retail business that seeks to employ the beneficiary as a nutrition consultant. The petitioner, therefore, endeavors to employ 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 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) counsel's response to the director's RFE and supporting documentation; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before reaching its decision.

The director denied the petition on July 23, 2007, concluding that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation.

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 (5<sup>th</sup> 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 petitioner states that it is seeking the beneficiary’s services as a nutrition consultant. On the Form I-129, the petitioner stated that it currently employs 3 individuals and has a gross annual income of approximately \$1 million dollars. In a letter of support, dated March 30, 2007, the petitioner explained the petitioner’s business plan and the beneficiary’s proposed duties as follows:

As part of its business plan, [the petitioner] is creating and branding its own line of products and selling directly to consumers through the planned opening of six

retail stores situated in major shopping malls in the Southeastern United States. [The petitioner's] new product lines include innovative beauty products such as natural herbal supplements made exclusively from Asian herbs. To accomplish its planned business goals, [the petitioner] is assembling a staff of professionals with knowledge in food and nutrition, biochemistry, and Asian herbs.

\* \* \*

[The beneficiary] is needed to assist with the development of [the petitioner's] new herbal supplement product line. In her capacity as Nutrition Consultant, [the beneficiary] will be responsible for conducting nutritional research and supervising activities in the product development stage that relate to nutritional issues.

In addition, the petitioner stated that the proffered position requires "a minimum of a Bachelor's degree in Nutrition or equivalent education, and several years of experience in nutrition, with an emphasis on nutritional research."

In response to the director's request for evidence, the petitioner provided a more detailed description of the duties to be performed by the beneficiary as follows:

1. Research and develop herbal products for general consumer use that is safe and effective (50%).
2. Provide staff and management expert knowledge in food science and nutrition for product development (15%).
3. Work with industry experts in food science and nutrition to ensure compliance with the U.S. Food and Drug Administration in developing nutritional supplements made from exotic herbs (15%).
4. Travel to vendor locations to inspect herbal ingredients for quality, color, texture, and aroma (15%).
5. Train staff on the benefits of using new herbal products to increase sales (5%).

In response to the director's request for evidence, the petitioner also submitted a 2007 business plan. The business plan described the product line it wishes to develop which includes an Asian herbal therapy pack, Saint-John's wart oil, balsam eye packs, and salves with Comfrey.

The petitioner also submitted its lease agreement with Gwinnett Market Fair Shopping Center. The lease is for the rental of a store with an approximate total square foot area of 3,450. In addition, the petitioner submitted a chart of the current employees and their job titles, duties, and credentials. The petitioner employs two sales associates and one assistant sales manager.

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 AAO finds that the proffered position is not a specialty occupation.

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 Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

In reviewing the 2008-2009 edition of the *Handbook*, the AAO looked at the description of dietitians and nutritionists. The *Handbook* states that dietitians and nutritionists "plan food and nutrition programs, supervise meal preparation, and oversee the serving of meals. They prevent and treat illnesses by promoting healthy eating habits and recommending dietary modifications." This explanation does not fit the job duties provided by the petitioner in any way. The AAO attempted to review other positions depicted in the *Handbook* but since the petitioner provided an extremely vague and generalized description of the proposed duties, it is impossible to determine if the beneficiary will be placed in a specialty occupation position. 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 record failed to establish that the petitioner's operations were of the scope or complexity to require the services of a nutrition consultant or that its business was of the type in which a nutrition consultant would be employed on a full- or part-time basis for any length of time. The petitioner employs three individuals, one assistant sales manager and two sales associates. According to the lease agreement and the photographs of the store, the petitioner is a retail store in a strip mall. It is not clear how the beneficiary will "provide staff and management expert knowledge food science and nutrition for product development," when the staff consists of sales associates. In addition, the petitioner stated that the beneficiary will develop herbal products which requires a chemical and biotechnology knowledge rather than a "food science and nutrition" knowledge. Furthermore, the petitioner did not explain where the beneficiary will develop the product line in the retail store. In order to develop an herbal product line, the beneficiary would generally need a laboratory and/or factory to develop and fabricate the products. The record does not establish that the petitioner will actually employ the beneficiary as a nutrition consultant. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In the absence of any evidence to prove that it is engaged in the business activities that it asserts require the beneficiary's services, the petitioner cannot establish that it will actually employ the beneficiary as a nutrition consultant. In addition, without a detailed description of the work to be performed by a beneficiary, a petitioner cannot establish that the tasks he or she would perform are of sufficient complexity to impose the minimum of a baccalaureate degree or its equivalent,

as required by the first criterion. For all of these reasons, the AAO finds that the position does not qualify as a specialty occupation on the basis of a degree requirement in a specific specialty under the first criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.

The proposed position does not qualify as a specialty occupation under any 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. To meet the burden of proof imposed by the regulatory language, a petitioner must establish that its degree requirement exists in positions that are parallel to the proffered position and found in organizations similar to the petitioner.

The petitioner submitted one job posting for a Formulations Scientist for a company that "conducts product testing and assists in the development of new products for a wide variety of Health and Beauty Aids." The record fails to establish that this job posting comes from a company that is "similar" to the petitioner, that is essentially a retail store. There is insufficient evidence to establish that the advertiser is 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)).

Moreover, even if the AAO were to find that this company was similar to the petitioner, the one job posting is insufficient by itself to establish an industry-wide standard.

Finally, counsel's reference to and assertions about the relevance of information from the *O-Net Online* are not persuasive. The *O-Net's* SVP rating 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. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular position. An SVP classification does not describe how those years are to be divided among training, formal education, and experience, nor specify the particular type of degree, if any, that a position would require. Accordingly, the AAO accords no weight to this information.

Accordingly, the proposed position does not qualify for classification as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO also concludes that the record does not establish that the proposed position is a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires a showing that the position is so complex or unique that it can only be performed by an individual with at least a bachelor's degree in a specific specialty. The AAO finds no evidence that would support such a finding, as the position proposed in the petition is very general and vague. The petitioner offered a generic description of the beneficiary's duties in the proposed position. Without a specific description of the work to be performed by a beneficiary, a petitioner cannot establish that the tasks he or she would perform are of sufficient complexity to impose the minimum of a baccalaureate degree or its equivalent in a specific specialty.

Accordingly, the petitioner has not established its proposed position as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a showing that the petitioner normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet this 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 never employed a nutrition consultant before, and its current employees are sales associates and an assistant sales manager. The petitioner did not submit any supporting evidence to establish the third criteria. Again, 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. at 165.

While the petitioner states that a degree is required, the petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. 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 or 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. To interpret the regulations in any other way would lead to absurd results: if USCIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

Accordingly, the petitioner has not established the proffered position as a specialty occupation under the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

To the extent that they are depicted in the record, the duties of the proposed position do not appear so specialized and complex as to require the highly specialized knowledge usually associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Again, there is no information in the record to support a finding that the proposed position is more complex or unique than similar positions in other, similar organizations. As previously noted, USCIS must examine the actual employment of an alien, i.e., the specific tasks to be performed by that alien, to determine whether a position qualifies as a specialty occupation. However, the petitioner's description of the duties of its position is so generic that it is not possible to identify those tasks and, therefore, whether the position is that of a nutrition consultant. Further, without a reliable description of the position's duties, the AAO is unable to determine whether the performance of those duties meets the statutory definition of a specialty occupation -- employment requiring the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation. As a result, the AAO finds the petitioner has failed to establish that it has a specialty occupation for which it is seeking the beneficiary's services. Therefore, the evidence does not establish that the proposed position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Therefore, for the reasons related in the preceding discussion, the proposed position, as described by the petitioner, does not qualify for classification as a specialty occupation under any of the four criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4), and the petition was therefore properly denied. The proposed position in this petition is not a specialty occupation, so the beneficiary's qualifications to perform its duties are inconsequential. Accordingly, the AAO will not disturb the director's denial of the petition.

The petition will be denied and the appeal dismissed for the above stated reasons. 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.