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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals, MS 2090  
Washington, DC 20529



U.S. Citizenship  
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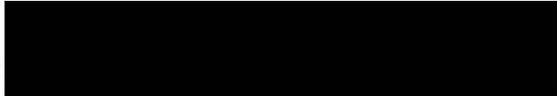


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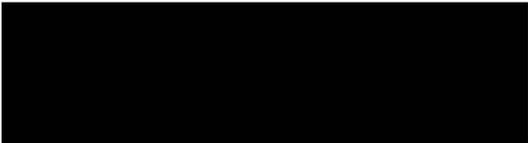
FILE: WAC 07 051 51688 Office: CALIFORNIA SERVICE CENTER Date:

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).

John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, 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 operates a convenience store. It was established in 2001 and claims to employ four persons and to have a gross annual income of \$1,308,702. It seeks to employ the beneficiary as a sales manager. Accordingly, the petitioner 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).

On January 22, 2008, the director denied the petition, determining that the record did not establish that the proffered position is a specialty occupation. On appeal, counsel for the petitioner asserts that the proffered position is a specialty occupation and notes that the “petitioner’s”<sup>1</sup> first H-1B was approved by United States Citizenship and Immigration Services (USCIS). Counsel also submits the opinion of [REDACTED] to establish that the proffered position is a specialty occupation.

The record includes: (1) the Form I-129, Petition for a Nonimmigrant Worker and supporting documentation; (2) the director’s request for evidence (RFE); (3) counsel for the petitioner’s response to the director’s RFE; (4) the director’s denial decision; and, (5) the Form I-290B and the opinion of [REDACTED] in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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.

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<sup>1</sup> Although counsel references the petitioner’s first H-1B, the record does not reveal that the petitioner had previously petitioned for an individual to hold the proffered position as sales manager. The AAO acknowledges that the beneficiary was employed in an approved H-1B position as a sales manager for a different employer. However, the beneficiary’s position with a different employer does not establish that the proffered position is a specialty occupation. It is the nature of the proposed duties of the proffered position as those duties relate to this petitioner’s business that must be evaluated when considering whether the proffered position is a specialty occupation.

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 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.

On the Form I-129, the petitioner stated that the proffered position is that of a “sales manager.” In the petitioner’s December 4, 2006 letter appended to the petition, the petitioner stated that the job requires the prospective employee to plan, direct, and coordinate the sales operation of the business, including the following specific job duties:

- Manage sales activities of establishment.
- Direct the actual distribution of movement of a product to the customer.
- Resolve customer complaints regarding sales and service.
- Coordinate sales distribution by establishing sales territories, quotas, and goals.
- Determine price schedules and discount rates.
- Review operational records and reports to project sales and determine profitability.
- Analyze sales statistics gathered by staff to determine sales potential and inventory requirements and monitor the preferences of customers.  
Direct, coordinate, and review activities in sales and service accounting and record keeping, and in receiving and shipping operation.
- Provide sales reports to store manager.

The petitioner also provided the beneficiary’s approval notice for classification in H-1B status valid from February 2, 2006 to December 16, 2008 that had been filed by a different employer.

In an October 18, 2007 response to the director’s RFE, counsel for the petitioner repeated the job description previously provided and also provided an hourly breakdown of the beneficiary’s proposed duties. The petitioner also included a summary report for sales managers issued by the Department of Labor’s *O\*NET Online (O\*NET)*. Counsel also submitted an occupation profile of sales managers in North Carolina that provided an overview of the occupation and percentages of sales managers with a bachelor’s degree or more. Counsel further submitted job announcements including announcements for: (1) a sales manager at a university convenience store that required completion of a bachelor’s degree program; (2) a convenience store manager that required an associate degree in business management, business administration, or hospitality management with two years experience or a high school diploma or GED with five years of experience; (3) a retail store manager for a national chain of convenience stores that preferred a bachelor’s degree in a

related field or a minimum of two years of management experience in retailing, convenience or fast food industries; (4) a store sales manager for a national bookstore that preferred a bachelor's degree in business administration or liberal arts; (5) a community bookstore manager that indicated the ideal candidate would have a bachelor's degree in business administration, retail merchandising, accounting, communications, marketing or a related field and five or more years of experience as a manager in a retail environment; (6) a retail store manager that required a four-year college degree or two to four years related experience or a combination of education and experience; and (7) a senior assistant or assistant manager or a store manager that preferred an associate's or bachelor's degree and two years experience.

On January 22, 2008, the director denied the petition, noting that the proffered position corresponded to the Department of Labor's *Occupational Outlook Handbook's (Handbook)* discussion of sales representatives and sales managers. Upon review of the *Handbook's* report regarding the educational requirements to perform the duties of a sales representative or sales manager, the director determined that the *Handbook* did not require such a position to have a baccalaureate or higher degree in a specific specialty. The director further determined that the petitioner had not established: that it had previously required a baccalaureate degree for the proffered position; that other businesses similar to the petitioner required individuals with specialized degrees to perform the duties of parallel positions; or that the nature of the proposed duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. The director concluded that the petitioner had not established that the proffered position qualified as a specialty occupation.

On appeal, counsel for the petitioner asserts that the sales manager position is a specialty occupation and submits an opinion letter from [REDACTED], Associate Professor of Management Science, Robert H. Smith School of Business, University of Maryland, College Park, Maryland. Dr. [REDACTED] notes that the petitioner is a convenience store that required the services of a sales manager to help ensure the company's continued success. [REDACTED] opines that a sales manager position with the duties listed by the petitioner would normally be filled by a graduate with a minimum of a bachelor's degree or a master's degree in business administration or a closely related field. [REDACTED] opines further: "[s]uch a requirement is necessary in that a college graduate obtains specific knowledge for the complex responsibilities of this position during an undergraduate or graduate program leading to such a degree" and that "[c]ompletion of such a degree program provides the student with specialized knowledge of Business Administration and related areas and directly prepares the graduate for the challenging tasks of the position." [REDACTED] concludes that the nature of the specific responsibilities and knowledge set out in the description of duties as described by the petitioner are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or master's degree. [REDACTED] also notes that he is aware that employers with openings for sales manager and similar professional positions that recruit at the campus seek graduates with the minimum of a bachelor's degree.

Upon review of the evidence in the record, the AAO does not find the evidence of record persuasive in establishing the proffered position as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO routinely consults the *Handbook* for information about the duties and educational requirements of particular occupations as one method to determine whether a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into a particular position. The *Handbook* discusses the occupation of “sales manager” under the heading “advertising, marketing, promotions, public relations, and sales managers.” The *Handbook* reports:

*Sales managers* direct the firm’s sales program. They assign sales territories, set goals, and establish training programs for the sales representatives. . . . Sales managers advise the sales representatives on ways to improve their sales performance. In large, multiproduct firms, they oversee regional and local sales managers and their staffs. Sales managers maintain contact with dealers and distributors. They analyze sales statistics gathered by their staffs to determine sales potential and inventory requirements and to monitor customers’ preferences. Such information is vital in the development of products and the maximization of profits.

Upon review of the petitioner’s description of the proffered position, the AAO finds that the position corresponds generally with the *Handbook*’s statements regarding the occupation of a sales manager. The AAO observes, however, that the petitioner borrows phrases from the *Handbook* in the description of the position’s duties. For example, the petitioner states that the beneficiary in the proffered position will “[c]oordinate sales distribution by establishing sales territories, quotas, and goals,” a task that is lifted almost verbatim from the *Handbook*’s broad description of the sales manager occupation. The AAO finds that a petitioner cannot establish a proffered position as a specialty occupation by describing the duties of that employment in the same general terms as those used by the *Handbook*. Such a generalized description is necessary when defining the range of duties that may be performed within an occupation, but cannot be relied upon by a petitioner when discussing the duties attached to specific employment. In establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in relation to its particular business interests. The petitioner in this matter has not described why the beneficiary in the proffered position would be required to set sales territories, goals, and establish training programs for sales representatives, when the petitioner has described its four other employees as “cashiers” who operate cash registers, activate and fill fuel pumps, balance cash drawers, and are responsible for cleanliness, not as sales representatives.

Further, upon review of the *Handbook*’s discussion of the educational requirements associated with the position of sales manager, the AAO finds that a sales manager position is not a position that requires the attainment of a baccalaureate degree or higher in a specific field of study. The *Handbook* reports that sales supervisors usually acquire knowledge through work experience and that the educational backgrounds for this position vary widely. It is the variety of paths that are available to individuals pursuing a position as a sales manager that precludes this position from consideration as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). Stated another way, when the requirements to perform a position include avenues other than the attainment of a baccalaureate degree to successfully perform the duties of the position, the position is not a specialty occupation under this criterion.

The AAO has reviewed the opinion of [REDACTED] and finds that the opinion also fails to establish that the proffered position is a specialty occupation under the first criterion. Although [REDACTED] provides his opinion that employers seek candidates for sales manager positions with an educational requirement of a bachelor's or master's degree, the record does not establish his authority to speak to the national hiring practices of U.S. employers. The AAO acknowledges [REDACTED] anecdotal information regarding employers who recruit on campus; however, such information is not in accordance with the *Handbook*, which offers an overview of national hiring practices, draws on personal interviews with individuals employed in the occupation or from websites, published training materials and interviews with the organizations granting degrees, certification, or licenses in the field, to reach its conclusions regarding the nation's employment practices. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). In this matter, [REDACTED] opinion is insufficient to overcome the *Handbook's* report that not all sales manager positions require an individual with a degree in a specific discipline.

The AAO also acknowledges counsel's reference to the *O\*NET* regarding a sales manager position. However, the *O\*NET* provides only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. An SVP or Job Zone rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. The *O\*NET* does not describe how those years are to be divided among training, formal education, and experience and does not specify the particular type of degree, if any, that a position would require. The AAO does not consider the *O\*NET* to be a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. The record does not demonstrate that the occupation of a sales manager of a convenience store would require the beneficiary to have attained a bachelor's degree or its equivalent in a specific specialty to perform the duties described.

Moreover, counsel and the petitioner's implication that the beneficiary's educational background and work experience as a sales manager in an H-1B classification for another employer should be used to establish that the petitioner's proffered position is a specialty occupation is not persuasive. Although the AAO agrees that an individual with the beneficiary's educational background would be prepared to perform the duties of the proffered position, the AAO does not find that *only* an individual with such education would be able to perform the duties of the proffered position. A beneficiary's background and educational experience do not make a position a specialty occupation. Rather it is whether the duties of the position require 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. In this matter, the description of duties does not include duties that could only be performed by those individuals with a bachelor's or higher degree in a specific field. The petitioner has not explained why the routine duties of a sales manager would require the attainment of a baccalaureate or higher degree, and has not otherwise

demonstrated that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the proffered position. The petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO now turns to consider whether the petitioner may qualify the proffered position under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), whether a degree requirement is 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. Factors considered by the AAO when determining these criteria include: whether the *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, reports 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)).

A review of the evidence of record finds it insufficient to establish that the proposed duties comprise a position that is identifiable with an industry-wide educational standard, or is distinguishable, by its unique nature or complexity, from a similar but non-degree-requiring position. The AAO acknowledges the advertisements submitted by the petitioner to establish an industry-wide educational standard for the proffered position. However, the advertisements submitted do not assist in this regard. As the director noted, the advertisements even when indicating that a degree is required, do not indicate that the degree must be a bachelor's degree in a specific discipline. In addition, the advertisements do not contain adequate evidence establishing that the advertising businesses are similar to the petitioner in size, number of employees, or level of business. Going on the 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 190 (Reg. Comm. 1972)). The job announcements submitted do not establish that organizations similar to the petitioner "routinely employ and recruit only degreed individuals," in a specific discipline. Thus, the petitioner has not established that a degree requirement is common to the industry in parallel positions among similar organizations. The petitioner has not established the first prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner in this matter has also failed to establish the second prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) which requires that the proffered position be of such complexity or uniqueness that it can be distinguished from other positions within the same industry. The record does not contain evidence detailing what duties of the sales manager position require the attainment of a baccalaureate or higher degree. The record lacks evidence or analysis establishing that particular duties of the proffered position differ from the routine duties of a skilled sales manager. The AAO does not find that the evidence of record establishes that the specific duties of the proposed position are more specialized and unique than those of a typical sales manager or are so complex or unique that they can be performed only by an individual with a degree in a specific discipline. The petitioner has not provided evidence to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The record also fails to demonstrate that the petitioner has a history of recruiting and hiring degreed candidates for the proffered position. To determine whether the petitioner has fulfilled the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), 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 states that it has been in the business since 2001 and that prior to its desire to hire the beneficiary, the owner of the business, who has a bachelor's degree, used to take care of the store. The petitioner does not provide evidence of the owner's degree and does not provide evidence that a degree is required to "take care of the store" rather than is simply a preference. 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. The AAO also observes that 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 non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. The record does not establish that the petitioner has satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The AAO now turns to the fourth criterion and whether the petitioner has established that the duties of the proffered position are sufficiently specialized and complex to require knowledge usually associated with the attainment of a baccalaureate degree in a specific discipline and, therefore, establish the proffered position as a specialty occupation under the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). The duties of the proffered position show that the tasks relate primarily to the routine duties of a sales manager. Although the petitioner asserts that the duties of the position are the duties of a specialty occupation, the petitioner has not explained what particular duties of the proffered position comprise tasks that require the application of specialized or complex knowledge associated with the attainment of a baccalaureate degree or higher degree. The petitioner has not adequately explained how the duties of the proffered position differ from those of a generalist position in sales management. The petitioner has not substantiated that the nature of its business requires a sales manager who must perform duties that are specialized and complex to be designated a specialty occupation. The AAO has again reviewed the opinion of ██████████ and does not find that ██████████ conclusions are based on a factual foundation. The record does not reveal that ██████████ visited the petitioner's site, interviewed the officers of the petitioner, or obtained any information that would substantiate that the petitioner's convenience store would require an individual with knowledge usually associated with the attainment of a baccalaureate degree in a specific discipline to perform specialized or complex duties. Again, when an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791. Moreover, as determined above, a preference on the part of the petitioner to hire an individual with a baccalaureate degree in a specific discipline does not establish that the duties of the petitioner's store manager position comprise tasks that are sufficiently specialized or complex. Although the position may require skill, the petitioner has not established that that skill may be attained only through the specialized coursework attendant to a four-year university level education in a specific discipline. The petitioner has not established that the proffered position requires the performance of duties that require a bachelor's degree in a specific discipline. The petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4).

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