

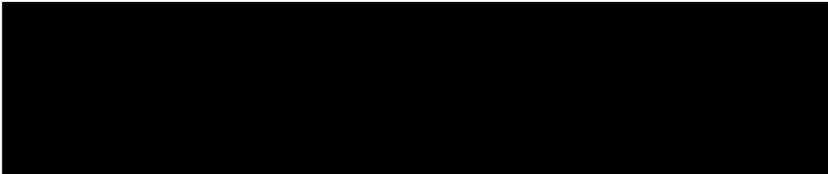
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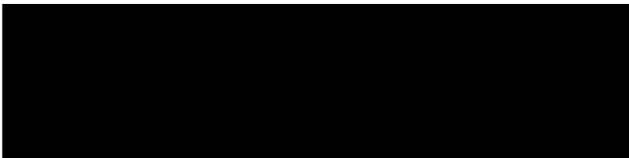
FILE: WAC 07 195 52496 Office: CALIFORNIA SERVICE CENTER Date:

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 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 an ethnic grocery wholesaler with four claimed employees that seeks to employ the beneficiary as a full-time financial analyst. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to § 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 because the petitioner has not demonstrated that the proffered position is a specialty occupation.

The issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation. As will be discussed below, the AAO finds that the petitioner has not established that the proffered position is a specialty occupation. Accordingly, the director's decision to deny the petition shall not be disturbed.

The AAO bases its decision upon its consideration of the entire record of proceeding before it, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the matters submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief in support of the appeal.

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.

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 (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.

The AAO will now discuss and evaluate the evidence of record.

In the May 24, 2007 letter submitted with the Form I-129, the petitioner describes the proposed duties of the proffered financial analyst position as follows:

[I]nvestigating the possibilities of increasing the company's profitability . . . [A]ssess company's financial needs and strategies . . . [P]articipate in projects to reduce the overhead operational costs of the company . . . [P]roviding support in management tasks such as budgeting and investments . . . [P]articipating in studies regarding operational costs of the company . . . [E]stablishing the financial profile of the company.

In the December 19, 2007 letter of response to the RFE, the petitioner describes the proposed duties and time allocations of the proffered financial analyst position as follows:

- The financial analyst will assess company's financial needs and strategies, including determining the advisability of purchases overseas; the availability of funds for payments; the transaction rates and rates of exchange; the availability and costs of shipping, customs, and storage pending sales (20%);
- The financial analyst will investigate the possibilities of increasing the company's profitability, including management of cost and overhead, management of purchases in relationship to the fluctuating exchange rates; management of credit available to the company (20%);
- The financial analyst will provide support and guidance in management tasks such as budgeting and investments (5%);
- The financial analyst will participate in studies regarding operational costs of the company (5%);
- The financial analyst will establish the financial profile of the company (5%);
- The financial analyst will develop eCommerce plans by analyzing and interpreting data and historical trends. Validate budget with management and Direct Marketing (10%);
- The financial analyst will lead eCommerce financial planning and forecasting on a daily, weekly, monthly and seasonal level (10%);

- The financial analyst will identify business opportunities based on website analysis and partner with merchants to implement changes (15%);
- The financial analyst will create, update and distribute eCommerce reports and share insights and communicate findings with business partners (5%);
- The financial analyst will evaluate current reporting tools and identify improvements and changes (5%).

On appeal, counsel reiterates the proposed duties, as listed above by the petitioner, and claims that the proffered position is similar to that of a financial manager. Counsel claims further that the petitioner is a growing company that “is seeking an individual to manage and advise on their financial affairs on an international basis.”

The AAO routinely consults the Department of Labor’s (DOL) *Occupational Outlook Handbook (Handbook)* for its information about the duties and educational requirements of particular occupations. The AAO does not find that the proffered position is that of a financial analyst, for which most companies require at least a bachelor’s degree in finance, business administration, accounting, statistics, or economics. *See the Handbook*, 2008-09 edition. As discussed by the DOL, financial analysts are individuals who:

Assess the economic performance of companies and industries for firms and institutions with money to invest. Also called *securities analysts* and *investment analysts*, they work for investment banks, insurance companies, mutual and pension funds, securities firms, the business media, and other businesses, helping them make investment decisions or recommendations. Financial analysts read company financial statements and analyze commodity prices, sales, costs, expenses, and tax rates in order to determine a company’s value and to project its future earnings. They often meet with company officials to gain a better insight into the firm’s prospects and to determine its managerial effectiveness.

Financial analysts can usually be divided into two basic types: those who work on the *buy side* and those who work on the *sell side*. Analysts on the buy side work for companies that have a great deal of money to invest. These companies, called institutional investors, include mutual funds, hedge funds, insurance companies, independent money managers, and charitable organizations, such as universities and hospitals, with large endowments. Buy side financial analysts work to devise investment strategies for a company’s portfolio. Conversely, analysts on the sell side help securities dealers to sell their products. These companies include investment banks and securities firms.

In this matter, the petitioner is not an investment bank, insurance company, mutual and pension fund, securities firm, business media, or institutional investor, as described above by the DOL.

Rather, the petitioner is an ethnic grocery wholesaler that was established in 1999, with 4 claimed employees and a claimed gross annual income of \$400,000. The petitioner has not demonstrated that it will employ the services of a financial manager, who is part of an executive decision-making team. Furthermore, there is no evidence that the position offered includes complex or advanced financial planning duties involving mergers and consolidations, global expansion and financing, or that the position requires an individual with a knowledge of sophisticated financial planning techniques normally associated with the duties of a financial manager. Of further note, the petitioner has not provided any evidence in support of its claimed employees, income, or business expansion, such as federal income tax returns and quarterly wage reports. 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)).

The AAO also does not concur with counsel that the proffered position is that of a financial manager, an occupation that would normally require a bachelor's degree in finance, accounting, economics, or business administration. In its *Handbook*, 2008-09 edition, the DOL describes the job of a financial manager, in part, as follows:

Controllers direct the preparation of financial reports, such as income tax statements, balance sheets, and analyses of future earnings or expenses, that summarize and forecast the organization's financial position. Controllers also are in charge of preparing special reports required by regulatory authorities. Often, controllers oversee the accounting, audit, and budget departments.

Financial managers play an increasingly important role in mergers and consolidations and in global expansion and related financing. These areas require extensive, specialized knowledge to reduce risks and maximize profit. Financial managers increasingly are hired on a temporary basis to advise senior managers on these and other matters. In fact, some small firms contract out all their accounting and financial functions to companies that provide such services.

The role of the financial manager, particularly in business, is changing in response to technological advances that have significantly reduced the amount of time it takes to produce financial reports. Financial managers now perform more data analysis and use it to offer senior managers ideas on how to maximize profits. They often work on teams, acting as business advisors to top management.

The petitioner has not demonstrated that it will employ the services of a financial manager/controller, who is part of an executive decision-making team. Further, there is no evidence that the position offered includes complex or advanced financial planning duties involving mergers and consolidations, global expansion and financing, or that the position requires an individual with a knowledge of sophisticated financial planning techniques normally associated with the duties of a financial manager. Moreover, the record contains insufficient evidence to support counsel's claim

on appeal that the petitioner requires the services of a financial manager “to manage and advise on their financial affairs on an international basis.”

The record in this matter is insufficient to establish the proffered position as a specialty occupation. As reflected in the above discussion, the petitioner’s organizational hierarchy and the nature of the proffered position remain unclear. The petitioner must provide independent objective evidence of the daily tasks the petitioner requires the proffered position as it relates to its specific business. The petitioner must detail its expectations of the proffered position and must provide evidence of what the duties of the proffered position entail on a daily basis. Such descriptions must correspond to the needs of the petitioner and be substantiated by documentary evidence. To allow otherwise, essentially requires acceptance of any petitioner’s broadly stated description, rather than a detailed, comprehensive description demonstrating what the petitioner expects from the beneficiary and what the proffered position actually requires.

The petitioner does not provide evidence of what the beneficiary does on a day-to-day basis or of the petitioner’s organizational hierarchy. Only a detailed job description as it relates to the petitioner’s specific business will suffice to meet the burden of proof in these proceedings. *See Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The duties of the proffered position are only generally and generically described. They do not convey the substantive work that would be required of the beneficiary. The petitioner also provides no evidence in support of its claimed employees, income, or business expansion. Therefore, the petitioner has not established that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the position. Accordingly, the petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO now turns to a consideration of the proffered position pursuant to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), whether a degree requirement is common to the industry in parallel positions among similar organizations or that a particular position is so complex or unique that only an individual with a degree can perform the duties associated with the position. The record contains job postings for various positions including: an accounting and consolidations manager to work in the corporate accounting department for a Fortune 500 company; a financial analyst and a merchandise analyst for a large retail business founded in 1947; a research analyst for a leading international management consulting firm; and an e-Commerce analyst for Williams-Sonoma, Inc. The AAO observes that the advertisers are dissimilar to the petitioner’s ethnic grocery wholesaler business. Moreover, the petitioner has not shown that the proposed duties of the proffered position are as complex as the duties described for the advertised positions, such as: performing monthly consolidation of foreign and domestic subsidiaries; supervising and developing accounting staff; providing pertinent visibility, feedback, and direction to the planning manager and buying teams to support the development of store volume clusters and the implementation of new merchandise concepts; and collaborating with direct marketing, finance, inventory, and merchandising teams to develop and validate eCommerce 3-year financial plans. Thus, the advertisements are insufficient to establish that a degree requirement is common to the industry in parallel positions among similar organizations.

Counsel also states that USCIS has already determined that the proffered position is a specialty occupation since USCIS has approved another, similar petition in the past. This record of proceeding, however, does not contain all of the supporting evidence submitted to USCIS in the prior case. In the absence of all of the corroborating evidence contained in the other record of proceeding, the information submitted by counsel is not sufficient to enable the AAO to determine whether the position offered in the prior case was similar to the position in the instant petition. Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

The record does not include any evidence from firms, individuals, or professional associations regarding an industry standard. In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. In the instant petition, the petitioner has submitted insufficient documentation to distinguish the proffered position from similar but non-degreed employment. Moreover, the evidence of record about the particular position that is the subject of this petition does not establish how aspects of the position, alone or in combination, make it so unique or complex that it can be performed only by a person with a degree in a specific specialty. The petitioner has failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO usually 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 to aid in determining the third criterion. In this matter, although the petitioner indicates it was established in 1999, the record does not contain evidence that the petitioner previously employed anyone in the proffered position. As referenced above, 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 specialized field of study. Moreover, the AAO notes that while a petitioner may believe that a proffered position requires a degree, that opinion cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. *See Defensor v. Meissner*, 201 F. 3d at 384. The petitioner has not sufficiently described the duties of the proffered position or provided other documentary evidence that would establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

Neither has the petitioner satisfied the requirements of the fourth criterion by distinguishing the proffered position based on the specialization and complexity of its duties. On appeal, counsel reiterates the proposed duties and time allocations as provided by the petitioner in response to the RFE. As discussed above, the petitioner's organizational hierarchy and the exact nature and level of authority of the proffered position remain unclear. As reflected earlier in this decision, the record fails to establish the substantive nature of this particular position's duties. Accordingly, the evidence

does not establish the level of specialization and complexity required by this criterion. The evidence of record does not contain sufficient information to establish that the duties as described are duties that correspond to a position that is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. Accordingly, the petitioner has failed to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall 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.