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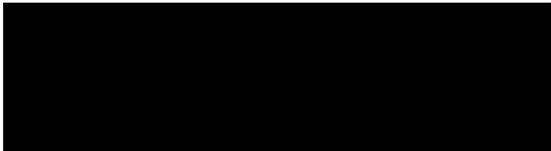
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: EAC 08 160 50382 Office: VERMONT SERVICE CENTER Date: **AUG 03 2010**

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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 engaged in restaurant operations and it seeks to employ the beneficiary as a corporate quality control manager 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 concluding that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) counsel's response to the director's RFE; (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.

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 (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.

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.

In an addendum to the Form I-129, the petitioner stated that it owns six restaurants that employs more than 180 employees and has annual gross sales in excess of \$7 million. The petitioner described the duties of the proffered position as follows:

The duties of the position include conducting research and development of new and improved methods and systems for production, quality control, packaging, and distribution; studying methods and recommending solutions to management; developing food standards, safety and sanitary regulations, and waste management; and testing new methods and procedures. In addition, [the petitioner] will also be responsible for developing and initiating standards and methods for inspection and testing; devising sampling procedures and designs and develops forms and instructions for recording, evaluating, and reporting quality and reliability data; directing workers engaged in measuring and testing and tabulating data concerning materials, products, and process quality and reliability; and establishing programs to evaluate precision and accuracy of testing and measurement.

This is done in order to ascertain where more efficient methods of operating might create financial savings and increased profitability and effectiveness. This analysis entails planning studies of work problems and procedures, such as organizational changes, communications, information flow, inventory control and cost analysis; gathering and organizing information on problems and procedures, including present and future operating procedures; analyzing data gathered, developing information and considering all available solutions or alternate methods of proceeding; and organizing and documenting the findings of the studies and preparing recommendations for implementation of systems, procedures and organizational actions.

The duties of this position require the services of an individual who is the holder of a Bachelor's Degree in Business Administration, Business Management, or a closely related discipline.

On June 24, 2008, the director requested further information of the proffered position and the petitioner's operations.

In response, the petitioner submitted a letter and stated that it wishes to "hire a Corporate Quality Control Manager who will centralize and regulate the standards for food quality, safety regulations, sanitary regulations, and waste management." The petitioner also stated that it wishes to serve the same high quality of food at all of its restaurants and the corporate quality control manager "will be responsible for teaching and supervising all of our cooks the proper way to cook our food, how to properly follow all recipes, how to properly store food, and which ingredients to use." Furthermore, the petitioner stated that the corporate quality control manager will spend "45% of his time developing, establishing, and teaching all of our restaurants' food standards; 25% of his time will be spent developing and initiating standards and methods for inspection and testing; 20% of his time will be spent directing and training workers regarding food safety and sanitary regulations; and 10% of his time will be spent advising and recommending changes in current procedures and programs to the company's Management team.

The director denied the petition, finding that the petitioner had satisfied none of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), and therefore had not established that the proposed position qualifies for classification as 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 U.S. Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

The AAO finds the petitioner's description of the duties of its proffered position to reflect the type of activities generally performed by a Food Service Manager. The *Handbook* states, in part, the following with regard to the employment of food service managers:

Food service managers are responsible for the daily operations of restaurants and other establishments that prepare and serve meals and beverages to customers. Besides coordinating activities among various departments, such as kitchen, dining room, and banquet operations, food service managers ensure that customers are satisfied with their dining experience. In addition, they oversee the inventory and ordering of food, equipment, and supplies and arrange for the routine maintenance and upkeep of the restaurant's equipment and facilities. Managers are generally responsible for all administrative and human-resource functions of the business, including recruiting new employees and monitoring employee performance and training.

The *Handbook* states the following educational requirements to fill the position of a food service manager:

Most food service managers have less than a bachelor's degree; however, some postsecondary education, including a college degree, is increasingly preferred for many food service manager positions. Many food service management companies and national or regional restaurant chains recruit management trainees from 2- and 4-year college hospitality or food service management programs, which require internships and real-life experience to graduate. While these specialized degrees are often preferred, graduates with degrees in other fields who have demonstrated experience, interest, and aptitude are also recruited.

Most restaurant chains and food service management companies have rigorous training programs for management positions. Through a combination of classroom and on-the-job training, trainees receive instruction and gain work experience in all aspects of the operation of a restaurant or institutional food service facility. Areas include food preparation, nutrition, sanitation, security,

company policies and procedures, personnel management, recordkeeping, and preparation of reports. Training on the use of the restaurant's computer system is increasingly important as well. Usually, after several months of training, trainees receive their first permanent assignment as an assistant manager.

Almost 1,000 colleges and universities offer 4-year programs in restaurant and hospitality management or institutional food service management; a growing number of university programs offer graduate degrees in hospitality management or similar fields. For those not interested in pursuing a 4-year degree, community and junior colleges, technical institutes, and other institutions offer programs in the field leading to an associate degree or other formal certification.

As such, the 2010-2011 edition of the *Handbook* reports that a baccalaureate degree is not the normal minimum educational requirement for food service managers as it states that “most food service managers have less than a bachelor’s degree.” In addition, as it only states that “some postsecondary education, including a college degree, is increasingly preferred,” these findings do not support the contention that a bachelor’s degree is normally required for entry into the field. Employer preferences do not equate to employer requirements, and do not rise to the “normally required” standard imposed by the regulation. Moreover, the *Handbook* notes, institutions offering hotel or restaurant management courses include technical institutes and vocational and trade schools, as well as community, junior, and four-year colleges. The *Handbook* also specifically states that while a two or four-year degree in a specific specialty is often preferred, graduates with degrees in other fields and experience are also recruited for these positions.

Accordingly, the AAO finds the record does not establish that the proffered position qualifies as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. Accordingly, the proposed position does not qualify for classification as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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 either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations. The petitioner submitted a professional position evaluation report by [REDACTED] a Program Director/Full-Time Faculty [REDACTED]. The author stated that the “position of

corporate Quality Control Manager is a common position required by similar sized companies and clearly meets the standards of a ‘Specialty Occupation Position.’”

The letter submitted by the petitioner does not satisfy this prong. The author of the letter does not submit any industry surveys or other data to support her assertions. In addition, in reviewing the authors resume, it does not appear that she has any experience in restaurant management. Moreover, the author has not established adequate factual foundations to support her opinion. More specifically, the author does not indicate whether she reviewed company information about the petitioner, visited its site, or interviewed anyone affiliated with the petitioner. 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).

Finally, regardless of the weight the AAO gives this opinion, [REDACTED] conclusion, i.e., "that the position of Corporate Quality Control Manager at [the petitioner] would require a Bachelor's degree in Business Administration, Restaurant Management or its equivalent to adequately perform the complex duties required for the position," does not support a finding that the proffered position qualifies as a specialty occupation. Even if established by the evidence of record, which it is not, the requirement of a bachelor's degree in business administration is inadequate to establish that a position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close corollary between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). To prove that a job requires the theoretical and practical application of a body of specialized knowledge as required by Section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study. As explained above, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

Therefore, the AAO finds that the letter from [REDACTED] does not establish that the proffered position is a specialty occupation.

The petitioner also submitted job postings from several companies including, [REDACTED] a company that owns [REDACTED] On the Border, and [REDACTED] All of these companies are nationwide chain restaurants and some of them have manufacturing processing plants. The record fails to establish that these job postings come from companies that are “similar” to the petitioner. In

other words, there is insufficient evidence to establish that the advertisers are similar to the petitioner in size, scope, and scale of operations, business efforts, and expenditures. Moreover, even assuming arguendo that these advertised positions are for similar organizations, only five of the postings provided appear to be for similar positions. Of those five postings, two do not require a degree in a specific specialty. Of the remaining three, the specified degree is one related to food science, not business administration or restaurant management. As such, the evidence provided fails to demonstrate that a bachelor's or higher degree, or its equivalent, in a specific specialty is a normal minimum entry requirement for the proffered position. Even if it did and as discussed in greater detail below, the beneficiary would not qualify to perform the duties of such a position as he does not possess the requisite degree or its equivalent. 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)).

Therefore, the proposed position does not qualify as a specialty occupation under the criteria set forth at the first prong of the second criterion.

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 petitioner's listing of the duties is similar to the duties listed in the *Handbook*, and the petitioner did not explain how the proffered position may be more complex than a typical food services manager position. The initial job description stated that duties of the proposed position will entail "planning studies of work problems and procedures, such as organizational changes, communications, information flow, inventory control and cost analysis." However, the petitioner did not explain what kind of studies or changes the beneficiary will complete. The nonspecific description precludes the AAO from determining precisely what tasks the beneficiary would perform for the petitioner on a daily basis. 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 position of quality control manager is a newly-created position and thus, the petitioner did not submit any evidence to establish this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires a demonstration that 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.

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. 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 the specific tasks the beneficiary will perform on a daily basis and, therefore, whether those duties are so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree or its equivalent in a specific specialty. 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).

The generic description of the duties of the proffered position, which precluded consideration of the proffered position under the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) also makes it impossible to evaluate these duties under the specialized and complex threshold of the fourth criterion. Accordingly, the AAO concludes that the proffered position is not a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Therefore, for the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position meets the requirements for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). 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. Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, although a beneficiary's qualifications are only relevant when a proffered position has been demonstrated to be a specialty occupation, the AAO will nevertheless find that the petitioner has failed to demonstrate that the beneficiary qualifies to perform the duties of a specialty occupation. Specifically, the evaluation of professional work experience written by ██████ fails to establish that the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) have been met in that insufficient evidence has been presented to show that ██████ "has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience." Although ██████ claims in her evaluation to have such authority, no independent evidence has been presented from South University in West Palm Beach, Florida to corroborate this self-serving claim. As such, the appeal will be dismissed and the petition denied for this additional 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.