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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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JAN 05 2010

FILE: EAC 08 140 53312 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

for Michael F. Kelly
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner operates a banquet hall and hospitality center, and seeks to employ the beneficiary as a business affairs coordinator. Therefore, 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).

The director denied the petition, finding (1) that the proffered position did not qualify as a specialty occupation, and (2) that the beneficiary was not qualified to perform the duties of a specialty occupation. On appeal, counsel submits a brief and additional evidence.

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 its attachments.

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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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 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 petitioner seeks to employ the beneficiary as a business affairs coordinator, and indicated that she holds a master of education degree from Mechnikov Odessa National University in the Ukraine. An accompanying credentials evaluation contends that based on her degree and her three years of work experience in business administration, the beneficiary holds the equivalent of a U.S. bachelor’s degree in business administration. In his letter of support dated March 31, 2008, counsel contended that the beneficiary, in the proffered position, will be in charge of approximately 20-25 persons coming from abroad under the J-1 State Department Program. Counsel further stated that her duties will include direct supervision of administrative teams, support of project operations, coordination of documentation, control of activities, and involvement in the operation activities of the petitioner’s facility.

The initial evidence submitted with the petition was deemed insufficient; therefore, the director issued an RFE requesting additional documentation regarding the specialized knowledge position offered to the beneficiary. According to counsel's response to the director's RFE, the position of "business manager" or "business affairs coordinator" is a functional title, and contends that the beneficiary's corporate position title would be "chief operating officer," since she will be in charge of the business flow and success. Counsel continued by explaining the business of the petitioner, stating that it was a huge banquet operation with three banquet halls with a total capacity of 2,000 persons. Counsel explained that the petitioner's business operates seven days per week, and currently employs a large staff, including eleven chefs and cooks, sixteen barmen, twelve additional kitchen staff, and at least 24 wait staff.

Regarding its staff, counsel explained that "finding, hiring, training and keeping service industry employees is a continual problem." Consequently, counsel explained that the petitioner recruited Ukrainian students in the summer months, and recruited students from South America in the winter months. Noting that language barriers would exist as a result of these measure, counsel explained that the beneficiary speaks and writes five languages and her language skills would facilitate the coordination and supervision of the petitioner's foreign employees.

Regarding her position, counsel stated that her duties and responsibilities were as follows:

As part of her responsibilities, she will manage the facility to ensure efficient and profitable operation. She will head the operating team that includes all other professional department heads and their respective departments. She will delegate authority and assign responsibility to the various department heads. Her primary responsibility shall be to ensure smooth and efficient operating systems among all the various department[s] and the large staff.

She will analyze current systems and operations. She shall identify existing problems or areas of weakness and make recommendations for improvements. She shall set out the procedures that may be followed to achieve the successful implementation of her proposal. She shall also plan business and marketing strategies and report directly to the General Manager.

She will allocate funds, authorize and approve expenditure[s] and plan budgets for the various departments. She will also review all accounting procedures being followed.

Her job duties will also include the following: In consultation with the general manager she will establish standards for personnel administration and performance, service to patrons, advertising, publicity, credit policies, décor, food quality, and banquet operation. She will also determine the type of patronage to be selected and will plan the dining areas, bar and food operations. As a profitable source of income she shall plan strategies for optimum usage of its many versatile function rooms and direct the banqueting strategy.

A primary duty will also be to maintain top corporate accounts and to plan appropriate strategies to attract the huge Indian market segment and the constant travel requirements of

top Indian corporate organizations to make the facility their destination of choice in terms of pricing, convenience, and services offered.

Similarly she will coordinate with the Sales and Reservations departments to increase revenues through effective yield management.

She will, in coordination with the HR Manager, also interview, hire and assess the performance of all personnel. [She] will also continue to supervise day-to-day operations such as the J-1 visa process.

As evident in the descriptions of the beneficiary's future work above, the petitioner describes the proffered position exclusively by generalized statements of broad functions. These statements do not convey whatever applications of highly specialized knowledge in a specific specialty the functions might entail when performed in the context of the petitioner's business.

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 proffered position is not a specialty occupation.

The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook (Handbook)* for information about the duties and educational requirements of particular occupations. The petitioner, through counsel, describes the position broadly and with several titles, indicating that it can fit into a variety of classifications. Since the *Handbook* has no specific position entitled "business manager" or "business affairs coordinator," the AAO will examine multiple positions that may be akin to the proffered position in this matter.

The AAO will first examine the petitioner's claim that the corporate title of the proffered position is "chief operating officer." The position of chief operating officer falls under the heading of Top Executives, and is described by the 2008-09 edition of the *Handbook* as follows:

All organizations have specific goals and objectives that they strive to meet. Top executives devise strategies and formulate policies to ensure that these objectives are met. Although they have a wide range of titles—such as chief executive officer, chief operating officer, board chair, president, vice president, school superintendent, county administrator, or tax commissioner—all formulate policies and direct the operations of businesses and corporations, public sector organizations, nonprofit institutions, and other organizations.

A corporation's goals and policies are established by the *chief executive officer* in collaboration with other top executives, who are overseen by a board of directors. In a large corporation, the chief executive officer meets frequently with subordinate executives to ensure that operations are conducted in accordance with these policies. The chief executive officer of a corporation retains overall accountability; however, a *chief operating officer* may be delegated several responsibilities, including the authority to oversee executives who direct the activities of various departments and implement the organization's policies on a day-to-

day basis. In publicly held and nonprofit corporations, the board of directors ultimately is accountable for the success or failure of the enterprise, and the chief executive officer reports to the board.

A review of this description in comparison to the description of the duties of the proffered position indicate that the proffered position in this matter is not akin to that of a chief operating officer as contemplated by the *Handbook*. While the AAO acknowledges the petitioner's claim that the beneficiary is responsible for the business flow of the company, the position of chief operating officer, as defined above, does not appear to match the description of duties provided by the petitioner. The beneficiary, while allegedly in charge of overseeing other employees, is not in charge of executives and does not report to a board of directors. However, the beneficiary does in fact appear to have authority over employees who direct the activities of various departments.

Further research by the AAO indicates that an occupation appearing to more appropriately encompass the duties described by the petitioner is that of food service manager. The *Handbook* describes this position as follows:

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 generally are responsible for all of the administrative and human-resource functions of running the business, including recruiting new employees and monitoring employee performance and training.

Managers interview, hire, train, and when necessary, fire employees. Retaining good employees is a major challenge facing food service managers. Managers recruit employees at career fairs, contact schools that offer academic programs in hospitality or culinary arts, and arrange for newspaper advertising to attract additional applicants. Managers oversee the training of new employees and explain the establishment's policies and practices. They schedule work hours, making sure that enough workers are present to cover each shift. If employees are unable to work, managers may have to call in alternates to cover for them or fill in themselves when needed. Some managers may help with cooking, clearing tables, or other tasks when the restaurant becomes extremely busy.

* * *

In addition to their regular duties, food service managers perform a variety of administrative assignments, such as keeping employee work records, preparing the payroll, and completing paperwork to comply with licensing laws and tax, wage and hour, unemployment compensation, and Social Security laws. Some of this work may be delegated to an assistant manager or bookkeeper, or it may be contracted out, but most general managers retain

responsibility for the accuracy of business records. Managers also maintain records of supply and equipment purchases and ensure that accounts with suppliers are paid.

It is clear that this position description best encompasses the beneficiary's wide variety of duties, which encompasses the hiring and supervision of staff, the direction of banquet operations, and the administrative functions of bookkeeping and purchasing.

The *Handbook* states the following with regard to academic credentials for food service manager positions:

Experience in the food services industry, whether as a cook, waiter or waitress, or counter attendant, is the most common training for food service managers. Many restaurant and food service manager positions, particularly self-service and fast-food, are filled by promoting experienced food and beverage preparation and service workers.

Education and training. Experience as a waiter or waitress, cook, or counter help is the most common way to enter the occupation. Executive chefs, in particular, need extensive experience working as chefs. Many food service management companies and national or regional restaurant chains recruit management trainees from 2- and 4-year college hospitality management programs, which require internships and real-life experience to graduate. Some restaurant chains prefer to hire people with degrees in restaurant and institutional food service management, but they often hire graduates with degrees in other fields who have demonstrated experience, interest, and aptitude.

The AAO first considers the criteria at 8 C.F.R. 9tj 214.2(h)(4)(iii)(A)(l) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors often considered by USCIS when determining these criteria include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(l), which assigns specialty-occupation status to a position for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties.

Even if the generic statements that comprise the information about the proffered position and its duties were sufficient to align the position with the broad occupational category of food service manager as discussed in the *Handbook*, this position has not been established as a specialty occupation. As already indicated in the discussion of the *Handbook*, employers of food service managers do not normally require at least a bachelor's degree, or its equivalent, in a specific specialty.

The *Handbook* indicates that entry into the food service manager occupation may occur with mere experience as a cook, waiter, or other position in the food service industry. While the *Handbook* indicates that many food service management companies and national or regional restaurant chains recruit management trainees from 2- and 4-year college hospitality management programs, a bachelor's degree in a specific course of study leading to a specific degree is not required. This information from the *Handbook* does not by itself preclude a particular marketing manager position from qualifying as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). However, it is incumbent on the petitioner to establish that its particular position is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties. This the petitioner has failed to do.

The AAO notes that, even if the petitioner established that the proffered position was akin to the executive position of chief operating officer, as discussed above, it is noted that top executive positions, while often requiring a bachelor's or graduate degree in business administration, liberal arts, or a more specialized discipline, do not require a degree in a specific specialty for entry into the field. The *Handbook* states that "[t]he specific degree required often depends on the type of organization for which they work. College presidents, for example, typically have a doctorate in the field in which they originally taught, and school superintendents often have a master's degree in education administration."

The AAO finds, therefore, that the evidence of record does not indicate that the particular position before it is one that normally requires at least a bachelor's degree, or the equivalent, in a specific specialty. In this regard, the AAO notes that, as reflected in its earlier discussions about the examples of the beneficiary's work-product and the petitioner's generalized descriptions of the duties of the proffered position, the record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires a specialty occupation's level of knowledge in a specific specialty. The record's evidence is not sufficiently specific and concrete to distinguish the proffered position from positions in the food service manager occupational category that do not normally require at least a bachelor's degree, or its equivalent, in a specific specialty.

As the evidence of record does not establish that the particular position proffered here is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong assigns specialty occupation status to a proffered position with a requirement for at least a bachelor's degree, in a specific specialty, that is common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the

industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d at 1165.

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. Also, there are no submissions from professional associations, individuals, or firms in the petitioner's industry.

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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." The evidence of record does not refute the *Handbook's* information to the effect that there is a spectrum of degrees acceptable for food service managers or even chief operating officers, including degrees not in a specific specialty related to business. As evident in the earlier discussion about the generalized descriptions of the proffered position and its duties, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than food service manager positions that can be performed by persons without a specialty degree or its equivalent.¹

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) provides that an employer normally requires a degree or its equivalent for the position. In this matter, the petitioner provides no evidence to establish that the petitioner has a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty. Therefore, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. As reflected in the earlier discussion of the limited information about the proffered duties, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than marketing manager positions that are not usually associated with a degree in a specific specialty.

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed.

It is noted that the director also determined that the beneficiary would not be qualified to work in the proffered position even if it had been found to be a specialty occupation. However, a beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed

¹ The AAO notes that translation duties encompass some of the beneficiary's proposed duties. However, a review of the *Handbook's* section devoted to translators and interpreters indicates that no specific degree is required to work in such a position. Specifically, the *Handbook* states, "[b]eyond high school, there are many educational options. Although a bachelor's degree is often required, interpreters and translators note that it is acceptable to major in something other than a language." Therefore, even if the position were deemed to be that of an interpreter or translator, the petitioner would still fall short of establishing that the position were a specialty occupation.

in this decision, the proffered position does not require a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the AAO will not address the beneficiary's qualifications further.

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.