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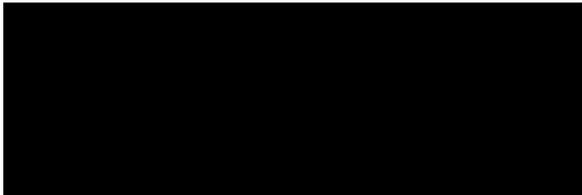
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



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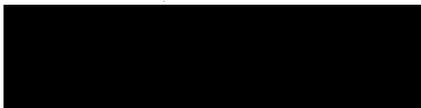
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FILE: EAC 08 146 51434 Office: VERMONT SERVICE CENTER

Date: **JAN 07 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:

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).

for Michael T. Kelly
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 alleges that it is a gasoline station investment company established in 2008 with five employees. It seeks to employ the beneficiary as a business administrator 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 failed to establish that the proffered position is a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (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) Form I-290B, with counsel's brief and supporting documents. The AAO reviewed the record in its entirety before reaching its decision.

The primary issue that the AAO will consider is whether the position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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 this matter, the petitioner seeks the beneficiary’s services as a business administrator. Evidence of the beneficiary’s duties includes: the Form I-129; the petitioner’s letter in response to the RFE dated July 14, 2008; and the petitioner’s business plan submitted in response to the RFE. The petitioner did not submit a detailed description of the proffered position with the petition filing. However, the RFE response letter indicates the proffered position would require the beneficiary to perform the following duties:

- Monitor the facility to ensure that it remains safe, secure, and well-maintained.
- Direct or coordinate the supportive services department of a business, agency, or organization.
- Set goals and deadlines for the department.
- Prepare and review operational reports and schedules to ensure accuracy and efficiency.
- Analyze internal processes and recommend and implement procedural or policy changes to improve operations, such as supply changes or the disposal of records.
- Acquire, distribute and store supplies.

- Plan, administer and control budgets for contracts, equipment and supplies.
- Oversee renovation projects to improve efficiency and to ensure that facilities meet environmental, health, and security standards, and comply with government regulations.
- Hire and terminate clerical and administrative personnel.
- Oversee the maintenance and repair of machinery, equipment, and electrical and mechanical systems.

In the response letter, the petitioner writes that it purchases “small to medium Gas Stations, turn them into profitable stations and resale them for profit [sic]. I have been very successful in doing these types of transactions in the past. More recently, I have become aware of my company’s need for a Business Administrator to assist me with my investments.”

The duties described for the proffered position in the petitioner’s business plan submitted in response to the RFE are as follows:

- Direct and coordinate activities of businesses concerned with pricing and sales of products.
- Manage staff, preparing work schedules, and assigning specific duties.
- Review financial statements, sales and activity reports, and other performance data to measure productivity and goal achievement and to determine areas needing cost reduction and program improvement.
- Establish and implement departmental policies, goals, objectives, and procedures, conferring with board members, organization officials, and staff members as necessary.
- Determine staffing requirements, and interview, hire and train new employees, or oversee those personnel processes.
- Monitor businesses and agencies to ensure that they efficiently and effectively provide needed services while staying within budgetary limits.
- Oversee activities directly related to making products or providing services.
- Direct and coordinate organization’s financial and budget activities to fund operations, maximize investments, and increase efficiency.
- Determine goods and services to be sold, and set prices based on forecasts of customer demand.

The petitioner offers no additional details with respect to the proffered position, despite the request in the RFE to provide “a detailed description of the proffered position, to include approximate percentages of time for each duty the beneficiary will perform” and “brief job descriptions for the majority of positions within the petitioner’s employ and approximately how many individuals occupy such positions (to include job titles, duties and education requirements).” The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12).

The director denied the petition on the basis that the proffered position does not qualify as a specialty occupation. On appeal, the petitioner disputes this finding.

To make its determination whether the employment qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty 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 in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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)).

On appeal, the petitioner argues that the director's characterization of the position as an administrative services manager as found in the *Handbook* is in error. However, the petitioner does not offer an alternative section in the *Handbook* under which the proffered position might fall. The petitioner argues that, according to the *Handbook*, business administrators "generally need at least a bachelor's degree in business, human resources, or finance." This degree requirement is not found under the section on administrative services managers and the petitioner does not state where in the *Handbook* this quote comes from. Despite the petitioner's request that the AAO "not mystify this Business Administrator position with a Service Manager title or position," it is noted that the reference to "business administrators" in the *Handbook's* Index provides, "see: Administrative Services Managers," which is the section that the director found to be the most pertinent to the proffered position. Therefore, it is clear that the *Handbook* considers business administrators to be included in the section on administrative services managers.

Despite the petitioner's argument to the contrary on appeal, it is the job description, and not the title, that is central to the analysis of whether the proffered position is a specialty occupation. As the petitioner has not provided evidence that the proffered position should be classified in the *Handbook* as anything other than an administrative services manager, the AAO will first turn to the *Handbook's* description of Administrative Services Managers, which provides as follows:

Administrative services managers coordinate and direct the many support services that allow organizations to operate efficiently. They perform a broad range of duties. They might, for example, oversee secretarial and reception services, administration, payroll, conference planning and travel, information and data processing, mail, materials scheduling and distribution, printing and reproduction, records management, telecommunications management, security, parking, energy consumption and personal property procurement, supply, recycling and disposal. They manage support services for organizations as diverse as insurance companies, computer manufacturers, and government offices.

Specific duties for these managers vary by degree of responsibility and authority. First-line administrative services managers directly supervise a staff that performs various support services. Mid-level managers, on the other hand, develop departmental plans, set goals and

deadlines, implement procedures to improve productivity and customer service, and define the responsibilities of supervisory-level managers. . . .

In small organizations, a single administrative services manager may oversee all support services. . . .

The nature of managerial jobs varies as significantly as the range of administrative services required by organizations. For example, *administrative services managers* who work as contract administrators oversee the preparation, analysis, negotiation, and review of contracts related to the purchase or sale of equipment, materials, supplies, products, or services. In addition, some administrative services managers acquire, distribute, and store supplies, while others dispose of surplus property or oversee the disposal of unclaimed property.

Administrative services managers who work as *facility managers* plan, design, and manage buildings, grounds, equipment, and supplies, in addition to people. This task requires integrating the principals of business administration, information technology, architecture, engineering, and behavioral science. Although the specific tasks assigned to facility managers vary substantially depending on the organization, the duties fall into several categories, relating to operations and maintenance, real estate, project planning and management, leadership and communication, finance, quality assessment, facility function, technology integration, and management of human and environmental factors. Tasks within these broad categories may include space and workplace planning, budgeting, purchase and sale of real estate, lease management, renovations, or architectural planning and design. Facility managers may suggest and oversee renovation projects for a variety of reasons, ranging from improving efficiency to ensuring that facilities meet government regulations and environmental, health, and security standards. . . . Additionally, facility managers continually monitor the facility to ensure that it remains safe, secure and well-maintained. Often, the facility manager is responsible for directing staff, including maintenance, grounds, and custodial workers.

A number of the duties for the proffered position as described by the petitioner in its RFE response letter comport with those described in the *Handbook's* section on administrative services managers. These duties described by the petitioner are vague and generic. Therefore, without further context or objective supporting evidence provided by the petitioner to the contrary, the AAO agrees with the director that the duties describe a position most closely resembling that of an administrative services manager in the *Handbook*.

The *Handbook's* description of training for administrative services managers includes in pertinent part: "Education and experience requirements for these managers vary widely, depending on the size and complexity of the organization. In small organizations, experience may be the only requirement needed to enter a position as an office manager. . . ." Although the *Handbook* also states that most facility managers have an undergraduate or graduate degree in engineering, architecture, construction management, business administration, or facility management, because the fields in which the degree can be attained vary so broadly, the *Handbook* description does not establish that a facility manager is a specialty occupation under Section 214(i)(1) of the Act, which requires 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 the United States."

Moreover, as mentioned above, the lack of supporting evidence regarding the petitioner's business justifications for hiring someone to perform the duties of the proffered position, even when it was specifically requested in the RFE, calls into question the accuracy of the job descriptions provided by the petitioner and whether the petitioner's business needs sufficiently support a facilities manager. The petitioner stated that the beneficiary would plan, administer and control budgets for contracts, equipment and supplies as well as oversee renovation projects to improve efficiency and to ensure that facilities meet environmental, health, and security standards, and comply with government regulations, all of which are duties consistent with the facilities manager position as described in the *Handbook*; however, the petitioner provided no evidence to support that the beneficiary would actually perform these duties, such as copies of contracts that the beneficiary might oversee or documents establishing new renovation projects. Therefore, the petitioner has not established that the proffered position resembles a facilities manager as described in the *Handbook*. Based on the photographs and other documentation that the petitioner provided in response to the RFE, it appears that the beneficiary would, at best, be an office manager for one gas station that allegedly has five or six employees.¹

As the evidence of record does not establish that the particular position here proffered 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 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

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. On appeal, the petitioner submitted three job advertisements, two of which are from the same company, for business administrators. However, the advertisements provided are not evidence of a common degree-in-a-specific-specialty requirement in positions that are both: (1) parallel to the proffered position; and (2) located in organizations similar to the petitioner. None of the advertisements are for gas stations, or even for small offices. Instead, they are for large multi-national companies. Moreover, only one of the advertisements requires a degree in a specific specialty. Additionally, the advertisements' content and the record's

¹ The petitioner did not provide any evidence establishing the existence of these employees or their job titles, despite the director's request for this information in the RFE.

information about this petition's proffered position and the petitioner's business operations are too limited and generalized to establish that the advertised positions are parallel to the proffered position and that the advertising organizations are similar to the petitioner.

The petitioner has not satisfied 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 nature of the duties of the proposed position, as set forth in the response to the RFE, does not support such a finding, as they are too vaguely described. The duties are described exclusively in terms of general and generic functions that relate neither the substantive nature of the matters upon which the beneficiary would work nor how the actual execution of those functions would require a person with at least a bachelor’s degree in a specific specialty. As the record does not contain substantive information about the exact nature of the employment to be performed, it cannot be concluded that the proposed position is so complex or unique that only an individual with a degree in a specific field can perform them.

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) -- the employer normally requires a degree or its equivalent for the position. The petitioner has not provided any evidence that it hired someone to fill this position in the past. As the record has not established a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, 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. 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 associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Moreover, as stated above, the record does not contain information about the exact nature of the employment to be performed and therefore it cannot be concluded that the duties are so complex and specialized that they require knowledge normally associated with the attainment of a bachelor’s degree in a specific specialty.

Further, the AAO notes that the petitioner’s assessment that a bachelor’s degree in business administration, without a particular concentration, would suffice for the proffered position also indicates that the position is not a specialty occupation. When a range of degrees, e.g., the liberal arts, or a degree of generalized title without further specification, e.g., business administration, can perform a job, the position does not qualify as a specialty occupation. *See Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the AAO shall not disturb the director’s denial of the petition.

The appeal will be dismissed and the petition denied. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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ORDER: The appeal is dismissed. The petition is denied.