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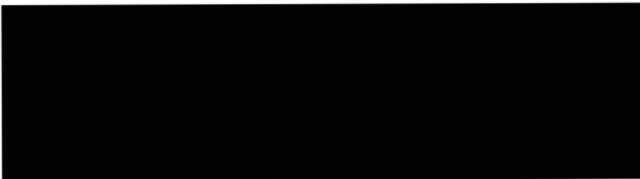
MAY 03 2010

FILE: WAC 08 210 51238 Office: CALIFORNIA 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).

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 stated on the Form I-129 Petition for a Nonimmigrant Worker that it is a health food store. To employ the beneficiary in a position designated as a Chief Information Officer, the petitioner endeavors to classify him 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 that the petitioner failed to establish that the petitioner will employ the beneficiary in a specialty occupation position. On appeal, the petitioner asserted that the director's basis for denial was erroneous, and contended that the petitioner satisfied all evidentiary requirements. In support of these contentions, counsel submitted a brief.

The AAO bases its decision upon its review of the entire record of proceedings, 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 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.

The issue before the AAO is whether the petitioner has provided evidence sufficient to establish that it would employ the beneficiary in a specialty occupation position.

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.”

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5<sup>th</sup> Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation position, the AAO does not solely rely on the job title or the extent to which the petitioner’s descriptions of the position and its underlying duties correspond to occupational descriptions in Department of Labor’s Occupational Outlook Handbook. (the *Handbook*) Critical factors for consideration are the extent of the evidence about specific duties of the proffered position and about the particular business matters upon which the duties are to be performed. In this pursuit, the AAO must examine the evidence about the substantive work that the alien will likely perform for the entity or entities ultimately determining the work’s content.

In response to a September 30, 2008 request for evidence in this matter, counsel provided an organizational chart showing that the petitioner then had a president and four additional employees, including the beneficiary. That chart indicates that the petitioner then contemplated hiring an additional five employees. Although the petitioner had only its president, a store supervisor, two

store associates, and the beneficiary at that time, the organizational chart states that the petitioner contemplated employing a general manager, a chief financial officer, a systems administrator, a software developer, and an accountant within six months. No evidence in the record indicates that this goal has been realized, in whole or in part.

Counsel also provided two vacancy announcements printed from content of a popular employment website. One of those announcements is for a Director, IS Process Management for Panera Bread. The other is for a Vice President, IT Infrastructure and Operations for Beam Global Spirits & Wine. The position with Panera Bread requires an "Undergraduate degree from a respected institution," but does not state that the degree must be in any specific field. The position with Beam Global Spirits requires a "Bachelor degree or equivalent in Information Systems or Management."

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.

The petitioner provided no evidence that it has ever previously filled the proffered position, and cannot show, therefore, that it normally requires a degree or its equivalent for the proffered position. The petitioner provided a description of the beneficiary's duties, but that description is too abstract to demonstrate that the position is unique or sufficiently complex that it can be performed only by an individual with a degree.

That job description states that the beneficiary will have various supervisory duties in the petitioner's computer department, including facilitating communications with the petitioner's "other technology resources;" overseeing back office computer operations; selecting, training, supervising, evaluating, and, if necessary, dismissing the petitioner's network administrator; and serving as chair of the Information Technology Committee. The AAO notes that, according to the petitioner's organizational chart, the petitioner has no other information technology employees for the beneficiary to supervise, but anticipates hiring two.

The petitioner provided a section of the *Handbook* describing the duties of Computer and Information Systems Managers, implying that the proffered position is such a position. The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of a wide variety of occupations. The current edition of the *Handbook* is available at [www.stats.bls.gov/oco/](http://www.stats.bls.gov/oco/), and states that a computer and information systems manager position “usually” a “bachelor’s degree in a computer-related field.”

The *Handbook* also states, “Computer and information systems managers direct the work of other IT professionals, such as computer software engineers and computer programmers, computer systems analysts, and computer support specialists.” It thus makes clear that managing the work of other computer professionals is an integral part of the position. As such, whether a computer and information systems manager is a specialty occupation is irrelevant, because the proffered position does not qualify for such a position due to the fact that the petitioner has no other computer professionals for the beneficiary to manage.

The petitioner has also attempted to establish that the proffered position is a position in a specialty occupation by providing the vacancy announcements described above. One viable method of demonstrating that the proffered position is a specialty occupation position is to show that a degree requirement is common to the industry in parallel positions among similar organizations. Here, however, the petitioner failed to provide any evidence that demonstrates that the petitioner is in the same industry or that it is an organization similar to either Beam Global Spirits or Panera Bread. An unsupported assertion is insufficient to meet 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)).

Moreover, the AAO notes that Beam Global Spirits and Panera Bread are not similar to the petitioner. Neither is in the health food business. Further, reference to the website of Panera Bread at <http://www.panerabread.com/pdf/pk-2009-q4.pdf> shows that it had 1,380 outlets as of December 29, 2009, whereas the petitioner appears to have only one location.

Reference to the vacancy announcement from Beam Global Spirits shows that it has annual sales in excess of \$8 billion. The petitioner provided an income statement that shows that during the two-month period ending August 31, 2008, the petitioner had sales of \$38,913, which is equivalent to annual sales of \$233,478, approximately three one-thousandths of one percent of the annual sales of Beam Global Spirits.

The vacancy announcements that the petitioner provided, and with which the petitioner seeks to support the proposition that the proffered position is in a specialty occupation, are not for parallel positions in similar organizations and cannot be used to show that the proffered position is in a specialty occupation. Neither of the companies that posted those announcements is in the same business as the petitioner. The applicant does not operate on a scale remotely similar to either of the organizations.

Further, even if the announcements provided were more directly relevant to the proffered position, two announcements are insufficient to establish an industry-wide hiring practice. Finally, the announcement

from Beam Global Spirits requires a college degree, but does not require a degree in any specific specialty.

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. The requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility. *See Matter of Michael Hertz, Assoc.*, 19 I&N Dec. 558, 560 (Comm. 1988).

For all of the reasons noted above, the evidence submitted does not demonstrate that the proffered position is or will be in a specialty occupation within the meaning of section 101(a)(15)(H)(i)(b) of the Act and section 214(i)(1) of the Act.

The AAO notes that in various submissions the petitioner has represented that it intends to hire more employees, to expand its volume in its current business, and to expand into other businesses. The AAO expresses no opinion as to whether, based on some other set of facts, the petitioner might be able to demonstrate that the proffered position is in a specialty occupation, but notes that the salient regulations require that a petitioner establish eligibility for the benefit it is seeking at the time the petition is filed, rather than pursuant to anticipated changes in circumstances. *See* 8 C.F.R. 103.2(b)(1).

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. The appeal will be dismissed and the petition denied.

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