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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:

Office: VERMONT SERVICE CENTER

Date:

SEP 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,

*Michael T. Perry*  
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 a fast food restaurant with five employees. It seeks to employ the beneficiary as an Operations 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 failed to establish that the proffered position is a specialty occupation and that the beneficiary is eligible to change status from J-1 to H-1B.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) counsel's response to the director's RFE; (3) the director's denial letter; and (4) Form I-290B with a letter from counsel and supporting documentation. The AAO reviewed the record in its entirety before reaching its decision.

The AAO will only examine whether the petitioner's proffered position qualifies as a specialty occupation.<sup>1</sup> 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 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

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<sup>1</sup> The service center director's denial of change of status is not a subject for appeal, per the regulation at 8 C.F.R. § 248.3(g).

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 (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), 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 states that it is seeking the beneficiary's services as an Operations Manager. In the March 27, 2008, letter of support, the petitioner states that the beneficiary will be responsible for:

- Finding qualified candidates, conducting interviews and assisting in salary negotiations;
- Monitoring employee performance and training, create staff work schedules, and resolve employee conflicts;
- Estimating food needs, place orders with distributors, and schedule the delivery of fresh food and supplies;
- Arranging for equipment maintenance/repairs and coordinate services such as waste removal and pest control;
- Inspecting quality of food to ensure that expectations are met;
- Tallying cash and charge receipts received as well as deposit receipts at bank;
- Keeping employee work records and prepare payroll; and
- Maintaining accuracy of business records.

The petitioner stated that the person who fills the proffered position must have at least a Bachelor's Degree in Business Management or a related field.

The petitioner submitted a copy of the beneficiary's foreign degrees, but did not submit a credential evaluation with the petition. Additionally, the petitioner submitted documentation indicating that the beneficiary was in the United States in J-1 status at the time the petition was filed.

The director's RFE asked for documentation to support a finding that the proffered position is a specialty occupation, including, in part, a more detailed job description, copies of any employment agreements between the petitioner and the beneficiary, documentation regarding other individuals employed in the proffered position, and brief job descriptions for the petitioner's other employees.

In the response to the RFE, counsel broke down the day-to-day responsibilities as follows:

- Building and sustaining vendor and distributor relationships (25%)
- Supervision and management of employees (25%)
- Overseeing inventory, equipment and supplies (25%)
- Maintaining accurate financial, business and payroll records (25%)

Counsel submitted a copy of the petitioner's payroll register for August 2008, which lists employees by name, but does not indicate their job titles or descriptions. Additionally, counsel submitted copies of the petitioner's lease, which indicates the petitioner is located in a shopping mall, as well as photos, which demonstrate that the petitioner is essentially an Asian fast food counter in a mall food court. The petitioner did not provide evidence to demonstrate that it has its own tables or wait staff.

Additionally, counsel submitted a credential evaluation that states the beneficiary's education is equivalent to a bachelor's degree in management from a regionally accredited college or university in the United States.

The director denied the petition finding that the proffered position is not a specialty occupation.

On appeal, counsel for the petitioner argues that the proffered position is a specialty occupation and that the director erred in classifying the proffered position as that of a restaurant and food services manager. Counsel asserts that the proffered position is an operations manager as described in the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*. Counsel also submits advertisements for food service operations managers.

To make its determination whether the employment qualifies as a specialty occupation, the AAO first 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 *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)).

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. See generally *Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The AAO will first turn to the *Handbook's* (2010-11 online edition) description of general and operations managers, which is found in the section on Top Executives and provides as follows:

In small organizations, such as independent retail stores or small manufacturers, a partner, an owner, or a general manager often is responsible for purchasing, hiring, training, quality control, and day-to-day supervisory duties. . . .

\* \* \*

General and operations managers plan, direct, or coordinate the operations of companies and other public- or private-sector organizations. Their duties and responsibilities include formulating policies, managing daily operations, and planning the use of materials and human resources that are too diverse and general in nature to be classified into any one area of management or administration, such as personnel, purchasing, or administrative services. In some organizations, the tasks of general and operations managers may overlap those of chief executive officers.

Alternatively, the *Handbook's* description of food service managers is 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 are generally responsible for all administrative and human-resource functions of 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 and at schools that offer academic programs in hospitality management 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. Some managers may help with cooking, clearing tables, or other tasks when the restaurant becomes extremely busy.

Food service managers ensure that diners are served properly and in a timely manner. They investigate and resolve customers' complaints about food quality and service. They monitor orders in the kitchen to determine where backups may occur, and they work with the chef to remedy any delays in service. Managers direct the cleaning of the dining areas and the washing of tableware, kitchen utensils, and equipment to comply with company and government sanitation standards. Managers also monitor the actions of their employees and patrons on a continual basis to ensure the personal safety of everyone. They make sure that health and safety standards and local liquor regulations are obeyed.

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, 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.

Managers tally the cash and charge receipts received and balance them against the record of sales, securing them in a safe place. Finally, managers are responsible for locking up the establishment, checking that ovens, grills, and lights are off, and switching on alarm systems.

On appeal, counsel argues that the beneficiary would not be responsible for preparing or serving meals to customers, nor would he be responsible for food preparation or cleanup. However, the *Handbook's* description of food service managers does not state that food service managers must be responsible for these tasks. It merely states that food service managers are responsible for operations of restaurants that provide these services. Additionally, counsel asserts that the beneficiary would not be responsible for supervising employees who prepare/serve meals, prepare food, or cleanup. However, the petitioner and counsel never provided information about the job titles and descriptions for the petitioner's employees, even though this information was specifically requested in the RFE. Therefore, the petitioner has not provided evidence to support counsel's assertion. Again, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19

I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. In any event, the AAO finds that the proffered position as described in the record of proceeding substantially comports with the *Handbook's* description of the Food Service Manager occupation.

Under the section on Training, Other Qualifications, and Advancement, the *Handbook* states that:

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.

Because the *Handbook* indicates that working as a food service manager does not normally require at least a bachelor's degree in a specific specialty, the *Handbook* does not support the proffered position as being a specialty occupation. Further, there is nothing in the evidence of record that otherwise establishes that the duties described for the proffered position would require the application of at least a bachelor's degree level of highly specialized knowledge in any specialty.

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.

Again, 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 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

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.

As stated previously, the advertisements from other companies submitted on appeal are not probative 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. There is no independent evidence of how representative the advertisements are of recruiting and hiring practices in the advertisers' particular industries. Thus, the advertisements do not establish that they relate to positions parallel to the proffered position and that belong to organizations similar to the petitioner, that is, a relatively small mall-food-counter operation. Further, the advertisements do not reflect a common requirement for at least a bachelor's degree in a specific specialty.

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 evidence of record does not refute the *Handbook's* information to the effect that there is a spectrum of degrees acceptable for food service manager positions. Moreover, as mentioned previously, 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, particularly in parallel positions in organizations similar to the petitioner.

Next, 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). The petitioner did not provide any information about who, if anyone, previously worked for the petitioner in the proffered position.

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. The proposed duties do not indicate that they are more specialized and complex than those of food service manager positions that are not usually associated with a degree in a specific specialty.

Therefore, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). For this reason, the petition will be denied.

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any of 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.

Beyond the decision of the director, the AAO also finds that the petitioner failed to submit requested evidence that precludes a material line of inquiry. The petitioner and counsel did not provide the job titles and descriptions for the petitioner's other employees, which were specifically requested by the director to provide further information that clarifies whether the proffered position is a specialty occupation. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Therefore, the petition will be denied for this additional reason.

The AAO conducts appellate review on a de novo basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.

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