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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



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FILE: EAC 09 195 51736 Office: VERMONT SERVICE CENTER Date: **APR 05 2011**

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:

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 \$630. 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,

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

DISCUSSION: The nonimmigrant visa petition was denied by the service center director, 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 provider of decorative flower arrangements that seeks to employ the beneficiary as a general manager. The petitioner, therefore, 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 on July 27, 2009, finding that the petitioner had failed to demonstrate that the proffered position was a specialty occupation. Specifically, the director noted that the size and scope of the petitioner's business operations did not support a finding that the beneficiary would be primarily engaged in performing the services of a specialty occupation.

On appeal, counsel for the petitioner submits a brief and additional evidence, contending that the director's findings were erroneous.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

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 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 occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

The petitioner is seeking the beneficiary’s services as a general manager. According to the petitioner’s June 15, 2009 letter of support, the beneficiary’s proffered duties are as follows:

1. Directing and managing the operations of the business;

2. Building up and overseeing a [sic] sales, marketing, purchasing and accounting departments;
3. Searching for, interviewing and hiring and firing employees;
4. Developing and implementing cost effective business strategies;
5. Making decisions and assisting other department's manager in solving problems with merchants, customers and operations; and
6. Reporting directly to the President.

The petitioner also indicated that the candidate for the proffered position should hold a bachelor of science degree in business management. The petitioner submitted an evaluation from Samuel L. Tiras, Ph.D., Department of Accounting, Louisiana State University, which concluded that, by virtue of his fifteen years of training and work experience in management, the beneficiary possessed the U.S. equivalent of a bachelor's degree in business management.

On July 13, 2009, the director issued a request for evidence, which requested specific evidence in support of the contention that the proffered position required an individual with at least a four-year degree, noting that the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* indicated that one could become a manager without a college degree. The director specifically requested details pertaining to the nature, scope and activity of the petitioner's business, as well as the complexity of the proffered position.

In response, the petitioner indicated that it was a new company that commenced operations in 2009 and currently had zero employees. The petitioner further stated that the non-qualifying duties of the proffered position "may be relieved only upon the company expanding consistent with the goals and vision of the company," yet the petitioner provided no additional details regarding proposed expansion of the business. The petitioner also resubmitted the educational evaluation and job postings submitted initially with the petition in further support of eligibility in this matter. Regarding the beneficiary's duties, the petitioner provided the following updated overview:

There will be 3 essential managerial functions: business development, finance, sales, and the beneficiary will devote 33.33% to each activity, as each activity is peer in relation to the other and calls for equal opportunity dedication. . . .

* * *

Utilizing expert marketing management knowledge, create customer base and repeat dynamics within the marketing domain;

Utilizing specialized knowledge of budgetary and promotional logistics, prepare for extended and sustained profit margin, for horizontal and vertical growth of financially viable sub unit patterns in holistic management growth;

Monitor statistical and qualitative response system based on web surf and buying impulses and patterns;

Submitting reports to parent company in Saudi Arabia on all aspects of retail, wholesale and related business clusters to provide insight into current health of company and business ventures and likely outcomes of projected growth.

The director found, and the AAO concurs, that the proffered position of general manager is not a specialty occupation. Citing to the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent in a specific specialty. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel for the petitioner contends that the director's decision was contrary to current case law and is an abuse of discretion. Additionally, counsel claims that, contrary to the findings of the director, the *Handbook* requires a bachelor's degree as the minimum educational requirement for entry into the position of general manager, and contends that the director erred by finding differently. Counsel concluded by stating that the petitioner has met its burden of proof in these proceedings.

Upon review of the record, the AAO finds that 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.

At the outset, the AAO finds that the petitioner has failed to provide evidence of other than speculative and indefinite work for the beneficiary, and such evidence does not provide a sufficient basis for the AAO to discern the substantive nature of the work comprising the proffered position. This fact is in itself sufficient to preclude the petitioner from establishing a specialty occupation. A position may be awarded H-1B classification only on the basis of evidence of record establishing that, at the time of the petition's filing, definite, non-speculative work would exist for the beneficiary for the period of employment specified in the Form I-129. The record of proceeding does not contain such evidence. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; and 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.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The AAO does not concur with counsel's assertion that the proffered position is a specialty occupation.

In reaching its own conclusions regarding the nature of the proffered position, the AAO has reviewed the discussion of general and operations managers under the "Top Executives" category, as described by the 2010-2011 edition of the *Handbook*. It has taken particular note of the following section of that discussion:

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

* * *

To monitor operations and meet with customers, staff, and other executives, general managers and executives travel considerably among international, national, regional, and local offices. Many top executives also attend meetings and conferences sponsored by various associations. In large organizations, job transfers between local offices or subsidiaries are common for those on an executive career track.¹

As noted by the director, a review of the training required for positions included in the heading of top executives indicates that the formal education of such employees varies widely. Specifically, the *Handbook* states as follows:

Education and training. Many top executives have a bachelor's or master's degree in business administration, liberal arts, or a more specialized discipline. The specific type and level of education required often depends on the type of organization for which top executives work. College presidents and school superintendents, for example, typically have a doctoral degree in the field in which they originally taught or in education administration. (For information on lower level managers in educational services, see the *Handbook* statement on education administrators.)

Some top executives in the public sector have a degree in public administration or liberal arts. Others might have a more specific educational background related to their jobs. (For information on lower level managers in health services, see the *Handbook* statement on medical and health services managers.)

Many top executive positions are filled from within the organization by promoting experienced lower level managers when an opening arises. In industries such as retail trade or

¹ *Occupational Outlook Handbook*, 2010-2011 Edition, at www.bls.gov/oco/ocos012.htm.

transportation, for example, individuals without a college degree may work their way up within the company and become executives or general managers. When hiring top executives from outside the organization, those doing the hiring often prefer managers with extensive managerial experience.²

While the *Handbook* indicates that many top executives have a bachelor's degree in business administration or liberal arts, no evidence in the *Handbook* indicates that a baccalaureate or higher degree in a specific specialty, or its equivalent, is required for a top executive or, more specifically, a general manager. Therefore, since the *Handbook* does not indicate that a degree in a specific specialty is normally required, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO now turns to the first prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). To satisfy this criterion, a petitioner must establish that its degree requirement for the proffered position is common to the petitioner's industry in parallel positions among similar organizations.

Factors considered by the AAO when determining this criterion include 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)).

Regarding what it asserts to be parallel positions in its industry, the petitioner has provided seven job vacancy postings advertised at www.monster.com. Of the seven postings, three are confidential listings that fail to identify the nature and scope of the company for which the position of general manager is being advertised; however, they indicate that the industry for each such posting includes energy, manufacturing, and retail. Moreover, the four postings which include complete listings and company information are for companies that are not considered similar organizations within the petitioner's industry. The petitioner is a new decorative flower arrangement company with no employees. The four postings with detailed information indicate that the companies which seek to hire general managers are: (1) [REDACTED], a century-old manufacturer and distributor of durable consumer products; (2) [REDACTED] a national data discovery and management company providing services to law firms, corporations and government agencies; (3) [REDACTED] a global company providing business and personal communications products, technologies and services; and (4) [REDACTED], a technology and services company providing systems for risk forecasting, process management, and loss prevention. None of these four companies can be considered similar to the petitioner's decorative flower arrangement company which is newly formed, has no employees, and lacks a national and/or international market presence.

While all postings indicate that a bachelor's degree is a requirement, the advertisements are for entities that are not similar in scope or focus to the petitioning entity. The wide variety of fields in which the above-referenced companies are engaged does little to persuade the AAO that these are parallel positions in the

petitioner's industry. In addition, it should be noted that, while a bachelor's degree is required for most of the job postings, none of the postings require a degree in a specific specialty. Therefore, the petitioner has failed to establish the first alternate prong of the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Under the alternate prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position.

The record of proceeding, however, contains insufficient evidence regarding the specific work the proffered position would actually encompass. In fact, the record of proceeding does not develop the actual content of that work beyond generic and general functions – such as “[d]irecting and managing the operations of the business,” “developing and implementing cost-effective business strategies,” and “creat[ing] a customer base and repeat dynamics within the marketing domain” - and the petitioner has provided no documentary evidence addressing the relative complexity or uniqueness of the proffered position. As such, the record of proceeding lacks an evidentiary record which would afford the AAO a reasonable basis by which to assess the proffered position in terms of complexity or uniqueness.

Further, while the size of a petitioner's business is normally not a factor in determining the nature of a proffered position, both level of income and organizational structure are appropriately reviewed when a petitioner seeks to employ an H-1B worker. In matters where a petitioner's business is relatively small, the AAO must review the record for evidence that its operations, are, nevertheless, of sufficient complexity to indicate that it would employ the beneficiary in a position requiring a level of managerial knowledge that may be obtained only through a baccalaureate degree in business management or its equivalent.

At the time of filing, the petitioner stated that it is a new office that commenced business operations in 2009. It further claimed to have *no employees or gross annual income*. As a *flower arrangement company*, there is no indication that it employs floral designers or arrangers or other staff members to handle the everyday tasks associated with such a business. Nor has the petitioner submitted a business plan which outlines the potential organizational structure of this new business. This raises questions regarding the legitimacy of the petitioner's need for a general manager when it does not appear to have adequate staff to perform its essential operations. In this regard, the record offers no meaningful evidence to establish that the duties to be performed by the beneficiary in relation to the petitioner's claimed operations are sufficiently complex to require the services of a degreed individual. Further, the petitioner's not submitting information related to its financial operations or general business dealings contributed to its failure to establish for the proffered position the complexity or uniqueness required for the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

For the reasons discussed above, the petitioner has failed to establish the second prong of the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

To determine whether a proffered position may be established as a specialty occupation under the third criterion, which requires that the employer demonstrate that it normally requires a degree or its equivalent for the position, the AAO usually reviews the petitioner's past employment practices, as well as the histories,

including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. In the instant matter, the petitioner is a new office that has no employees and no hiring history. Therefore, since the petitioner has not established that it previously recruited and employed only degreed general managers, the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) has not been satisfied.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree.

Again, the *Handbook* reveals that the duties of the proffered position comport with those of the general-manager occupation; but the *Handbook* indicates a wide range of educational and experiential backgrounds that are associated with this occupation, including credentials not amounting to a bachelor's degree, or the equivalent, in a specific specialty. As evident in this decision's excerpts from the petitioner's submissions, the petitioner has addressed the duties of the proffered position in exclusively generalized and generic terms, which do not convey an association with a particular type and educational level of knowledge. Further, the petitioner has provided no documentary evidence establishing the duties as so complex or unique that their performance would require the level of highly specialized knowledge requisite for this criterion. Thus, the petitioner fails to satisfy the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition on that ground.

The burden of proof in the 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.