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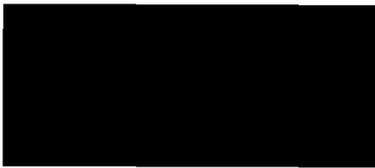
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

D2



DATE: JUN 02 2011 Office: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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:
[REDACTED]

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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the California Service Center denied the nonimmigrant visa petition due to abandonment. After granting a subsequent motion to reopen, the director denied the petition on the merits, 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 dairy farm with thirty employees. It seeks to extend the employment of the beneficiary as its dairy farm manager. The petitioner therefore endeavors to employ the beneficiary in the nonimmigrant classification as a 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 August 24, 2009, having concluded that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation.

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

The issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, a petitioner must establish that the job 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 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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires [1] 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,

¹ The record also contains former counsel's motion to reopen, filed with the service center on July 16, 2009. As the issues addressed in the motion do not pertain to the matter on appeal, the motion is acknowledged but will not be considered by the AAO in adjudicating the appeal.

theology, and the arts, and which requires [2] the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act 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.

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. *Cf. 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 petitioner states that it wishes to continue the employment of the beneficiary as its dairy farm manager. In a letter of support dated March 16, 2009, the petitioner described the beneficiary's proposed duties as follows:

The Dairy Farm Manager will implement and oversee all cow management operations and procedures including vaccination and treatment protocols, procedures for daily care of calves, young stock, and cows: Responsible for hiring, firing and management of over 30 farm employees including farm management team, veterinarian, nutritionist and parlor personnel. Must be able to communicate in Spanish with workers.

The petitioner concluded by stating that the proffered position is highly specialized and thus requires at least a bachelor's degree in agricultural science or a similar field, or its equivalent.

The director determined that the petitioner had submitted insufficient evidence to process the petition. On April 13, 2009, the director requested additional evidence to demonstrate that the proffered position was in fact a specialty occupation in accordance with the four criteria outlined at 8 C.F.R. § 214.2(h)(4)(iii)(A). Noting that the Department of Labor's *Occupational Outlook Handbook (Handbook)* did not specifically require at least a bachelor's degree for entry into the proffered position, the director requested additional documentation, including but not limited to:

- a clear explanation of what differentiates the proffered position such that the specific tasks require the expertise of someone with a bachelor's degree in a specific field;
- evidence showing that the petitioner and similarly situated businesses in the same industry require individuals with a bachelor's degree in a specific field of study to fill the position;
- an explanation of how many other individuals have been employed in similar positions in the past and documentary evidence to establish those

- employees were employed by the petitioner and have a bachelor's degree in the specific field of study; and
- the petitioner's present and past job announcements for the proffered position and evidence of any other forms of recruitment utilized by the company for the proffered position showing that the petitioner requires its applicants to have at least a bachelor's degree in a specific specialty or its equivalent.

In a response letter dated May 18, 2009, the petitioner addressed the director's conclusion that a bachelor's degree was not required to perform the duties of the proffered position. Specifically, the petitioner referred to the *Handbook's* section pertaining to certification and advancement, noting that the *Handbook stated that* "agricultural managers can *enhance their professional status* through voluntary certification as an Accredited Farm Manager (AFM)." Additionally, the petitioner noted that the *Handbook* also listed years of farm management experience, a bachelor's degree, or even a master's degree in agriculture science as methods of criteria for accreditation. The petitioner concluded that, since the petitioner requires its farm manager to possess a bachelor of science degree in agricultural management, and since the beneficiary possesses that degree, the proffered position is a specialty occupation.

Counsel also submitted a cover letter in response to the RFE which identified the supporting documentation included with the response. Counsel submitted copies of the beneficiary's federal tax returns and W-2 forms for 2007 and 2008, as well as his earning statements from July 28, 2008 to March 13, 2009. Counsel also submitted a letter from [REDACTED] dated January 22, 2009. In this letter, [REDACTED] confirmed that the beneficiary worked for [REDACTED] beginning in February 2008 as a dairy manager, but due to unforeseen circumstances, [REDACTED] could no longer continue his employment.²

Neither counsel nor the petitioner addressed the four criteria under 8 C.F.R. § 214.2(h)(4)(iii)(A) as requested by the director, and no additional documentation was submitted.

The director denied the petition on August 24, 2009, concluding that the proffered position is not a specialty occupation. On appeal, newly-retained counsel for the petitioner contends that performance of the duties of the proffered position requires the theoretical and practical application of a body of highly specialized knowledge, and cites to relevant sections of the *Handbook* and the Department of Labor's *O*Net Online* in support of these contentions. Although counsel submits excerpts from *O*Net Online* in support of her contentions, no additional documentation is submitted.

² An affidavit from [REDACTED] is also submitted; however, this document addresses issues pertaining to the beneficiary's maintenance of status in the United States that are not subject to appeal. Therefore, this document need not be addressed further.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the AAO finds that the proffered position is not a specialty occupation.

In determining whether a proposed position qualifies as a specialty occupation, USCIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty, as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. In reviewing the 2010-2011 edition of the *Handbook*, the AAO finds that the duties and responsibilities of the proposed position are encompassed within the *Handbook's* entry for the occupation of agricultural manager as discussed below.

In its discussion of the duties of farmers, ranchers and agricultural managers, the 2010-2011 edition of the *Handbook* states the following:

American farmers, ranchers, and agricultural managers direct the activities of one of the world's largest and most productive agricultural sectors. They produce enough food and fiber to meet the needs of the United States and for export. *Farmers and ranchers* own and operate mainly family-owned farms. They also may lease land from a landowner and operate it as a working farm. *Agricultural managers* manage the day-to-day activities of one or more farms, ranches, nurseries, timber tracts, greenhouses, or other agricultural establishments for farmers, absentee landowners, or corporations. While their duties and responsibilities vary widely, all farmers, ranchers, and agricultural managers focus on the business aspects of running a farm. On small farms, they may oversee the entire operation; on larger farms, they may oversee a single activity, such as marketing.

* * *

The type of farm managers operate determines their specific tasks. On crop farms—farms growing grain, cotton, other fibers, fruit, and vegetables—farmers are responsible for preparing, tilling, planting, fertilizing, cultivating, spraying, and harvesting. After the harvest, they make sure that the crops are properly packaged, stored, and marketed. Livestock, dairy, and poultry farmers and ranchers feed and care for animals and keep barns, pens, coops, and other farm buildings clean and in good condition. They also plan and oversee breeding and marketing activities. Both farmers and ranchers operate machinery and maintain equipment and facilities, and both track technological improvements in animal breeding and seeds, and choose new or existing products.

The size of the farm or ranch often determines which of these tasks farmers and ranchers handle themselves. Operators of small farms usually perform all tasks, physical and administrative. They keep records for management and tax purposes, service machinery, maintain buildings, and grow vegetables and raise animals. Operators of large farms, by contrast, have employees who help with the physical work. Although employment on most farms is limited to the farmer and one or two family workers or hired employees, some large farms have 100 or more full-time and seasonal workers. Some of these employees are in nonfarm occupations, working as truck drivers, sales representatives, bookkeepers, and computer specialists.

Agricultural managers usually do not plant, harvest, or perform other production activities; instead, they hire and supervise farm and livestock workers, who perform most daily production tasks. Managers may establish output goals; determine financial constraints; monitor production and marketing; hire, assign, and supervise workers; determine crop transportation and storage requirements; and oversee maintenance of the property and equipment.

Based upon its reading of the *Handbook*, the AAO concludes that the duties of the proposed position, as described by the petitioner in its letter of support and in its response to the director's request for additional evidence encompasses the duties of farmers, ranchers and agricultural managers. Having made such a determination, the AAO next turns to the *Handbook* to determine whether this occupational category normally requires applicants for employment to have the minimum of a baccalaureate or higher degree, or its equivalent, in a specific field.

The *Handbook* states the following regarding the educational requirements for farmers, ranchers and agricultural managers:

Experience gained from growing up on or working on a family farm is the most common way farmers learn their trade. However, modern farming requires making increasingly complex scientific, business, and financial decisions, so postsecondary education in agriculture is important, even for people who were raised on farms.

Education and training. Most farmers receive their training on the job, often by being raised on a farm. However, the completion of a 2-year associate degree or a 4-year bachelor's degree at a college of agriculture is becoming increasingly important for farm managers and for farmers and ranchers who expect to make a living at farming.

These statements do not support a finding that a bachelor's degree is normally required for entry into this occupation. The *Handbook* finds that completion of a 2-year degree and a 4-year bachelor's degree program is "becoming increasingly important" for farmers, ranchers and agricultural managers. A bachelor's degree in a specific specialty, however, is not a minimum

requirement for entry into this occupation. Moreover, the fact that obtaining a 2-year degree or a 4-year degree is “becoming increasingly important” is not synonymous with the standard imposed by the regulation of normally requiring a minimum of a bachelor’s degree in a specific specialty or its equivalent. It is clear that at least a bachelor’s degree in a specific specialty, or its equivalent, is not the normal minimum requirement.

On appeal, counsel refers to *O*Net Online*’s section pertaining to crop and livestock managers, noting that, with regard to education and training, it states that “most of these occupations require a four year bachelor’s degree, but some do not.” This statement is not persuasive, since it acknowledges that some positions do not require a degree. Moreover, the referenced section does not state that the occupation requires the attainment of a baccalaureate or higher degree, or its equivalent, in a specific specialty as a minimum for entry into the occupation. Accordingly, the AAO accords no weight to this information.

For all of these reasons, the AAO finds that the position does not qualify as a specialty occupation on the basis of a degree requirement under the first criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO now turns to a consideration of whether the petitioner, unable to establish its proposed position as a specialty occupation under the first criterion set forth at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under one of the three remaining alternative criteria: a degree requirement as the norm within the petitioner’s industry or the position is so complex or unique that it may be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position; or the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree.

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 alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, 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.

To meet the burden of proof imposed by the regulatory language under the first prong of this regulation, a petitioner must establish that its degree requirement exists in positions that are parallel to the proffered position and found in organizations similar to the petitioner. There is no information in the record to establish that farms similar in size, scope, scale of operations, business efforts, expenditures to the petitioner routinely require a specialty degreed individual to fill the position of farm manager. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record contains no evidence to establish that a bachelor’s degree in a specific specialty is an industry-wide minimum standard

for the position of farm manager. Accordingly, the proposed position does not qualify for classification as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO also concludes that the record does not establish that the proposed position is a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires a demonstration that the position is so complex or unique that it can only be performed by an individual with a degree. There has been no demonstration that the proposed position is more complex or unique than the general range of farmers, ranchers and agricultural managers in other, similar organizations, which would not normally require a specialty degreed individual. The *Handbook* indicates that such positions generally do not normally require at least a baccalaureate degree in a specific specialty or its equivalent; and the evidence of record does not establish the proposed position as unique from or more complex than the general range of such positions.

Additionally, the proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a showing that the petitioner normally requires at least a baccalaureate degree in a specific specialty or its equivalent for the position. To determine a petitioner's ability to meet this criterion, the AAO normally 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. Although documentation specific to this criterion was requested by the director, the petitioner failed to provide such evidence.

While the petitioner contends that it requires its dairy farm manager to possess at least a bachelor's degree in agricultural science or a similar field, the petitioner failed to present evidence in support of this contention. Nor did the petitioner present any supporting documentation of its past employment practices, as requested by the director. In the instant case, the petitioner has submitted no evidence regarding its past hiring practices with regard to other similarly situated employees. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

While the petitioner states that a degree is required, the petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position or 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. To interpret the regulations in any other way would lead to absurd results: if USCIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388. Accordingly, the petitioner has not established

the proffered position as a specialty occupation under the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

The AAO refers to the *Handbook* excerpts quoted previously in this decision, which state that a bachelor's degree in a specific specialty is not the normal minimum entry requirement for positions such as the one proposed here. The duties of the proposed position do not appear more specialized and complex than those of the corresponding positions as set forth in the *Handbook*. The AAO finds nothing in the record to indicate that the beneficiary, in his role as a dairy farm manager at the petitioner's place of business, would face duties or challenges any more specialized and complex than those outlined in the *Handbook*.

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 as an absolute minimum the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Again, there is no information in the record to support a finding that the proposed position is more complex or unique than similar positions in other, similar organizations. As the *Handbook* reveals, such organizations do not normally impose a bachelor's degree requirement. Therefore, the evidence does not establish that the proposed position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Therefore, for the reasons related in the preceding discussion, the proposed position does not qualify for classification as a specialty occupation under any of the four criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4), and the petition was properly denied on that basis. The proposed position in this petition is not a specialty occupation, and, as such, the beneficiary's qualifications to perform its duties are inconsequential. Accordingly, the AAO will not disturb the director's denial of the petition.

Finally, the AAO notes that the record indicates that a prior H-1B petition has been approved for the beneficiary. If the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, however, it would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an

extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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