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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: **FEB 07 2012** Office: CALIFORNIA SERVICE CENTER FILE:

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 \$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 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.

On the Form I-129 visa petition the petitioner stated that it is a dairy farm firm. To employ the beneficiary in what it designates as an agriculture and food science technician position, the petitioner endeavors to classify her 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 it would employ the beneficiary in a specialty occupation position, and failed to demonstrate that it would comply with the terms and conditions of employment stated on the labor condition application (LCA). On appeal, counsel asserted that the director's bases for denial were erroneous, and contended that the petitioner satisfied all evidentiary requirements. In support of these contentions, counsel submitted a brief and additional evidence.

The AAO bases its decision upon its review of the entire record of proceeding, 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 and attached exhibits in support of the appeal.

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. 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 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.

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 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, 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 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 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 a particular position 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 LCA submitted to support the visa petition is certified for employment in Pierz, Minnesota and in Sauk Rapids, Minnesota. With the visa petition, counsel provided evidence that the beneficiary had received a bachelor's degree in zoological technical sciences from the Universidad Nacional del Centro del Peru. Counsel provided an evaluation, prepared by an educational evaluation service, equating that foreign degree to a bachelor's degree in zoology earned in the United States.

Counsel also provided a letter, dated March 31, 2009, from the petitioner's owner. That letter contains the following description of the duties of the proffered position:

(1) assist the general manager with the gathering of information to make informed decisions regarding treatment of fresh and sick cows and calves; (2) provide care and treatment for fresh cows, sick cows and calves; (3) enter data into the computer and monitor the results; (4) conduct milk quality tests and monitor quality control, assuring every load of milk shipped is of food grade quality; (5) assist with the implementation of breeding programs, using artificial insemination; (6) assist in monitoring the results of the breeding and nutritional programs; (7) continuously increase her [sic] knowledge of cow physiology, disease prevention, and new technologies in the production, monitoring and care of dairy cattle and the production of food grade milk; (8) perform any duties required of [the beneficiary]; and (9) additional duties that may be assigned from time to time.

The petitioner's owner further stated:

In order to perform the duties of this position, the successful applicant must have a Bachelor's degree in Animal Agriculture, Zoology, or a foreign degree that is equivalent to a U.S. degree in either of those disciplines.

The petitioner's owner did not, however, indicate which of the enumerated duties would require such a degree, nor did she provide evidence that a degree in zoology would prepare one to perform such duties.

At the outset, the AAO will here enter a number of findings, all adverse to the appeal, which are hereby incorporated into and adopted as an integral part of this decision's later analysis of this petition under the framework of the USCIS regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO first finds that the petitioner describes the proposed duties in general terms of generic functions to be performed. Illustrative examples from the above-quoted duty descriptions include, for instance, the petitioner's stating that the beneficiary would "assist the general manager with the gathering of information," related to care and treatment of cows and calves; "conduct milk quality tests"; "monitor quality control"; and "assist with the implementation of breeding programs, using artificial insemination." Upon review of these descriptions, both separately and in the aggregate, and in the context of the information that the petitioner provided about itself, the AAO further finds that they convey neither the constituent tasks involved in these generally described duties; nor any particular body of highly specialized knowledge in a particular specialty that would have to be

theoretically and practically applied to perform such work; nor a minimum level of education, or educational equivalency, in a specific specialty that would be necessary to attain such knowledge.

The AAO will also here state several additional findings resulting from the generalized nature the information that the petitioner provided about the duties of the proffered position.

First, that duty information is not sufficient to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), by establishing that the particular position under review is one for which a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry.

Next, the generalized information about the proposed duties and the position that they comprise is not sufficiently detailed to provide a substantive basis for determining whether any industry position represented as parallel to the proffered position under the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) is indeed parallel and therefore appropriate for review for a common degree requirement, under that criterion.

Further, the AAO finds, that, by so generally describing the duties of the proffered position, and without exposition of whatever relative complexity or uniqueness may reside in them, the petitioner failed to establish a relative degree of complexity or uniqueness in the proffered position, let alone such a level of complexity or uniqueness that would satisfy the second alternate prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), by “show[ing] that [the petitioner’s] particular position is so complex or unique that it can be performed only by an individual with a degree.”

Additionally, the petitioner does not describe the proposed duties with sufficient specificity to establish duties with the degree of specialization and complexity that is the focus for analysis under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), that is specific duties with a nature so specialized and complex that their performance would require knowledge usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

On August 19, 2009, the service center issued an RFE in this matter. The service center requested that the petitioner provide a more detailed description of the duties of the proffered position and explain why a minimum of a bachelor’s degree or the equivalent in a specific specialty is required in order to perform in the proffered position.

In response, counsel submitted her own letter dated September 4, 2009. In it, counsel provided what purports to be a more detailed description of the duties of the proffered position. Counsel did not, however, indicate her basis in stating that the duties she described are the duties the beneficiary would perform.

On September 25, 2009, the director denied the visa petition finding, as was noted above, that the petitioner had not demonstrated that the proffered position is a specialty occupation position and had not demonstrated that it would abide by the terms and conditions of employment as stated on the

LCA. The AAO will first address the finding that the petitioner had not demonstrated that the petitioner would employ the beneficiary as stated on the LCA.

The director noted that the petitioner stated that it had four farms, but had listed only two work locations on the LCA. Those locations are Pierz, Minnesota and in Sauk Rapids, Minnesota. This appears to have been the sole reason for the finding that the petitioner has not demonstrated that it would employ the beneficiary pursuant to the terms of the LCA.

On appeal, counsel stated that the reason only two towns are listed on the LCA is that all of the petitioner's farms are located in those two towns. No reason exists to doubt that assertion, and the AAO finds that, on the balance, the petitioner has demonstrated that, if the visa petition were approved, it would employ the beneficiary in the locations for which the LCA is valid. The finding that it has not so demonstrated is withdrawn.

The remaining basis for the denial of the visa petition is the director's finding that the petitioner has not demonstrated that it would employ the beneficiary in a specialty occupation position. The AAO will now address the alternative requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A). In orienting the petitioner to this analysis, the AAO restates that its introductory findings regarding the deficiencies of the descriptions of the proposed duties and, by extension, the position that they comprise, are deemed incorporated into and adopted as an integral part of the following analysis of the application of the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A) to this petition.

The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which is satisfied if the petitioner establishes that the normal minimum requirement for entry into the particular position that is the subject of this petition is a baccalaureate or higher degree, or the equivalent, in a specific specialty.

The AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹ The *Handbook* describes the duties of agricultural and food science technicians, in the chapter entitled Science Technicians, as follows:

Agricultural and food science technicians work with related scientists to conduct research, development, and testing on food and other agricultural products. Agricultural technicians are involved in food, fiber, and animal research, production, and processing. Some conduct tests and experiments to improve the yield and quality of crops or to increase the resistance of plants and animals to disease, insects, or other hazards. Other agricultural technicians breed animals for the purpose of investigating nutrition. Food science technicians assist food scientists and technologists in research and development, production technology, and quality control. For example, food science technicians may conduct tests on food additives and preservatives to ensure

¹ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2010 – 2011 edition available online.

compliance with Food and Drug Administration regulations regarding color, texture, and nutrients. These technicians analyze, record, and compile test results; order supplies to maintain laboratory inventory; and clean and sterilize laboratory equipment.

The AAO agrees with the petitioner's implicit assertion that the duties of the proffered position mark it as an agricultural and food science technician position. The *Handbook* states, in the chapter entitled Science Technicians, the following about the educational requirements for science technician positions, including agricultural and food science technician positions:

There are many ways to qualify for a job as a science technician. Most employers prefer applicants who have at least 2 years of specialized postsecondary training or an associate degree in applied science or science-related technology. Some science technicians have a bachelor's degree in the natural sciences, while others have no formal postsecondary education and learn their skills on the job.

The referenced section of the U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-11 ed., available at <http://www.bls.gov/oco/ocos115.htm> (last accessed January 17, 2012).

As evident in the excerpt above, the *Handbook* does not support the assertion that agricultural and food science technician positions categorically require a minimum of a bachelor's degree, let alone that they require such a degree in a specific specialty. The record contains no other evidence to indicating that agricultural and food science technician positions normally require a minimum of a bachelor's degree or the equivalent in a specific specialty.

As the petitioner has not demonstrated that a baccalaureate or higher degree, or its equivalent, in a specific specialty, is normally the minimum requirement for entry into the particular position, it has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO will consider 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.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As was observed above, the *Handbook* provides no support for the proposition that the dairy industry, or any other, requires agricultural and food science technicians to possess a minimum of a

bachelor's degree or the equivalent in a specific specialty. The record contains no evidence pertinent to a professional association of agricultural and food science technicians that requires a minimum of a bachelor's degree or the equivalent in a specific specialty as a condition of entry. The record contains no letters or affidavits from others in the dairy industry. In short, the record contains no evidence to corroborate that the dairy industry requires its agricultural and food science technicians to have a minimum of a bachelor's degree or the equivalent in a specific specialty. The petitioner has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner demonstrates that, notwithstanding that other agricultural and food science technician positions in the dairy industry may not require a minimum of a bachelor's degree or the equivalent in a specific specialty, the particular position proffered in the instant case is so complex or unique that it can be performed only by an individual with such a degree.

The AAO finds that the record of proceeding contains no evidence to corroborate that gathering information to make decisions about the treatment of fresh cows, sick cows, and calves; caring for fresh cows, sick cows, and calves; entering data into computers; testing milk; assisting in breeding plans; monitoring the results of breeding plans and nutritional programs; continuously increasing one's knowledge of cow physiology, disease prevention, and new technologies in milk production; and additional unspecified duties are so complex or unique that they require a minimum of a bachelor's degree or the equivalent in a specific specialty.

As it has not demonstrated that the particular position proffered is so complex or unique that it can be performed only by an individual with at least a bachelor's degree, or the equivalent, 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).

The record contains no evidence of a previous history of recruiting and hiring to fill the proffered position, and the petitioner has not, therefore demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO will address the alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which is satisfied if the petitioner demonstrates that 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, or its equivalent.

As reflected in its introductory discussion of the generality of the information provided about the proposed duties, the AAO finds no evidence establishing that the proffered position involves specific duties that have the degree of specialization and complexity required to satisfy this criterion. For instance, nothing about gathering information to make decisions about the treatment of fresh cows, sick cows, and calves; caring for fresh cows, sick cows, and calves; entering data into computers; testing milk; assisting in breeding plans; monitoring the results of breeding plans and nutritional programs; continuously increasing one's knowledge of cow physiology, disease prevention, and new

technologies in milk production; and additional unspecified duties indicates that those tasks, individually or collectively, are so specialized and complex that they require knowledge usually associated with attainment of a minimum of a bachelor's degree or the equivalent in a specific specialty.

The petitioner has not demonstrated that 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 has not, therefore, demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO finds that the director was correct in her determination that the record before her failed to establish that the beneficiary would be employed in a specialty occupation position, and it also finds that the evidence and argument submitted on appeal have not remedied that failure. Accordingly, the appeal will be dismissed and the petition denied on this basis.

The record suggests another issue that was not addressed in the decision of denial.

The evaluation in the record asserts that the beneficiary's foreign degree is equivalent to a U.S. bachelor's degree in zoology, rather than veterinary science, or any subject more closely related to agricultural or food science.

The AAO observes that if the petitioner had demonstrated that the proffered position required a minimum of a bachelor's degree or the equivalent *in a specific specialty*, the petitioner would be obliged, in order for the visa petition to be approvable, to demonstrate, not only that the beneficiary has a bachelor's degree or the equivalent, but that the beneficiary has a minimum of a bachelor's degree or the equivalent *in that specific specialty*.² See *Matter of Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968).

Pursuant to the instant visa category, however, a beneficiary's credentials to perform a particular job are relevant only when the job is found to qualify as a specialty occupation. As discussed *supra* in this decision, the proffered position has not been shown to require a baccalaureate or higher degree, or its equivalent, in a specific specialty and has not, therefore, been shown to qualify as a position in a specialty occupation. Because the finding that the petitioner failed to demonstrate that the proffered position qualifies as a specialty occupation position is dispositive, the AAO need not reach the issue of the beneficiary's qualifications.

² The petitioner's owner stated, in her March 31, 2009 letter, that the proffered position requires a bachelor's degree in animal agriculture or zoology. The AAO is not inclined to believe that animal agriculture and zoology are interchangeable or that, together, they delineate a single specific specialty. Because the proffered position has not been shown to require either degree, however, the AAO need not reach that issue in the instant case.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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.