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U.S. Citizenship
and Immigration
Services

[REDACTED]

DATE: **JAN 22 2015** OFFICE: VERMONT 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director (hereinafter "director") denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed. The petition will be denied.

I. PROCEDURAL AND FACTUAL BACKGROUND

On the Form I-129 visa petition, the petitioner describes itself as a 250-employee "Management Company" established in [REDACTED]. Other evidence in the record indicates that it manages [REDACTED] franchises. In order to continue to employ the beneficiary in what it designates as an "Area Manager" position, the petitioner seeks 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. On appeal, counsel asserted that the director's basis for denial was erroneous and contended that the petitioner satisfied all evidentiary requirements.

As will be discussed below, we have determined that the director did not err in her decision to deny the petition on the specialty occupation issue. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

We base our decision upon our 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 petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's submissions on appeal.

II. THE LAW

The issue before us is whether the petitioner has demonstrated that the proffered position qualifies as a specialty occupation. Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human

endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed 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 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 result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and 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. *See*

Royal Siam Corp. v. Chertoff, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular 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 directly related to the duties and responsibilities of the particular position, 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. 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.

III. EVIDENCE

The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is an "Area Manager" position, and that it corresponds to Standard Occupational Classification (SOC) code and title 11-9051, Food Service Managers from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a Level I, entry-level, position.

With the visa petition, counsel submitted evidence that the beneficiary received a master's degree in Business Administration – Hospitality – Event Leadership from [REDACTED] in [REDACTED] Rhode Island.

Counsel also submitted a letter, dated July 25, 2013, from [REDACTED] the petitioner's managing member, who stated:

The petitioner . . . is a service and management company that oversees the operation of various corporations and/or franchises producing high volume bakery and dairy products known as [REDACTED] all owned by [REDACTED]

As to the duties of the proffered position, Mr. [REDACTED] stated:

The beneficiary will work as Area Manager for the Networks located in the state of New Jersey. She will direct the company's development of business, management of sales and marketing operations for her assigned territory or networks. She will apply her professional expertise in business administration and management to design and implement business strategies that inform potential customers about the company's products, services and the quality of products. She will manage the business planning development and implementation of the company's market strategies for her assigned territory to achieve business goals and needs of the customers and corporate objectives. She will analyze business operations within each franchised store within her territory, and will develop and implement methods needed to improve services, product offerings and efficiencies in accordance with the approved expansion plans. She will also track, report, and analyze the business ventures and client relationships in order to determine the success of the company's business plans. Specifically, the breakdown of the beneficiary's job duties are [sic] described as follows:

- *Achieve regional/territory sales objectives by contributing territory sales information and recommendations to strategic plans and weekly business reviews, and prepare and oversee implementation of action plans by subordinate managers and employees.*
- *Implement production, productivity, quality and customer-service standards to each store in territory and resolve customer, delivery, financial and logistic problems that cannot be handled by subordinates.*
- *Establish sales objectives by creating a sales plan for the territory and quota systems in support of company objectives and maintain and expand customer base by counseling sales representatives and building and maintaining contacts with key vendors and large scales [sic] customers such as corporations, clubs, caterers, etc.*
- *Identify and recommend new product lines and discontinuation of unsuccessful product lines and service, price schedules and discount rate changes by surveying customer needs and trends and tracking competitors.*
- *Prepare sales forecasting reports by researching pricing and costing for the preparation of refined business and services strategies in territory.*
- *Initiate development of monitoring, financial modeling and recording databases for future quarter indicators so that immediate comparisons of business objectives over a given period can be easily obtained.*
- *Study work problems and inefficiencies such as organizational change, communications, information flow, and cost analysis and report the findings in business reports to improve efficiencies and consider available solutions or alternate methods of proceedings [sic].*

- *Recommend franchise budgets and approve budgetary expenditures for the territory based upon allocation from corporate headquarters.*

As to the educational requirements of the proffered position, Mr. [REDACTED] stated that the duties of the proffered position require a "baccalaureate degree in a specific field of study, which is a degree in Hotel and Restaurant Management, Business Administration, Business Management, or any directly related field."

On January 22, 2014, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence that the petitioner would employ the beneficiary in a specialty occupation. The service center provided a non-exhaustive list of items that might be used to satisfy the specialty occupation requirements.

In response, counsel provided, *inter alia*,: (1) a vacancy announcement placed by the petitioner; (2) evidence pertinent to the qualifications of people other than the beneficiary; and (3) a letter, dated March 10, 2014, from [REDACTED]

The petitioner's vacancy announcement is for the proffered position and states that it requires a bachelor's degree in management; business administration; accounting; hotel, restaurant and institution management; marketing; or any business related field. [REDACTED] indicates in his March 10, 2014 letter that this announcement was not published, but rather, it was posted internally within the petitioner's organization.

The evidence pertinent to the qualifications of people other than the beneficiary shows that: (1) [REDACTED] has a bachelor's degree in hotel, restaurant, and institution management from [REDACTED] in the Philippines and was paid by [REDACTED] during March of 2014; (2) [REDACTED] has a bachelor's degree in business administration with a concentration in accounting from [REDACTED] and was paid by [REDACTED] during March of 2014; (3) [REDACTED] has a bachelor's degree in food service management from [REDACTED] and was paid by [REDACTED] from December 2011 to February 2012; (4) [REDACTED] has a bachelor's degree in business administration with a major in E-Business from [REDACTED] in the Philippines and was paid by [REDACTED] from December 2010 to December 2011; and (5) [REDACTED] has a bachelor's degree in hotel, restaurant, and institution management from [REDACTED] in the Philippines and was paid by [REDACTED] from December 2005 to December 2006.

In his March 10, 2014 letter, [REDACTED] stated that the petitioner currently has two area managers, [REDACTED] and that in the past it had three other area managers, [REDACTED]. He further stated that the proffered position requires a minimum of a bachelor's degree in business management; business administration; hotel, restaurant, and institution management; marketing; or a

directly related field. He asserted that the evidence presented demonstrates that the proffered position qualifies as a specialty occupation position.

The director denied the petition on April 29, 2014, finding, as was noted above, that the petitioner had not demonstrated that the proffered position qualifies as a position in a specialty occupation by virtue of requiring a minimum of a bachelor's degree in a specific specialty or its equivalent. More specifically, the director found that the petitioner had satisfied none of the supplemental criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states:

In this Appeal Brief we will demonstrate and prove that the Beneficiary's duties and responsibilities as **Area Manager** for this organization are very much different from those of the Food Service Manager, taking into consideration the nature of business operations, scope of the organization, its staff hierarchy and position requirements, as well as methods, techniques, and tools used in accomplishing work.

As to the duties of the proffered position, counsel stated:

The Area Manager in our organization is tasked with directing the company's entire business operations to include development of business, management of sales, and directing the marketing operations of the assigned territory. The position encompasses the areas of management, administration, finance, logistics, sales, and marketing of the business. The job involves design and implementation of business strategies to inform potential customers about the company, its products and quality of products that it distribute or offer [sic]. The Area Manager manages the business planning, development and implementation of our marketplace and strategies for the territory of his/her jurisdiction in order to satisfy the business goals and needs of our customers and our corporate objectives. The Area Manager's responsibility includes implementation of advertising and promotional campaigns that is effective for the territory as well as the production of advertising, press releases, and other documents to promote the sales of the territory. It is the professional worker's statistical business analysis and review that will make the company determine the size and nature of staffing requirements, promotional ventures and franchise expansion which is needed to be undertaken in the territory.

Counsel asserted that the evidence demonstrates that the proffered position qualifies as a specialty occupation position.

IV. ANALYSIS

As a preliminary matter, we observe that the petitioner has repeatedly asserted that an otherwise unspecified bachelor's degree in business administration would be a sufficient educational

qualification for the proffered position. A degree with a generalized title, such as business administration, without further specification, is not a degree in a specific specialty. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). As such, an educational requirement that may be satisfied by an otherwise undifferentiated bachelor's degree in business administration is not a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent. The assertion that an otherwise unspecified bachelor's degree in business administration would be a sufficient educational qualification for the proffered position is tantamount, therefore, to an admission that the proffered position does not require a minimum of a bachelor's degree in a specific specialty or its equivalent and, therefore, does not qualify as a specialty occupation position. The appeal must be denied and the visa petition dismissed on this basis alone.

Moreover, there are significant discrepancies in the record of proceeding with regard to the proffered position that undermine the petitioner's credibility with regard to the nature and requirements of the proffered position. The petitioner submitted an LCA in support of the instant petition that designated the proffered position under the SOC code and title 11-9051, Food Service Managers from O*NET. On appeal, however, counsel asserts that the duties and responsibilities of the proffered position "are very much different from those of the Food Service Manager." Thus, counsel claims that the occupational category designated on the LCA does not correspond to the proffered position.

The record contains conflicting statements as to the nature of the proffered position and fails to demonstrate through documentary evidence the work to be performed by the beneficiary. The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. Consequently, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

V. ADDITIONAL BASES

The record suggests an additional issue that was not addressed in the decision of denial but that, nonetheless, also precludes approval of this visa petition.

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) stipulates the following:

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

While the U.S. Department of Labor (DOL) is the agency that certifies LCAs before they are submitted to USCIS, the DOL regulations note that it is within the discretion of the U.S. Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) to determine whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification. . . .

[Italics added]

As was noted above, the LCA submitted to support the visa petition is certified for a Level I Food Service Manager position. On appeal, however, counsel argues that "the beneficiary's duties and responsibilities [in the proffered position] are very much different from those of [a] Food Service Manager" Counsel admits that the LCA submitted does not correspond to the visa petition.¹ The visa petition must be denied for this additional reason.

VI. CONCLUSION

An application or petition that fails to comply with the technical requirements of the law may be denied by us 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.

¹ The petitioner's organizational chart indicates that the petitioner has three Area Manager positions in New Jersey, and that they oversee and manage 27 Food Service Managers. Such a higher level position would almost certainly not be a *Level I* Food Service Manager position, as the proffered position is represented to be on the LCA, because a Level I position is an entry-level position for an employee with only a basic understanding of the occupation, performing routine tasks that require limited, if any, exercise of judgment, who works under close supervision, receiving specific instructions on required tasks and results expected, and whose work is closely monitored and reviewed. *See* U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf. Thus, even if the visa petition were demonstrated to be for a Food Service Manager position, the LCA would not be found to correspond to the LCA.

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 we conduct appellate review on a *de novo* basis). Moreover, when we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of the enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

The director's decision will be affirmed and the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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