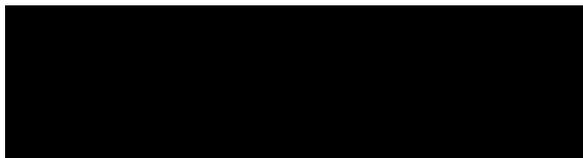


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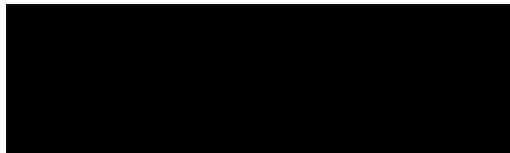
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FILE: LIN 04 003 51626 Office: NEBRASKA SERVICE CENTER Date: JUN 15 2005

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
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.

The petitioner is a Russian specialty grocery store (2 stores). It seeks to employ the beneficiary as a business/store manager and endeavors to classify him 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 because the proffered position does not qualify as a specialty occupation. On appeal, counsel submits a brief and additional information asserting that the offered position qualifies as a specialty occupation.

The issue to be discussed in this proceeding is whether the proffered position qualifies as a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

[A]n occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must 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 are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) 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.

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

The petitioner is seeking the beneficiary’s services as a business/store manager. Evidence of the beneficiary’s duties includes the Form I-129 petition with attachment and the petitioner’s response to the director’s request for evidence. According to this evidence the beneficiary would: manage daily operation of the retail store, selling specific gourmet food products; formulate pricing policies on merchandise according to requirements for profitability of store operations; research, identify and coordinate sales promotion activities, implementing them within a targeted community and beyond; prepare merchandise displays and advertising campaigns; manage the sale of groceries, review inventory and evaluate daily sales receipts; order merchandise to replenish inventory on hand; establish security procedures, sales, and record keeping requirements and practices; establish analysis and development of testing procedures assuring profitability; lock and secure the store; and train and supervise newly hired employees. The petitioner does not state that it requires a degree in any specific specialty for entry into the proffered position, but deems the beneficiary qualified for the position by virtue of his Masters Degree in Business Administration from Murray State University.

Upon review of the record, the petitioner has failed to establish that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the offered position, or that a degree requirement is common to the industry in parallel positions among similar organizations. Factors often considered by CIS when determining these criteria include: whether the Department of Labor’s *Occupational Outlook Handbook (Handbook)* reports that the industry requires a degree; whether an industry 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)).

The AAO routinely consults the *Handbook* for information about the duties and educational requirements of particular occupations. The duties of the proffered position are essentially those noted for general/operations managers. The *Handbook* notes that the formal education and experience of these managers varies as widely as the nature of their responsibilities. Many have a bachelor’s or higher degrees in business administration or liberal arts, while others obtain their positions by promotion from lower level management positions. Thus, it

is possible to obtain a position as a general or operations manager without a college degree by promotion from within the organization based upon performance alone. It is apparent from the *Handbook* that a baccalaureate or higher degree, in a specific specialty, is not the minimum requirement for entry into the offered position. Positions requiring a college degree are filled from a wide range of unrelated educational disciplines. A degree in a specific specialty, however, is not required. The petitioner has failed to establish the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner asserts that a degree requirement is common to the industry in parallel positions among similar organizations. 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). In support of this assertion the petitioner refers to: (1) an opinion letter from Dr. Kenneth E. Knight, Professor of Management and Information Systems at Seattle Pacific University; (2) an on-line article from the U.S. Business Advisor; (3) an article authored by Brian Head from the U.S. Small Business Administration; and (4) the *Dictionary of Occupational Titles (DOT)* and the SVP rating for retail store managers. None of the references, however, establish the regulatory criterion.

- (1) ██████████ states that the industry standard for a position such as a business/store manager is filled through recruiting a college graduate with the equivalent of at least a U.S. bachelor's degree in business administration or a related degree, and that the position's duties require the theoretical and practical application of a body of highly specialized knowledge, thereby qualifying the position as a specialty occupation. ██████████ opinion is based on his education and experience, and does not appear to be based on any industry or labor study or survey. His opinion is in conflict with Department of Labor findings noted in the *Handbook*. The findings in the *Handbook* are based on labor market information compiled for the nation as a whole on various occupations. It states that the duties of the proffered position are filled by individuals lacking a baccalaureate level education, as well as individuals holding degrees in a wide range of unrelated educational disciplines. For example, not only are positions requiring degrees filled by individuals with degrees in business administration as opined by ██████████ but by individuals holding liberal arts degrees as well. Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). ██████████ opinion will, therefore, be given little weight as it conflicts with the findings of the *Handbook* and offers no corroborative evidence supporting the basis of the opinion.
- (2) The petitioner makes reference to an on-line article from the U.S. Business Advisor. The referenced article is a generalized statement regarding business development, and does not state that the proffered position requires a degree in any specific specialty. It merely indicates that “. . . business owners need management and technical assistance, training and education, counseling and user-friendly access to information . . .” in successful business development. The article does not state that any particular level of education/training is needed for this development.

- (3) The article by [REDACTED] from the U.S. Small Business Administration is an article distinguishing between business success and closures/failures. The stated purpose of the article is to distinguish between business closures and failures, and what factors contribute to them. The petitioner cites from the article indicating, in part, that business survival is conditioned upon business owners "having a good education," and that business success rates increase with owners having a good education. Again, the article does not state that any particular level of training/education is required or recommended for a business manager or owner, or that any education be in any particular field of study. The article is, therefore, of little evidentiary value.
- (4) Counsel's assertions regarding the DOT's SVP rating for the offered position are also unpersuasive. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular position. The SVP classification does not describe how those years are to be divided among training, formal education, and experience, nor does it specify the particular type of degree, if any, that a position would require.

The petitioner has failed to establish that a degree requirement is common to the industry in parallel positions among similar organizations. 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner has not established that it normally requires a degree in a specific specialty for the proffered position, and offers no evidence in this regard as the position is new with the organization. The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) has not been established.

Finally, the petitioner has not established that the duties of the offered position are so complex or unique that they can only be performed by an individual with a degree in a specific specialty, or that the duties are so specialized or complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The duties are routinely performed by general and operations managers in the industry with education in a wide range of educational disciplines. The petitioner has failed to establish the referenced criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) or (4).

The petitioner has failed to establish that the offered position meets any of the criteria listed at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the AAO shall not disturb the director's denial of the petition.

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 and the appeal shall accordingly be dismissed.

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