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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: EAC-01-088-52835 Office: Vermont Service Center Date: AUG - 6 2002

IN RE: Petitioner: [redacted]
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)

Public Copy

IN BEHALF OF PETITIONER: SELF-REPRESENTED

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is an international freight forwarding business with 17 employees and a gross annual income of $8,400,000. It seeks to employ the beneficiary as a customer traffic consultant for a period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation.

On appeal, the petitioner submits a brief.

8 C.F.R. 214.2(h)(4)(ii) defines the term "specialty occupation" as:

> an 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.

The director denied the petition because the duties described by the petitioner did not appear to be so complex as to require a baccalaureate degree. On appeal, the petitioner's vice president states, in part, that information from the Encyclopedia of Careers and Vocational Guidance indicates that the position of traffic engineer requires a bachelor's degree in civil, electrical, mechanical, or chemical engineering. He further states that the Service previously approved H-1B petitions for two of the petitioner's other customer traffic consultants. He additionally states that the Department of Labor's (DOL) Occupational Outlook Handbook (Handbook) supports his claim.

The petitioner's statement on appeal is not persuasive. The Service does not use a title, by itself, when determining whether a particular job qualifies as a specialty occupation. The specific duties of the offered position combined with the nature of the petitioning entity's business operations are factors that the Service considers. In the initial I-129 petition, the petitioner described the duties of the offered position as follows:

> The responsibilities of this position are to consult with both North American based, and Chinese companies, and to plan and coordinate with them the services they require

> for shipments between China and North America. These duties include studying and analyzing proposed methods of preparing and packing freight for shipment; advising clients on choices of carriers and schedules, costs, routes and ports, special services provided, and gathering and providing information regarding customs forms and duties and the services of customs house brokers.

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;
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> 3. The employer normally requires a degree or its equivalent for the position; or
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> 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.

The petitioner has not met any of the above requirements to classify the offered position as a specialty occupation.

First, the Service does not agree with the petitioner's argument that the proffered position would normally require a bachelor's degree in business administration or an equivalent thereof. The petitioner's reference to the traffic engineer position in the Encyclopedia of Careers and Vocational Guidance is noted. Such publication indicates that the position of traffic engineer requires a bachelor's degree in civil, electrical, mechanical, or chemical engineering. The duties described for a traffic engineer in such publication, however, are not similar to those of the proffered position. In the Encyclopedia of Careers and Vocational Guidance, a traffic engineer is described as follows:

> Traffic engineers study factors that influence traffic conditions on roads and streets, including street lighting visibility and location of signs and signals, entrances and exits, and the presence of factories or shopping malls. They use this information to design and implement plans and electronic systems that improve the flow of traffic.

Rather than a traffic engineer as described above, the proffered position appears to be that of a cargo and freight agent. In its Handbook, 2002-2003 edition, the DOL describes the job of a cargo and freight agent as follows:

> Cargo and freight agents arrange for and track incoming and outgoing cargo and freight shipments in airline, train, or trucking terminals or on shipping docks. They expedite movement of shipments by determining the route that shipments are to take and preparing all necessary shipping documents. The agents take orders from customers and arrange for pickup of freight or cargo for delivery to loading platforms. They may keep records of the properties of the cargo, such as the amount, type, weight, and dimensions. They keep a tally of missing items, record conditions of damaged items, and document any excess supplies.
>
> Cargo and freight agents arrange cargo according to its destination. They also determine the shipping rates and other charges that can sometimes apply to the freight. For imported or exported freight, they verify that the proper customs paperwork is in order. They often track shipments using electronic data, such as bar codes, and answer customer inquiries on the status of their shipments.

A review of the DOL's Handbook finds no requirement of a baccalaureate or higher degree in a specialized area for employment as a cargo and freight agent. Applicants start out by checking items to be shipped and then attaching labels and making sure the addresses are correct. Training in the use of automated equipment is usually done informally, on the job. As the occupation becomes more automated, however, an individual may need longer training in order to master the use of the equipment. Thus, the petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary.

Second, although the petitioner claims that it normally requires a baccalaureate degree in a specialized area for the proffered position, the petitioner's reasoning is problematic when viewed in light of the statutory definition of specialty occupation. 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. As with employment agencies as petitioners, the Service 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 (5th Cir. 2000). 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 bachelor's degree in the specific specialty as the minimum for entry into the occupation

as required by the Act.[1] To interpret the regulations any other way would lead to absurd results: if the Service was 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 bachelor's degrees. See id. at 388.

In this case, although the petitioner claimed to have hired only individuals with a bachelor's degree in a specialized area for its customer traffic consultant positions, the position, nevertheless, does not meet the statutory definition of specialty occupation. The position, itself, does not require the theoretical and practical application of a body of highly specialized knowledge. Therefore, even though the petitioner has required a bachelor's degree in the past, the position still does not require a bachelor's degree in a specific specialty.

Third, the petitioner did not present any documentary evidence that businesses similar to the petitioner in their type of operations, number of employees, and amount of gross annual income, require the services of individuals in parallel positions. Finally, the petitioner did not demonstrate that the nature of the beneficiary's proposed duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The record contains a letter from an academic expert who states that the usual requirement for positions such as the proffered position is a baccalaureate degree. It is noted that the writer does not specify that such degree must be in a specialized area. Even if the writer had specified a degree in a specialized and related area, one letter is insufficient evidence of an industry standard. The writer has not provided evidence in support of his assertions. In addition, he has not indicated the number or percentage of customer traffic consultants who hold baccalaureate degrees in a specialized and related field.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

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[1] The court in Defensor v. Meissner observed that the four criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." Supra at 387.

With respect to the petitioner's objection to denial of this petition in view of the approval of a similar petition in the past, the Associate Commissioner, through the Administrative Appeals Office, is not bound to follow the contradictory decision of a service center. Louisiana Philharmonic Orchestra v. INS, 2000 WL 282785 (E.D.La. 2000), aff'd, 248 F.3d 1139 (5th Cir. 2001), cert. denied, 122 S. Ct.51 (U.S. 2001).

Beyond the decision of the director, the record does not contain any corroborating evidence to support the evaluator's finding that the beneficiary holds the equivalent of a baccalaureate degree in business administration, such as an evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience, as required by 8 C.F.R. 214.2(h)(4)(iii)(D)(1). As this matter will be dismissed on the grounds discussed, this issue need not be examined further.

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.