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Immigration and Naturalization Service

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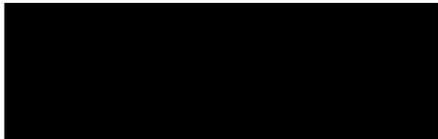
DEC 16 2002

File: LIN 0123851382 Office: NEBRASKA SERVICE CENTER Date:

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)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision 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.

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 that 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 that 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, California Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is described as a trucking company in Ohio. It was established in 1999, employs 52 persons and has a six million dollar gross income. It seeks to temporarily employ the beneficiary as a regional transportation manager for a period of three years. The director determined that the petitioner had not established that the position offered to the beneficiary was a specialty occupation.

On appeal, counsel asserts that the position offered to the beneficiary is a specialty occupation, and raises other issues.

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.

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 field 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 issue in this proceeding is whether the petitioner has established that the position offered to the beneficiary is a specialty occupation.

In the initial petition filing, the petitioner stated that the occupation in question involved the following duties:

Direct & coordinate the regional activities of motor transportation company; examine and analyze rates, tariffs, operating costs & to determine such needs or requirements as increase in rates & tariffs, reduction in operations & maintenance costs; & expansion of or

changes in schedules or routes; prepare recommendations designed to increase efficiency & revenues & lower costs.

In an accompanying letter, the petitioner identified the position as regional transportation manager, and reiterated the description contained in the I-129 petition. The petitioner also added that the beneficiary would review operational records and reports to detect deviations from operational practices and prepare directives to implement and maintain company standards. The beneficiary would also investigate safeguards and inspect regional premises to ensure that adequate protection exists for company assets, property and equipment.

In the petition, counsel examined the definitions of Manager, regional (motor transportation), Manager, customer technical services, Manager, department, and Manager, industrial organization contained in the Department of Labor (DOL) Dictionary of Occupational Titles (DOT). He viewed these professions as equivalent to the position offered to the beneficiary. Counsel stated that all four occupations were listed as having a Special Vocational Preparation (SVP) level of 8. Counsel added that according to another DOT document, Specific Vocational Preparation (SVP) Estimates for Occupations in the U.S. Department of Labor Dictionary of Occupational Titles (DOT), the lower SVP level of 7 requires a bachelor's degree.

Counsel also referenced the 2000-2001 DOL Occupational Outlook Handbook (Handbook) and its section on general managers, which included mention of transportation managers. Counsel's citation to this section was the following: "The educational background of managers and top executives varies as widely as the nature of their responsibilities. Their major often is related to the departments they direct." He also further noted that the Handbook description of industrial production manager was analogous to the position being offered. In comparing these job descriptions with the proffered position, counsel thought it appropriate to consider the proffered position to require at least a bachelor's degree in business administration (management).

On October 29, 2001, the director asked for additional information for the instant petition. In stating that the evidence submitted to date was insufficient to determine that the position was a specialty occupation, the director took exception to counsel's description of SVP Level 7. The director did not think this rating indicated that the proffered position requires a four-year baccalaureate degree. The director also noted that counsel's citation to the Handbook with regard to general managers omitted the next statement in the Handbook that stated the following:

Since many general manager and top executive positions are filled by promoting experienced, lower level

managers when an opening occurs, many are promoted from within the organization. In industries such as retail trade or transportation, for instance, it is possible for an individual without a college degree to work their way up within the company and become managers. Many companies prefer, however, that their top executives have specialized backgrounds and hire individuals who are managers in other organizations.

The director requested more evidence on the four criteria used to qualify the position in question as a specialty occupation. In particular, the director requested evidence on the criterion that the degree requirement is common to the industry in parallel positions among similar organizations. The director also requested the petitioner to submit documentation to show that the petitioner had previously employed individuals with baccalaureate or higher degrees in a specific specialty in the position.

In response, counsel asserts that the Service had interpreted the SVP rating of 7 incorrectly and that two SVP years represent a bachelor's degree. Counsel stated that the issue is whether the baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position, and submits excerpts from DOL publications as well as other publications that examine how to evaluate SVP rating levels or that comment on requirements for jobs similar in title to the position offered to the beneficiary. These publications included DOL documents Dictionary of Instructional Programs and Careers, and Enhanced Occupational Outlook Handbook (2000), among others. The petitioner provided no evidence that similar firms in the industry required a baccalaureate degree, or that the petitioner in the past had required a baccalaureate degree for the same position.

On January 15, 2002, the director denied the petition stating that the petitioner had failed to establish any of the four criteria listed in the regulations. With regard to the criterion that the baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the position, the director stated that the minimum requirement provided by the petitioner for the position was a bachelor's degree rather than a bachelor's degree in a specialized and related area. The director cited to the Handbook at page 521 and found no requirement for a baccalaureate or higher degree in a specialized area for employment as a transportation manager. In addition the director cited to the Handbook at page 50-51 to find that there is no requirement for a baccalaureate degree in a specialized area for employment as a general manager or executive. With regard to the degree requirement being common to the industry, the petitioner had not shown that similar firms had required the service of persons with a baccalaureate or higher in parallel positions. In addition the petitioner had not shown that the petitioner, in the

past, required the services of an individual with a baccalaureate or higher degree in a specialized specialty for the position.

With regard to the fourth criterion that the nature of the specific duties of the proffered position 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 director determined that the use of SVP levels as outlined in the DOT is not enough to establish an occupation as within the professions or as a specialty occupation. Likewise the Service found the use of the DOL's Selected Characteristics of Occupations Described in the Dictionary of Occupation Titles was similarly flawed.

On appeal, counsel asserts that the Service had not addressed the issue of whether a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position, or if the degree requirement is common to the industry in parallel positions among similar organizations. Counsel further states that if the published authorities cited to in the request for further evidence had been closely reviewed, the petition would have been granted.

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.

Factors often considered by the Service when determining the industry standard include: whether the DOL's 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." Shanti, Inc. v.

Reno, 36 F.Supp.2d 1151, 1165 (D. Min. 1999) (quoting Hird/Blaker Corp. v. Slattery, 764 F. Supp. 872,1102 (S.D.N.Y. 1991)).

The 2002-2003 edition of the Handbook examines classifications of both Transportation Managers on page 595, and Top Executives on pages 86-89. There is no general manager/executive classification in the 2002 Handbook, although a new Top Executive classification is in the Handbook. The Handbook also examines a third category of Industrial Production Manager on pages 64 to 66. This classification appears to be less relevant to the proffered position, in that it states, "the primary mission of industrial production managers is planning the production schedule within budgetary limitations and time constraints," and primarily refers to manufacturing production.

With regard to the first category, Transportation Managers, the most significant source of training on page 595 is described as "work experience in a related occupation." With regard to the second category, Top Executives, the Handbook states on page 87 that the formal education and experience of top executives varies as widely as the nature of their responsibilities. It goes on to state that "many top executives have a bachelor's or higher degree in business administration or liberal arts," and "in industries such as retail trade or transportation, for instance, it is possible for individuals without a college degree to work their way up within the company and become managers." With regard to the third category, industrial production managers, the Handbook states on page 65 that "[b]ecause of the diversity of manufacturing operations and job requirements, there is no standard preparation for this occupation. However, a college degree is required, even for those who have worked their way up the ranks." As stated previously, this third category presently appears the least relevant to the proffered position, due to the emphasis on manufacturing production.

Upon review of the Handbook information, while it is clear that degrees, either in liberal arts or in a specific specialty, are required for many positions in management and/or top executive positions, the evidence is not persuasive that the proffered position as transportation manager for the petitioner's trucking firm would require a baccalaureate degree in a specific specialty.

In addition, the fact that a position title similar to the petitioner's position can be found in the DOT, the Handbook or in similar job classifications books does not automatically establish that the actual job in question requires the same qualifications. For example, Exhibit D, an excerpt from the O*NET Dictionary of Occupational Titles, 1998 edition contained in counsel's evidence submitted to the Service examines the job of Communication, Transportation and Utilities Operations Managers. This job description in addition to mentioning duties similar to those included in the beneficiary's proposed duties, includes job duties

such as:

Conducting investigations in cooperation with government agencies to determine causes of transportation accidents, and to improve safety procedures . . . Acts as organization representative before commissions or regulatory bodies during hearings, such as to increase rates and change routes and schedules. Oversees procurement process, including research and testing of equipment, vendor contacts, and approval of requisitions. Negotiates and authorizes contracts with equipment and materials supplies. Participates in union contract negotiations and settlement of grievances.

The education listed for this position, which contains much, more advanced and complex duties than the position described in the petition is listed as "work experience, plus degree." Based on this job description, the beneficiary's prospective position could require even less experience, with or without a degree. As noted before by the director, the Handbook also mentions that persons within the organization who may or may not have a degree in a relevant field also fill the job of transportation manager.

Without more compelling evidence, the petitioner has not established that a bachelor's degree or higher or its equivalent is the minimum requirement to establish the job of regional transportation manager as a specialty occupation.

With regard to the other three criteria contained in 8 C.F.R. 214.2(h)(4)(iii)(A), the petitioner provided no information with regard to other firms in the industry requiring the bachelor's degree, or that the petitioner had ever required such a degree as a minimum requirement for previous or present applicants for the position in question. Finally the fourth criterion with regard to establishing that the complexity of the job would require a degree was never addressed by the petitioner. Based on the failure to adequately establish any of the four criteria to qualify as a specialty occupation, this petition may not be approved.

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified to perform the services of the proffered position. The beneficiary is a former Peruvian Air Force general. In the original petition, counsel described the beneficiary's education in the following manner:

[The beneficiary] has been awarded a U.S. bachelor's degree in military science. His academic credentials as supplemented by a career as a military officer, during which time he also received a diploma in tactical air operation and personnel administration when he was a

lieutenant. As a major, he received a diploma in command and staff, and another certificate in administration for the American Management Association. As a colonel, he was issued a diploma in high management and command, and as a major general, he participated in the programs of higher direction management. These certificates further verify his lengthy career as a military officer which by its very intrinsic nature is management.

The assertion of counsel that a military career by its very intrinsic nature is similar to management does not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980).

In looking at the educational credentials contained in the petition and on the record, the beneficiary's educational career is the following:

The beneficiary was not awarded a U.S. Bachelor degree in military science, but rather his education in Peru was established to be the equivalent of a U.S. bachelor degree in military science.

In looking at the certificates documenting the degrees that he received in Peru, it should be noted that the beneficiary's first degree received from the Peruvian Air Force in the 1960's covered coursework over four years and identified the beneficiary's specialty as "command arms and combat". The list of courses mention no management or business administration classes.

A second certificate indicates that as a lieutenant in 1972 the beneficiary finished a basic course in Tactical Air Operation at the Peruvian War College in Lima for an unspecified time and received a diploma. Although the petition and the translated version of the certificate describe the coursework as a Tactical Air Operation and Personnel Administration course, the actual certificate does not contain this information.

Another certificate dated 1979 indicates that the beneficiary completed a course at the Air War Academy to perform the functions of Command and Staff. No specific time periods are listed with regard to time in attendance.

Two certificates from the Peruvian Institute for Business Administration in conjunction with the American Management Association list the beneficiary as a participant at a six-day seminar in 1978 entitled "Integral Course on Administration" and as a participant for a month long program entitled "Managerial Excellence" in August of 1993.

A final certificate from the Peruvian Ministry of Defense is dated 1988 and indicates that the beneficiary completed studies for the

course entitled "High Command" while a Major in the Peruvian Air Force. Although the petition and the translation described the coursework as a high management and command course, the actual certificate does not contain the work "management" on it.

In conclusion, the major educational work done by the applicant has been some four years in the area of military science. His educational exposure to management has consisted of a month and a half of management seminars.

Without more compelling evidence, the coursework and certificates listed previously do not appear to establish that the beneficiary is qualified to perform the job of regional transportation manager for a trucking firm. His undergraduate military preparation contains no class work in logistics, finance, transportation, or management. The seminars that he attended were brief and the record is devoid of any relevancy of these courses to the proffered position. No other information is on the record as to how subsequent military courses would lend weight to finding the beneficiary qualified to perform the position. As the appeal will be dismissed on other grounds, 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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.