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U.S. Department of Justice

Immigration and Naturalization Service

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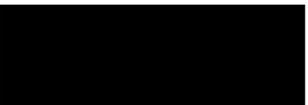


File: EAC-00-132-51941

Office: Vermont Service Center

Date: 4 FEB 2002

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)

IN BEHALF OF PETITIONER:



PUBLIC COPY

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, reopened, and denied again by the Director, Vermont Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a business engaged in the distribution and sales of plumbing and electrical material, ceramic tile, and natural stones, with 100 employees and an approximate gross annual income of \$3 million. It seeks to employ the beneficiary as an import purchasing manager for a period of two years. The director determined the petitioner had not established that the offered position is a specialty occupation.

On appeal, counsel submits a brief.

The term "specialty occupation" is defined at 8 C.F.R. 214.2(h)(4)(ii) as:

an occupation which requires theoretical and practical application of a body of highly specialized knowledge to fully perform the occupation in such 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 application because the evidence of record does not establish that the proffered position is a specialty occupation. On appeal, counsel argues in part that the proffered position is a specialized business management position with unique and complex duties and tasks which require a bachelor's degree in business administration and specialized knowledge of international business.

Counsel's argument 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 beneficiary] will plan, organize, direct, control, and coordinate activities of buyers, purchasing officers and related workers involved in purchasing materials, products [and] services.

- * [The beneficiary] will be in charge of buying from suppliers in Puerto Rico and the exterior.
- * It will be the beneficiary's responsibility to keep an inventory of every purchase that will be assigned to him.
- * [The beneficiary] will have the obligation to keep assignment areas adequate for exhibition of material acquired in all stores;
- * [The beneficiary] will be responsible to negotiate freight charges and deliveries related with the purchase.

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.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding.

The Service does not agree with counsel's argument that the proffered position as an import purchasing manager would normally require a bachelor's degree in business administration or a related field. In these proceedings, the duties of the position are dispositive and not the job title. The offered position appears to be that of a purchasing manager. A review of the Department of Labor's Occupational Outlook Handbook (Handbook), 2000-2001 edition, at pages 73-76 finds no requirement of a baccalaureate or higher degree in a specialized area for employment as a purchasing manager. Degrees in several unrelated fields appear equally

desirable. In addition, on-the-job training appears more important than a specific educational experience.

Counsel argues that the Department of Labor has determined in its Dictionary of Occupational Titles (DOT) that the position of import export agent, the occupation which most closely parallels the proffered position, requires a baccalaureate degree. However, a reference in the DOL's DOT, Fourth Edition, 1977, standing alone, is not enough to establish that an occupation is a specialty occupation. The DOT classification system and its categorization of an occupation as "professional and kindred" are not directly related to membership in a profession or specialty occupation as defined in immigration law. In the DOT listing of occupations, any given subject area within the professions contains nonprofessional work, as well as work within the professions.

The latest edition of the DOT does not give information about the educational and other requirements for the different occupations. This type of information is currently furnished by the Department of Labor in the various editions of the Occupational Outlook Handbook (Handbook). The latter publication is given considerable weight (certainly much more than the DOT) in determining whether an occupation is within the professions. This is because it provides specific and detailed information regarding the educational and other requirements for occupations.

The petitioner has not shown that it has, in the past, required the services of individuals with baccalaureate or higher degrees in a specialized area for the proffered position.

In addition, the petitioner has not shown that similar firms require the services of such individuals in parallel positions.

Counsel argues on appeal that the position involves complex duties which require a baccalaureate degree or its equivalent and cites American Biotech, Inc. v. INS, F. Supp. (E.D. Tenn. March 27, 1989; Arctic Catering, Inc. v. Thornburgh, 769 F. Supp. 1167 (D. Colo. 1991; and Shanti, Inc. v. Reno 36 F. Supp. 2d 1151 (D. Minn. 1999) in support of his argument. However, the duties of the positions in the cases cited are not similar to those in the instant case. Specifically, the proffered position in each of those cases involved a unique product or an unusual service. In this case, the proffered position involves duties normally associated with those of an import purchasing manager, such as negotiating prices and arranging for payment for, and shipment of, the goods purchased from Puerto Rican companies and from foreign companies.

In view of the foregoing, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

Beyond the decision of the director, the petitioner's labor condition application was certified on August 21, 2000, a date subsequent to March 11, 2000, the filing date of the visa petition. Regulations at 8 C.F.R. 214.2(h)(4)(i)(B)(1) provide that 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. 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.