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Immigration and Naturalization Service

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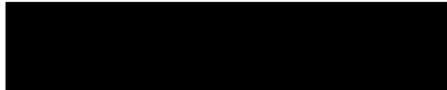
OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: EAC-01-216-55030 Office: Vermont Service Center

Date: OCT 01 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 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 and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a real estate agency with seven employees and a gross annual income of \$150,000. It seeks to employ the beneficiary as a real estate property manager for a period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation.

On appeal, counsel 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 petitioner had not demonstrated that a baccalaureate degree in a specific field of study is a standard minimum requirement for the proffered position. On appeal, counsel submits copies of approval notices and states, in part, that the Service has approved other individuals for the same specialty occupation.

Counsel's statement on appeal does not persuasively establish that the proffered position is a specialty occupation. 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, in part, as follows:

This employee will have full and complete responsibility for appraising real estate and offering assistance with commercial brokerage, residential rentals, and commercial leasing transactions. Therefore, the individual who we employ for this position must be a licensed real estate agent and must have a complete knowledge and understanding of the unique Japanese real estate market and pricing.

The employee will, on occasion, travel to conduct due diligence on the real estate under review for acquisition. The employee will conduct a full review of the financial, structural and operational aspects of the property including reviewing certain filings and documents in [sic] as well as conducting interviews with current management, tenants and lending institutions.

In addition to preparing profit & loss statements, detailed spreadsheets tabulating precise value & income stream of every property under management as well as written reports in English & Japanese for clients & creditors. The real estate property manager/appraiser will coordinate and negotiate contracts of sale, binders, sales agreements, promotional brochures, advertisements in addition to performing appraisals.

The person whom we employ for this professional position as real estate property manager/appraiser will be responsible for management of real estate property & appraisal activities. Prepare and develop proposals for new cost effective marketing methods. Perform sophisticated analysis of workflow, provide market forecasting, prepare cost & benefit estimations. Advise staff via progress. Assist with preparing reports, due diligence & negotiating contracts between foreign speaking corporate clients & individuals that retain property.

This employment position is one that requires a Japanese real estate appraiser's license; and who, in addition to having the necessary bi-lingual skills, must have technical business skill which will allow the employee to prepare the type of detailed real estate evaluation reports and real estate projections which are part and parcel to this employment position. In the past we have found applicants without at least a bachelor's degree in either business administration, accounting or real estate management to be unsuitable for the diverse tasks and responsibilities attendant to this type of employment position.

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

First, the Service does not agree with counsel's argument that the proffered position would normally require a bachelor's degree in business administration with a concentration in economics. The proffered position appears to combine the duties of a property and real estate manager with the duties of a real estate agent. A review of the Department of Labor's Occupational Outlook Handbook (Handbook), 2002-2003 edition, at page 78, finds no requirement of a baccalaureate or higher degree in a specialized area for employment as a property and real estate manager. Although most employers prefer to hire college graduates for property management positions, entrants with degrees in business administration, accounting, finance, real estate, public administration, or related fields are preferred, but those with degrees in liberal arts also may qualify.

A review of the Handbook at pages 363-364 also finds no requirement of a baccalaureate or higher degree in a specialized area for employment as a real estate agent. In every State and the District of Columbia, real estate agents must be licensed. Prospective agents must be a high school graduate, at least 18 years old, and pass a written test. Thus, the petitioner has not shown that a bachelor's degree or its equivalent in a specialized area is required for the position being offered to the beneficiary.

Second, although the petitioner's past hiring practices indicate that it required its former real estate property manager to hold a baccalaureate degree in marketing, 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 claims to hire only individuals with a bachelor's degree in business-related fields for its real estate property manager positions, the position, nevertheless, does not meet the statutory definition of specialty occupation. (It is also noted here that although the petitioner has been established since 1977, it has provided evidence that only one of its former real estate property managers held a baccalaureate degree.) 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, although the petitioner provides a list with the names of four employees in H-1B status who are allegedly in similar positions with the petitioner's competitors, 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.

It is further noted that the petitioner has not established that the beneficiary's duties as a translator are of such complexity that a baccalaureate degree in a specific specialty, as distinguished from familiarity with the Japanese language or a less extensive education, is necessary for the successful completion of its duties.

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

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.

concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

With respect to counsel'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).

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.