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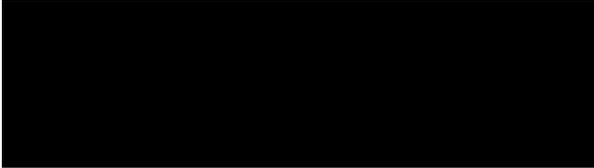
U.S. Department of Homeland Security

Citizenship and Immigration Services

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OFFICE OF ADMINISTRATIVE APPEALS
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, D.C. 20536



NOV 07 2003

File: LIN 01 162 53198 Office: VERMONT 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:
[Redacted]

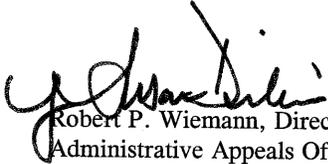
INSTRUCTIONS:

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 Citizenship and Immigration Services (CIS) 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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director of the Nebraska Service Center, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on motion to reconsider. The motion will be granted. The previous decision shall be affirmed. The petition will be denied.

The petitioner provides transportation services by land, air, and sea for agricultural products, particularly beef, pork, and poultry. It has two employees and a gross annual income of \$721,613. It seeks to employ the beneficiary as an operations manager for a period of three years.

Pursuant to 8 C.F.R. § 103.5(a)(3), a motion to reconsider must:

State the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Section 214(i)(1) of the Immigration and Nationality Act (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:

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.

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.

Counsel maintains that the petitioner should prevail on the motion for reconsideration because, contrary to the AAO's action on the petitioner's appeal, the evidence established that: (1) the proffered position has a degree requirement that is common to the industry in positions which are parallel to the proffered position among organizations which are similar to the petitioner [8 C.F.R. § 214.2 (h)(4)(iii)(A)(2), above]; and (2) the nature of the duties are so specialized and complex that that knowledge required to perform them is usually associated with a bachelor's degree [8 C.F.R. § 214.2 (h)(4)(iii)(A)(4), above]. According to the motion, the AAO specifically erred by:

1. Discounting the advertisements submitted by the petitioner as evidence that a degree requirement is common to the industry in positions that are parallel to the one proffered and among organizations similar to the petitioner's.
2. Not recognizing the specialty occupation status that is inherent in the specific duties of the proffered position, which are "so specialized and complex that the

knowledge required to perform the duties is usually associated with attainment of a baccalaureate or higher degree."

3. Not recognizing that the proffered position's "duties, responsibility, and authority indicate the position is professional."

As presented in a letter from the petitioner's president that accompanied the petition, the duties of the proffered position were:

- Planning and execution of business/logistics strategies
- Management of hiring & firing employees
- Vendor negotiation
- Traffic and distribution management
- Periodic evaluation of subordinates
- Analysis of logistics costs

In addressing the issue of the specialization and complexity of duties, the motion refers to a more detailed description that was provided by the petitioner's president in a letter replying to the director's request for additional information:

[A] detailed job description for the position of Operations Manager was previously submitted and said duties include: planning and executing business/logistic strategies in the meat industry; conducting regular research of the internet via the Internet, meat magazines, and industry contacts; identifying new importers and soliciting their business; planning business strategies to help respond to the market; conducting vendor negotiations; acting as an intermediary between exporters and importers for finding the specific types of meat customers want at a price that they are willing to pay; managing traffic and distribution; being responsible for carrier selection and rate rationalization, expediting and tracking, freight payment, and freight expenditure optimization; analyzing logistic costs including shipping, warehouse,

and product costs and devising cost-saving strategies;
and conducting periodic evaluation of subordinates and
management of hiring and firing employees.

The AAO did not misapply law or Immigration and Naturalization Service (now Citizenship and Immigration Services) (CIS) policy in its determination that the evidence had not established a degree requirement that was common in the petitioner's industry in positions both parallel to the one proffered here and part of organizations similar to the petitioner.

According to the record, the petitioner is a corporation whose main business is providing services for the international transportation of agricultural products, particularly beef, pork, and poultry. None of the advertisements submitted by petitioner relate to positions in that industry. They were issued by a restaurant association, a meat manufacturer, a real estate company, a provider of services to state and local governments, and a document management and workflow solutions firm. This fact alone defeats the petitioner's attempt to use the advertisements to prove an industry-wide practice.

Accordingly, the AAO had correctly decided the issue of an industry-wide degree requirement, in accordance with 8 C.F.R. § 214.2(h) (4) (iii) (A) (2).

The question now is whether the AAO misapplied law or policy in its determination that the evidence had not established duties so specialized and complex that their performance requires knowledge usually associated with a bachelor's degree, or its equivalent, in a specific specialty.

The motion, in part, states counsel's dissatisfaction that the AAO did not "explain which specific duties are not so [specialized and complex]" and give the reasons why they cannot be considered to be so specialized and complex as to require a bachelor's degree. Counsel maintains that "[b]ecause the appeals office has not supplied sufficient response to rebut" the petitioner's "detailed explanation" on the issue, it should be decided in the petitioner's favor.

The AAO's dismissal of the petitioner's appeal states, in pertinent part, "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 CIS regulation governing appeals, 8 C.F.R. § 103.3, does not require the AAO to "rebut" a petitioner's assertions or supporting evidence. An appeal is not an adversarial proceeding, and the petitioner and the AAO are not adverse parties. The petitioner's role on appeal is to present a case as to why the director's denial did not accord with the record. The AAO's role is not to contest or rebut the petitioner, but to make an independent and impartial determination based on the evidence in the record. Accordingly, to the extent that it asserts that the AAO's dismissal of the appeal was erroneous for lack of rebuttal or explanatory detail, the motion is without merit.

The relevant CIS regulatory provision, 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) implements Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), above. Therefore, like the Act, it necessarily requires that the knowledge, asserted to be necessitated by a position's specialization and complexity, be so specialized as to be associated with a bachelor's degree, or its equivalent, in a specific specialty. As listed by the petitioner (and reprinted above) the duties just do not indicate a requirement for that type of knowledge.

Likewise, the record does not support the motion's contention that the proffered position's duties, responsibility, and authority indicate that the position is "professional" in nature. Counsel's citation of *Matter of Michael Hertz Assoc., Inc.*, 19 I&N Dec. 558, does not advance the cause of the motion. The petitioner's evidence does not pass muster under *Hertz Assoc.'s* explanation, at 559, of the requirements for qualifying a position as an H-1B "profession" (a term replaced in the 1990 Act's adoption of the "specialty occupation" standard). In particular, the record in the instant case does not demonstrate that the proffered position requires a bachelor's degree in a specialized, precise, and specific course of studies.

Accordingly, the AAO had correctly decided the issue on the nature of the duties, in accordance with 8 C.F.R. § 214.2 (h) (4) (iii) (A) (4).

After careful consideration of the record and counsel's assertions in the motion for reconsideration, the AAO finds that the grounds advocated for overturning the dismissal of the appeal are without merit.

As always, 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 met that burden.

ORDER: The decision of the AAO is affirmed. The petition is denied.