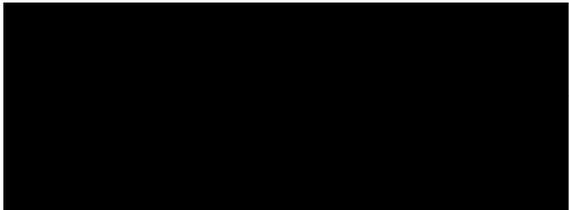


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U.S. Citizenship
and Immigration
Services



DZ

FILE: SRC 03 229 50207 Office: TEXAS SERVICE CENTER Date: APR 26 2004

IN RE: Petitioner: [Redacted]
Beneficiary [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Mari Johnson

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a franchise distributor of bathroom furnishings and accessories designed and manufactured by the Brazilian company Vallvé. In order to employ the beneficiary as an architectural design consultant, the petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the basis that the petitioner had failed to establish that the proffered position is a specialty occupation. On appeal, counsel submits a Form I-290B and a brief with exhibits of documentary evidence.

The director's decision to deny the petition was correct. The record does not present an evidentiary basis for classifying the proffered position as a specialty occupation in accordance with any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In reaching its decision, the AAO considered the entire record of proceeding, including: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the matters submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief and attached exhibits.

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.

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.

Citizenship and Immigration Services (CIS) interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The director found that the proffered position is related to occupations for which the 2002-2003 edition of the Department of Labor’s *Occupational Outlook Handbook (Handbook)* does not report a baccalaureate degree as a minimum requirement for entry. The director found further that the petitioner failed to satisfy any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel contends that the director misapplied the law and abused her discretion by not duly considering evidence in the record that establishes that the proffered position is a specialty occupation.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

For a description of the duties, the Form I-129 referred to a letter which the petitioner submitted with that form. The letter asserts, “As with any architectural design consultant, the usual minimum requirement for performance of these job duties is attainment of a Bachelor’s degree in architecture or its equivalent.” This letter of support from the petitioner provided this information about the proposed duties:

In order to maintain our reputation for cutting edge technology and design that our clients have come to count upon, it is essential to maintain on staff a professional who has the proper combination of experience and education to incorporate the elements of the theory and practice of architecture into our clients['] constructions and design schemes. [The beneficiary] is the ideal candidate for the position offered. [The beneficiary] is being offered temporary employment in the position of architectural design consultant. In general, [the beneficiary] will consult with the company’s new construction and remodeling clients to determine how best to incorporate our products into their building plans. Specific job duties will include:

1. Consult with company management to identify needs and/or problems in interior and exterior designing, building, and remodeling projects;
2. Survey home décor and commercial, electrical décor items, structural components and other home and office accessories;
3. Gather data regarding market and industry trends;
4. Access materials to effect purchase, repair, modification and/or replacement of structures and decoration projects;
5. Inspect and price out merchandise; quote the time and value for decoration projects, make recommendations as to remodeling, repair, architectural modification or replacement of existing structures and estimate costs thereof.

At the third page of her letter responding to the RFE, counsel asserted that there was no licensure requirement by virtue of a Florida statute that exempts employees of retail establishments who provide interior decorator services at the retail establishment or in the furtherance of a completed or prospective sale. In citing to this licensure exemption, the second page of the petitioner's letter of reply to the RFE refers to the position as that of a design consultant.

The sketches which the petitioner submitted depict the general dimensions of particular bathrooms and other dwelling areas and in-scale representations of furnishings and accessories as they would appear within those dimensions.

The Vallvé brochures submitted into the record indicate that the petitioner's bathroom furnishing and accessory products include sinks, soap dispensers, shower-curtain rods, shelving, mirrors, shower heads, soap dishes, baskets, and miscellaneous containers.

The AAO fully considered all of counsel's assertions on appeal, but found them unpersuasive.

Counsel contends that "improper weight was capriciously accorded to marketing tasks[,] hence disqualifying the position." There is nothing in the director's decision to indicate that she gave more weight or consideration to the beneficiary's proposed duties of "[g]ather[ing] data regarding market and industry trends." The director merely recited this duty in a list of duties, including sales and customer service, which were considered in reaching her decision. Despite counsel's assertion, there is no evidence that that the director reached her decision after giving this duty improper weight.

Counsel contends that the director ignored evidence, including duties listed by the petitioner in the letter that it submitted with the Form I-129. Upon its independent review and consideration of the entire record, including all the evidence submitted by the counsel and the petitioner, the AAO reached the same ultimate conclusion as the director, namely, that the record lacks an evidentiary basis for classifying the proffered position as a specialty occupation in accordance with any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

To the extent that they were depicted in the record, it is not evident that the proffered position and the duties that comprise it would require the theoretical and practical application of the highly specialized knowledge that is acquired by a baccalaureate or higher degree, or the equivalent, in architecture or any other specific specialty.

The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) is satisfied when the evidence establishes that a baccalaureate or higher degree, or its equivalent, in a specific specialty is the normal minimum requirement for entry into the particular position. The evidence of record here does not reach this threshold.

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of a wide variety of occupations. The totality of the evidence indicates that the proffered position is an amalgam of the retail sales representative and drafter occupations as described in the *Handbook*. The *Handbook* indicates that neither of these occupations requires a baccalaureate or higher degree, or the equivalent, in a specific specialty. Furthermore, the evidence of record does not establish that the duties of the proffered position comport with any occupation for which the *Handbook* reports a requirement for a baccalaureate or higher degree in a specific specialty.

In reaching these findings, the AAO gave particular weight to the limited nature of the sketches presented in the record; the type of products being sold for installation; and the type of general, non-architect advice which the petitioner has stated that the beneficiary would provide.

Some observations are in order about the duties listed in the petitioner's letter of support. The evidence of record does not convey the concrete nature of the "needs and/or problems in interior and exterior designing, building, and remodeling projects" upon which the beneficiary would consult with management. Likewise, the record does not provide any concrete details about the duty described as "Survey home décor and commercial, electrical décor items, structural components and other home and office accessories." Furthermore, the general scope of this duty appears to be inconsistent with the petitioner's emphasis upon the proffered position's involvement with bathroom furnishings and accessories. (See, for instance, the opening paragraph of the petitioner's letter of reply to the RFE.)

As the evidence does not establish that the proffered position is one that normally requires a baccalaureate or higher degree, or the equivalent, in any specific specialty, the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) is not met.

Next, the petitioner has not presented evidence that would qualify the proffered position under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The evidence does reach the first prong's threshold of a specific-specialty degree requirement that is common to the industry in parallel positions among similar organizations.

In determining whether there is such a common degree requirement, factors often considered by CIS include: whether the *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." See *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)).

As discussed earlier, the evidence does not establish the proffered position as one for which the *Handbook* reports a degree requirement in a specific specialty. Also, there are no submissions from individuals, other firms, or professional associations in the petitioner's industry.

The job vacancy advertisements submitted into the record are too small a sample to have any evidentiary impact. Furthermore, they are not relevant to this criterion: the advertised positions are not parallel to the one at issue, and they are not in organizations similar to the petitioner. Also, the advertisements do not indicate a shared requirement of a degree in a specific specialty. As stated earlier, CIS interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. One of the two advertisers specified only the generic requirement of a "Bachelor Degree."

Next, the evidence of record does not qualify the proffered position under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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." To the extent that it is described in the record, proffered position is not sufficiently complex or unique to require a person with at least a

baccalaureate degree in a specific specialty. In fact, the totality of the evidence comports with a sales representative position that involves some drafting skills, and, as earlier discussed, such a position does not require a baccalaureate degree in a specific specialty.

The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position – is not satisfied. At the time it filed the instant petition, the petitioner had been in existence for too short a time to establish a significant hiring history. Also, the fact that the petitioner currently employs a person with an architectural degree in the same position as proffered here does not establish that performance of the position requires at least a baccalaureate in a specific specialty. 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. CIS 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 baccalaureate or higher 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 CIS were 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 baccalaureate or higher degrees. *See id.* at 388.

Finally, the evidence does not satisfy the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4) – specific duties so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. To the extent that they are described in the record, the proposed duties indicate no such complexity or specialization. The AAO has noted the assertions of both counsel and the petitioner to the effect that the complexities of job duties qualifies the proffered position under this criterion. However, the evidence does not validate these opinions. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Also, the assertions of counsel do 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).

Because the petitioner has failed to establish that the proffered position is a specialty occupation within the meaning of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed.

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. The petition is denied.

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." *See id.* at 387.