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U.S. Citizenship
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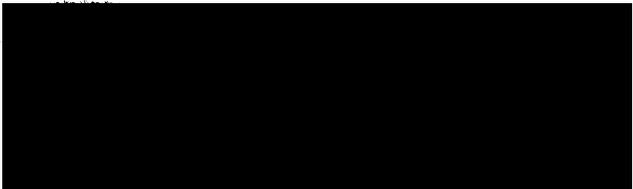


FILE: WAC 03 010 50296 Office: CALIFORNIA SERVICE CENTER Date: DEC 14 2007

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)

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. 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 trading company that currently imports and sells aluminum bottles and containers to various industries in the United States. It seeks to employ the beneficiary as a controller. The petitioner, therefore, 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 because the petitioner had not established it had a bona fide position for the beneficiary that is a specialty occupation. On appeal, counsel states that director did not provide specific reasons for the denial, and that the position is a specialty occupation. Counsel submits further documentation.

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 record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the petitioner's letter of support; (3) the director's request for additional evidence; (4) the petitioner's response to the director's request; (5) the director's denial letter; and (6) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a controller. In its response to the director's request for further evidence, the petitioner described itself as a trading company for goods and services from India primarily set up to take advantage of the lowering of trade barriers in 2005 between the United States and India. The petitioner presently imports and sells lined and unlined aluminum bottles and cans for resale to small U.S. companies, primarily in the fragrance industry. It stated that it was established in 2002, and had a projected gross income of \$200,000 for 2002. The petitioner stated that although it had two employees presently, it also projected having six employees by 2003. The petitioner also stated that it was one of a three-company global trade group.

Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's letter of support; and the petitioner's letter in response to the director's request for further evidence. According to the petitioner's response to the director's request for further evidence, the beneficiary would, on a day-to-day basis, track inventory, orders, sales, expenses, and cash flow, as well as match orders and shipments with sales and ensure timely collections and payment. The beneficiary would spend 50 per cent of his time in these duties. On the strategic/management level, the beneficiary would conduct monthly review of results, budgets and forecasts; implement a system that allows access to financial information; think broadly on how to build the business; and help create financial models and strategic plans for the company. This duty would involve 20 per cent of the beneficiary's time and involve travel to India to negotiate transactional details. For 25 per cent of his time, the beneficiary would also be responsible for managing relationships with vendors and partners in India. Finally, for five per cent of his time, the beneficiary would consult with the other companies in which the petitioner's president is the majority shareholder. The petitioner also submitted an organizational chart that showed the chief executive officer/president and the director of finance as two existing employees. According to the chart, another current employee was the East Coast sales representative. In the chart, the beneficiary's position is shown below the positions of CEO and director of finance and above the positions of warehouse manager, sales representatives, and the outsourced bookkeeping and accounting staff. The petitioner stated that it required a candidate to possess a bachelor's degree in business administration, accounting, finance, or a closely related field.

The director denied the petition and stated that it was not sufficient for the petitioner to state that he would employ an individual to perform duties that are characteristic of those found in a specialty occupation. The director further stated that the petitioner must establish that there is a reasonable and credible offer of employment that is consistent with the petitioner's needs. The director also determined that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states that director did not provide specific reasons for the denial of the petition. Counsel states that the petitioner requires the position of controller because of the unique nature of the business, the company's future growth in the next three years, the increasingly complex financial compliance issues that surround trade, and to ensure the future success of the business. Counsel further states that the petitioner currently deals with a manufacturing base in China and a services base in India. As such, counsel asserts that a controller is necessary for the petitioner to succeed in a global market that involves a sophisticated

knowledge of the financial laws and regulations of the United States and of foreign countries. Counsel provides a brochure on Liquidmetal Technologies, a company that counsel identifies as the petitioner's affiliate, and financial information and documentation on Simplificiti, Inc., a company also identified as the petitioner's affiliate. Counsel states that the petitioner's business plan is based on these two companies' business plans. In addition, counsel submits a letter from [REDACTED] the controller at Liquidmetal Technologies, and a letter from [REDACTED] a certified public accountant. Counsel also submits a letter from [REDACTED] the petitioner's present certified public accountant. [REDACTED] states that, based on the business description and proposed company growth of the petitioner, the petitioner would need to bring most of its finance and accounting functions in-house. [REDACTED] also states that he can continue to provide advice on tax and accounting issues as related to the U.S. laws and regulations; however, he would not be in a position to support the same functions for countries outside of the United States.

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

The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree.

Factors often considered by CIS when determining these criteria 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)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. While the petitioner, the controller at a business in which the petitioner was previously employed, a private accountant, and the petitioner's accountant all provide explanations for the need for an individual to perform the job duties of a controller based on the petitioner's projected revenues and business activities in India, the regulatory criteria are quite clear with regard to establishing eligibility. CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(12). The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The fact that the petitioner may grow in the future and may require the services of a controller is not solely determinative in this proceeding. The director appropriately examined the instant petition, by examining the record that included the job description for the proffered position, and documentation on the existing business activities and operations of the petitioner. Such documentation included sales invoices and financial documents submitted by the petitioner. Based on these documents, the petitioner sells a variety of cans and bottles to U.S. companies, and, as of July 31, 2003, it employed two individuals, one of which is the majority shareholder and president of the petitioner. Although on appeal, the letters from three accountants mention the petitioner's future business activities in India, the petitioner provided no documentation on any

present business activities between India and the United States. Such documentation could include sales receipts of products purchased in India and shipped to the United States, any negotiated contracts or shipping agreements, or similar items. There is also no information as to the manufacturing base in China, and any associated job duties. 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).

With regard to the proffered position and its job duties, the AAO does not find the position to be analogous to that of a controller. According to the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* classification of financial manager, controllers direct the preparation of financial reports that summarize and forecast the organizations' financial position, such as income statements, balance sheets, and analyses of future earnings or expenses. They can also be in charge of preparing special reports required by regulatory authorities. Their duties are basically and primarily of a financial management nature. In contrast, 50 per cent of the duties of the proffered position include supervising the warehouse activities and staff, checking on payments, and collections of payments, as well as supervising the outsourced accounting and bookkeeping duties. The position also appears to require expertise in international buying and shipping, and the ability to interact with Indian vendors, among other duties. These types of duties are more analogous to shipping agents, buyers, or sales managers, none of which are considered specialty occupations that require a baccalaureate degree in a specific specialty. In addition, the petitioner established that it already employed a director of finance. The petitioner provided no information on any differentiation of duties between the current director of finance and the financial duties of the proffered position. Thus, neither the petitioner nor the *Handbook* establish that the proffered position is a controller position, and would require a baccalaureate degree in a specific specialty.

The petitioner must prove that the beneficiary is coming temporarily to the United States to perform services in a specialty occupation. Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 101(a)(15)(H)(i)(b). 8 C.F.R. § 214.2(h)(1)(ii)(B). The petitioner has failed to establish that the beneficiary will be coming to the United States to perform services as a controller.

With regard to parallel positions in similar businesses, counsel provided six vacancy announcements for controllers. The jobs described in these vacancy announcements are not parallel positions to the proffered position, nor are the companies listed similar to the petitioner. Some job advertisements are for members of accounting teams, or accounting consultants, while others are positions in areas such as manufacturing. In addition, while all job positions required a bachelor's degree, several of these positions do not require a baccalaureate degree in a specific specialty. As previously noted, on appeal, the petitioner provided three letters from accountants, two of which either worked for the petitioner or worked for Liquidmetal Technologies, a company that the petitioner's president helped to create. All three letter writers stated that, based on the petitioner's job description and proposed business growth in India, the petitioner needed a controller. As noted previously, such projections of future needs, without more, are not sufficient to establish the eligibility of the instant petition at the time of filing. See *Matter of Michelin Tire Corp; Treasure Craft*. In addition, their statements do not establish an industry standard. The petitioner also did not provide sufficient documentation to support the complexity or uniqueness of the proffered position. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to 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. The petitioner stated in its petition that the controller position was a new position. Therefore the petitioner cannot meet this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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. As previously stated, the AAO does not consider the duties of the position as analogous to those of a controller. To the extent that they are depicted in the record, the majority of duties of the position appear routine to the operations of any sales and distribution company. While the petitioner stated that its business focus presently was to work with smaller U.S. and Indian companies, it provided no additional information as to why this factor would make the duties of the position either specialized or complex. Without more persuasive evidence, the petitioner has not established the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

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.