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U.S. Citizenship
and Immigration
Services



FILE: EAC 02 092 53902 Office: VERMONT SERVICE CENTER Date: **MAR 08 2004**

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:

SELF-REPRESENTED

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 director of the service center 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 bakery that seeks to employ the beneficiary as a sales and distribution manager. 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 proffered position is not a specialty occupation and the beneficiary is not qualified to work in a specialty occupation. On appeal, the petitioner submits a brief and additional evidence.

Section 214(i)(1) of the Immigration and Nationality Act (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 director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) 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 sales and distribution manager. Evidence of the beneficiary's duties includes: the Form I-129; the letter accompanying the Form I-129; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail, in part: developing and training the sales force; developing a marketing program; and creating job descriptions and policies for the Sales Department. In the petitioner's letter, dated June 21, 2002, the petitioning entity stated that it submitted, along with the letter, a statement indicating the educational requirements of the position. The record, however, does not contain the statement.

The director found that the proffered position was not a specialty occupation because the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A). The director stated that he never received additional evidence from the petitioning entity, contrary to the petitioner's statement that such evidence was submitted. The director, consequently, found that the neither the job offered nor the beneficiary qualified for classification under section 101(a)(15)(H)(i)(b) the Act.

On appeal, the petitioner states that the proffered position, product development and marketing director, is a specialty occupation and that the beneficiary is qualified to perform services in a specialty occupation because he possesses a bachelor's degree in chemistry and has extensive sales and distribution experience. The petitioner, furthermore, states that the beneficiary would develop a line of food production, preservation, and packaging to increase the longevity of food; and would set food production rules and regulations. Thus, the petitioner claims that a candidate must possess a bachelor's degree in chemistry.

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.

The AAO considers 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 Department of Labor's *Occupational Outlook Handbook* (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)).

On appeal, the petitioner substantially alters the position's title and adds new duties to the proffered position. 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). Any facts that come into being subsequent to the filing of a petition cannot be considered when determining whether the proffered position is a specialty occupation or the beneficiary is qualified to perform a particular specialty occupation. Thus, the only position description that the AAO will consider is the one from the December 11, 2001 letter and the I-129 petition. A petitioner cannot change a position's title or its associated duties after filing the I-129 petition. See *Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. A review of the *Handbook* reveals that the director correctly concluded that the proffered position does not qualify as a specialty occupation. First, as the director noted, the record does not contain evidence that the petitioner allegedly submitted. Second, the duties of the proffered position, director of distribution and sales, reflect those performed by marketing and sales managers. No evidence in the *Handbook* indicates that a baccalaureate or higher degree, or its equivalent, in a specific specialty is required for marketing and sales manager positions. Thus, the petitioner fails to establish the first criterion.

There is no evidence to establish the second criterion - that a degree requirement is common to the industry in parallel positions among similar organizations. The petitioner, furthermore, states that it does not believe that there is a peer group, union, or management organization that would be able to prepare a written advisory opinion as to whether the proffered position is a specialty occupation.

Similarly, no evidence is in the record that would show the proffered position is so complex or unique that it can be performed only by an individual with a degree.

No evidence in the record establishes the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): the employer normally requires a degree or its equivalent for the position. Nor is the fourth criterion established - that the nature of the specific 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. As the *Handbook* conveys, the duties of the proffered position correspond to those performed by marketing and sales managers. Consequently, a baccalaureate or higher degree, or its equivalent, in a specific specialty is not required for the proffered position.

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 director also found that the beneficiary would not be qualified to perform the duties of the proffered position if the job had been determined to be a specialty occupation. However, as the AAO is dismissing the appeal because the job is not a specialty occupation, it will not discuss the beneficiary's qualifications.

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.