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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
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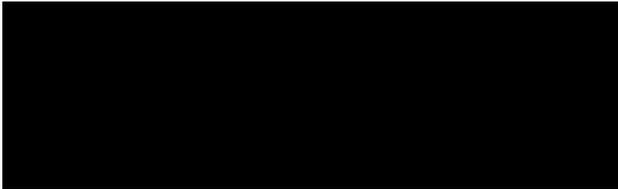


U.S. Citizenship
and Immigration
Services

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FILE: EAC 02 216 53162 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)

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
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 retail business that seeks to employ the beneficiary as a general manager. 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 because: (1) the proffered position is not a specialty occupation; and (2) the beneficiary is not qualified to perform services in a specialty occupation. On appeal, counsel submits a brief and additional evidence.

The AAO will first address the director's conclusion that the position is not a specialty occupation.

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 general manager. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's May 21, 2002 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: directing and coordinating the activities of the company; planning, developing, and implementing the company's policies and goals; coordinating the activities of divisions; promoting products and developing new markets; analyzing the budget; reviewing operations and sales; and promoting the company in industry associations. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in business or a related discipline.

Referring to the Department of Labor's *Occupational Outlook Handbook (Handbook)*, the director stated that a bachelor's degree is not a clear prerequisite for employment as a general manager. The director also stated that the submitted Internet job postings did not require a bachelor's degree. The director, finally, stated that the evidence contained in the record did not establish that the beneficiary is qualified to perform services in a specialty occupation.

On appeal, counsel contends that the proffered position qualifies as a specialty occupation, and that the beneficiary is qualified to perform the duties of the proffered position. However, 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.

First, 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 *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)).

Counsel states that a bachelor's degree or its equivalent is normally the minimum requirement for entry into the proffered position. Counsel contends that the director impermissibly raised this standard of proof by stating that the petitioner must demonstrate that a bachelor's degree is the prerequisite to enter into the proffered position. According to counsel, the Board of Immigration Appeals states that the attainment of a baccalaureate degree is usually the minimum requirement for entry into the occupation; it is not a prerequisite to enter into the position. *Matter of Desai*, 17 I&N Dec. 569 (R.C. 1980); *Matter of Palanky*, 12 I&N Dec. 66 (R.C. 1966).

The AAO concurs with counsel that the regulations state that a petitioner must establish "a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position." Essentially, in determining whether a position is a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act.

With respect to the duties of the proffered position, the petitioner's May 21, 2002 letter described the beneficiary's duties, and counsel's August 21, 2002 letter, submitted in the response to the request for evidence, expanded on the beneficiary's duties. However, since the petitioner did not corroborate the statements made by counsel in the August 21, 2002 letter, the AAO will disregard counsel's job description because the unsubstantiated 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).

Counsel contends that although the position of general manager is not described in the Department of Labor's *Dictionary of Occupational Titles (DOT)*, the *Handbook* states that general managers and top executives perform similar duties. As such, counsel refers to the *DOT's* position of president (which has an SVP of 8), to state that the minimum requirement for entry into a general manager position is a bachelor's degree. Moreover, counsel, referring to an unpublished case, contends that business management is a profession.

Counsel's reliance on the unpublished case and the *DOT* is misplaced. The AAO is not persuaded by counsel's reference to an unpublished case given that an unpublished case cannot serve as binding precedent. See 8 C.F.R. § 103.3(c). With the *DOT*, the AAO does not consider it a persuasive source of information regarding whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation. The Department of Labor has replaced the *DOT* with the *Occupational Information Network (O*Net)*. Both the *DOT* and *O*Net* provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. The Department of Labor's *Handbook* provides a more comprehensive description of the nature of a particular occupation and the education, training, and experience normally required to enter into and advance within that occupation. For this reason, CIS is not persuaded by a claim that the proffered position is a specialty occupation simply because the Department of Labor has assigned it a specific SVP rating in the *DOT*.

After reviewing the *Handbook*, the AAO finds that the duties of the proffered position are an amalgam of those performed by marketing, sales, and operations and general managers. For example, marketing managers develop a firm's detailed marketing strategy; sales managers direct a firm's sales program; and operations and general managers plan, direct, or coordinate the operations of a company. Yet, no evidence in the *Handbook* indicates that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into marketing, sales, and operations and general manager positions. For example, the *Handbook* explicitly notes that in the retail trade industry, it is possible for individuals without a college degree to work their way up within a company and become managers. With marketing and sales manager positions, the *Handbook* explains that some employers prefer a bachelor's or master's degree in business administration with an emphasis in marketing. Nonetheless, the mere preference of some employers falls short of establishing that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. Consequently, the petitioner fails to establish the first criterion.

With respect to the second criterion - a degree requirement is common to the industry in parallel positions among similar organizations - counsel contends that the submitted Internet postings and two letters from companies establish this criterion. Counsel also contends that a job offer that states that a degree is "preferred" or "strongly preferred" actually means that candidates without degrees must possess exceptional experience to overshadow candidates possessing bachelor's degrees; otherwise, an employer will hire the candidate possessing the bachelor's degree. Counsel further maintains that the *Handbook* substantiates this because managers and general managers generally hold professional and graduate degrees.

The AAO finds that counsel's contentions are baseless. None of the Internet job postings require a bachelor's degree. All of the postings explicitly state that a bachelor's degree is either preferred or strongly preferred. Counsel's contention about the meaning of "preferred" and "strongly preferred" is neither reasonable nor substantiated by independent evidence. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, the Handbook's information contradicts counsel's contention. As previously related, the *Handbook* explains that in the retail trade industry, it is possible for persons without a college degree to work their way up within the company and become managers.

The company letters also carry little weight. The letter from Charms International, Inc. merely states that a bachelor's degree is required for a general manager or parallel position; however, the letter writer does not indicate that the degree must be in a specific specialty that is directly related to the proffered position. The letter from Princess World Jewelers does not declare that the requirement of a bachelor's degree is common to the industry. Instead, the letter states:

[M]anagement of companies operating department stores [is] currently performed by individuals holding a bachelor[']s degree in business or with equivalent working experience. This is today an industry standard. . . .

Thus, the letter writer indicates that the industry standard is to hire either a person holding a bachelor's degree in business or a person possessing equivalent employment experience. This is incongruous with counsel's assertion that a degree requirement is common to the industry in parallel positions among similar organizations. However, the letter buttresses the *Handbook's* finding that it is possible for individuals without a college degree to work their way up and become managers.

The record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner has, therefore, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

On appeal, counsel states that the petitioner does not have a past practice of hiring a general manager. Accordingly, the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) is not established.

Last, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(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. Counsel states that a general manager position has been defined as a profession if the operation to be managed is complex. *Artic Catering, Inc. v. Thornburgh*, 769 F. Supp. 1167 (D. Colo. 1991). Counsel avers that the director did not consider the evidence, such as the duties of the proffered position, which show that the nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with attainment of a bachelor's degree.

To the extent that they are depicted in the record, the AAO finds that the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Moreover, in the case of *Artic Catering, Inc.* the court remanded the case to the Immigration and Naturalization Service for a hearing to consider whether the beneficiary is a member of the professions by virtue of the uniqueness and complexity of his position. Thus, the court did not decide this issue. Finally, the *Handbook* explicitly notes that it is possible for individuals without a college

degree to work their way up and become managers. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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.