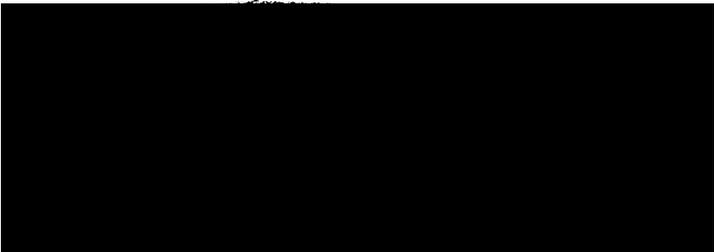


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FILE: LIN 02 283 53532 Office: NEBRASKA SERVICE CENTER Date: **MAY 21 2004**

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:



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 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 commercial bank that seeks to employ the beneficiary as a financial services supervisor. 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: (1) the proffered position is not a specialty occupation; and (2) the beneficiary is not qualified to perform a specialty occupation. On appeal, counsel 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 financial services supervisor. Evidence of the beneficiary's duties includes: the Form I-129; the evidence 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: administering the daily non-sufficient funds list, and contacting customers about this; compiling the branch's deficit balance list, financial reports, and profit and loss statement on a daily basis; supervising four branch staff and auditing them on a monthly basis; providing customer service by assisting customers with banking needs and offering new services and products; and opening and maintaining accounts. The petitioner stated that a candidate must possess a bachelor's degree in a financial or a business related field or have the equivalent in experience.

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 denoted that the petitioner had filed a prior case for the beneficiary for the same proffered position, and that the case was subsequently denied because of abandonment. The director stated that the previously filed case had required an associate's degree. Finally, the director stated that the evidence failed to demonstrate that the beneficiary's education, specialized training, and/or experience are equivalent to the training acquired by the attainment of a U.S. baccalaureate or higher degree. The director found that the duties of the proffered position resemble those performed by a head bank teller, and that the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*) reports that employers do not require a bachelor's degree in a specific specialty for this position; they require only on-the-job training, experience, and advancement within the organization.

On appeal, counsel states that the proffered position is a specialty occupation. According to counsel, the affidavit from the Assistant Vice President for Human Resources and Training clearly states that a bachelor's degree or equivalent experience is required for the position. Counsel maintains that, because of the shortage in the local labor market, the petitioner is sometimes compelled to employ a candidate without the requisite degree even though the degree is still a job requirement. In such cases, counsel claims that the applicant's experience is equivalent to the attainment of a bachelor's degree. Counsel contends that the proffered position requires a bachelor's degree and that the beneficiary is qualified to perform the proffered position. Counsel asserts that the statement from Buxton and Associates, Ltd., a professional recruiting firm, clearly stated that a college degree is required for this position, and moreover, that the Colorado Department of Labor certifies that a financial services supervisor is a certified specialty occupation under occupation code 166. According to counsel, the duties of the proffered position are dissimilar to those of a head bank teller, and furthermore, could not be performed by a head teller. Counsel asserts that the proffered position resembles a relationship manager employed with Community First National Bank and that this position requires a bachelor's degree.

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 finds that the evidence in the record evinces that the petitioner does not require a bachelor's degree in a specific specialty for the proffered position. According to the director's February 6, 2003 denial letter, the petitioner had filed on behalf of the beneficiary - and later abandoned - an Application for Alien Employment (Form ETA 750) for the same position as described in the instant petition, and alleged that the position requires an associate's degree. In the instant petition, the petitioner stated that a candidate must possess a bachelor's degree in a financial or a business related field or have the equivalent in experience. Thus, the documentary evidence discloses that the petitioner has a flexible degree requirement: it accepts candidates possessing an associate's degree or experience equivalent to a bachelor's degree in a financial or business

related field. On appeal, counsel explains the petitioner's rationale for accepting candidates without a bachelor's degree. However, this explanation only serves to demonstrate, once again, that the proffered position does not require a bachelor's degree in a specific specialty.

The AAO wishes to note that there are obvious inconsistencies with the petitioner's degree requirement for the proffered position: the Form ETA 750 stated that an associate's degree is required; whereas in the instant petition the petitioner claimed that a bachelor's degree or equivalent experience is required. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The AAO finds that the petitioner never explained these inconsistencies. As such, the value of the submitted evidence is greatly diminished.

The AAO next 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 asserts that the statement from a professional recruiting firm stated that a college degree is required for this position, and that the Colorado Department of Labor certifies that a financial services supervisor is a certified specialty occupation under occupation code 166. According to counsel, Community First National Bank and the U.S. Bank also have the degree requirement and their positions are similar to the proffered position.

Counsel's assertions are unpersuasive. No evidence is submitted to support the claim that the Colorado Department of Labor certifies that a financial services supervisor is a certified specialty occupation under occupation code 166. In addition, the Colorado Department of Labor's determinations are not binding upon CIS; the statutes and regulations pertaining to H-1B nonimmigrant visas differ from those governing the Department of Labor. The recruiting firm's July 29, 2002 letter states that extensive experience is a substitute for a college degree for a branch supervisor position. The Community First National Bank posting also stated that it accepts related work experience that is considered the equivalent of a bachelor's degree. U.S. Bank's position requires a bachelor's degree; however, the posting does not indicate that the degree must be in a specific specialty. Thus, none of the evidence states that a bachelor's degree in a specific specialty is required.

In determining whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and concludes, 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.

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. A review of the *Handbook* discloses that the director correctly concluded that the duties of the proffered position resemble those performed by a head teller at a bank, and that the *Handbook* indicates that a bachelor's degree is not required for this position. Accordingly, the petitioner fails to establish the first criterion.

No evidence establishes the second criterion - that a degree requirement is common to the industry in parallel positions among similar organizations or that the proffered position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty.

To establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A); namely, that the petitioner normally requires a degree or its equivalent for the position, the affidavit of the Assistant Vice President for Human Resources and Training attested "[a]ll financial services supervisors in this institution have college degrees, as do all those of which we are aware in other banking entities." Nevertheless, no independent evidence supports this claim, and in fact, the AAO finds that counsel's statements on appeal clearly contradict this statement. For example, counsel contends that the petitioner is sometimes compelled to employ a candidate without the requisite degree.

In addition, with respect to the petitioner's claim that all of its financial services supervisors possess the requisite degree, 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. Consequently, the petitioner fails to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish 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 previously discussed, the overwhelming weight of the documentary evidence evinces that the petitioner has a flexible degree requirement: it accepts candidates possessing an associate's degree or experience equivalent to a bachelor's degree in a financial or business related field. As such, the petitioner fails to establish the fourth criterion.

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.

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.

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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.