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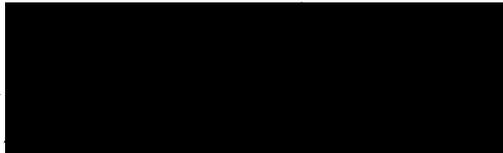
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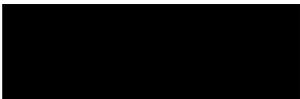
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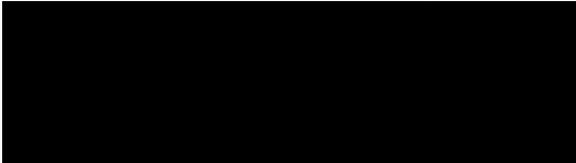
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FILE: WAC 03 202 50784 Office: CALIFORNIA SERVICE CENTER Date: **OCT 21 2004**

IN RE: Petitioner: 
Beneficiary:

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 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, a wholesaler and distributor of furniture and rugs with seven employees, seeks to employ the beneficiary as a budget analyst and petitions Citizenship and Immigration Services (CIS) the service to classify the beneficiary as a non-immigrant 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, saying the budget analyst duties of the proffered position were incidental to the primary functions of a bookkeeper whose task is to maintain the petitioner's financial records. The proffered position was thus not a specialty occupation.

In reaching its determination on the appeal, the AAO considered the entire record of proceeding, which contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's requests for additional evidence (RFE); (3) counsel's responses to the RFE; (4) the director's denial letter; and (5) the Form I-290B, annotated with reasons for the appeal, and the documents accompanying it.

In his brief counsel cites two federal district court cases for the following propositions: first, that the director has failed to give due "deference to the employer's view" on the need for a budget analyst; and second, that the proffered position was sufficiently complex to qualify as professional. Neither of the two cases is germane or probative.

Counsel first cites *Unico American Corp. v. Watson*, 1991 WL 11002594 (C.D. Cal., 1991), to support the assertion that CIS "should give deference to the employer's view, should consider the employer's evidence." There, the court granted summary judgment against the legacy Immigration and Naturalization Service for denying the employer's petition to classify a beneficiary as a temporary worker of distinguished merit and ability -- not as here, where the petition seeks to classify a worker in a specialty occupation. The insurance company in *Unico* was endeavoring to hire a computer expert, who had authored several books on computer science, as an MIS computer programmer. The judge found that the evidence "demonstrates overwhelmingly that [the beneficiary's] position requires someone highly skilled in the computer science field," adding that there was "a serious question about the appropriateness of second guessing the business judgement [sic] of a successful company" by insisting on the job requirements dictated by the Department of Labor's *Occupational Outlook Handbook* (March 2004) (the *Handbook*).

Counsel also cites *American Bictech, Inc. v. INS*, CIV-2-88-262 (E.D. Tenn. Mar. 27, 1989), discussed in a 1989 law journal article at 384 PLI/Lit 111, which focused on proposed regulations on the equivalence of professional-level experience and formal education in a highly specialized field of knowledge. See, 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). Counsel cites *American Bictech* for the proposition that an H-1B position can qualify as "professional based on the complexity of the duties alone." There, the employer wanted to classify an alien as an H-1 professional -- *under preexisting law* -- for a vacancy as company president. The company was an industry pioneer in the manufacture of custom injection-molded plastic parts. The court's decision turned on the complexities of the duties in deciding whether to accord the position professional status. Instead of

insisting the company hire only someone with a specialized college degree, the court found it reasonable that the new hire possess extensive corporate executive experience in the new, specialized field in plastics.

In the instant case, by contrast, CIS did not base its decision on the job's education and experience requirements, as was the case in *American Bitech*. Nor did CIS substitute its judgment for that of the petitioner or hold the petitioner to a rigid interpretation of the *Handbook's* job requirements. 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). Instead, the AAO finds that under the circumstances of the case, many of the job duties would be taken up with clerical accounting and bookkeeping tasks. The AAO agrees with the director's decision, pointing to the petitioner's own statements about the job, that it would not require the beneficiary to supervise anyone. It is thus reasonable to assume the beneficiary, by default, would assume such tasks that in many companies fall to bookkeepers, accounting clerks or other staff without bachelor's degrees. *Handbook*, p. 434.

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.

The petition described the duties of the proffered position as including budgeting the import and export of valuable rugs, advising how to better "forecast maximum efficiency on operations," analyzing financial reports and data for management, with comparison of "factors affecting price and profitability of company products, and exploring alternative funding methods."

In his denial, the director found in the abstract that under the *Handbook's* description of a budget analyst position, the position would be a specialty occupation. A closer reading of the *Handbook*, however, shows that the minimum entry requirement for a budget analyst position is often a bachelor's degree not in a specific specialty, but might rather be in any of a number of different fields such as accounting, public administration, political science, or sociology. CIS has consistently interpreted the term "degree" in the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) to mean not just any baccalaureate or higher degree, but a degree in a specific specialty. Short of having a minimum entry requirement for budget analysts of a bachelor's degree in a specific specialty, the position does not meet the definition set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). The position of budget analyst thus cannot be considered a specialty occupation under this criterion.

The job duties, and not the job title, determine the nature of the position. As noted above, the duties described appear to be those of an accounting clerk or bookkeeper, which does not require a baccalaureate degree as a minimum for entry into the occupation. The petitioner has not met the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Nor does the position meet any of the other specialty occupation criteria. Nowhere in the record does the petitioner contend that its business was highly specialized, as was the case with plastics manufacturing or computer programming. Instead, the rug-making industry is a traditional craft developed over the centuries, largely in and around the beneficiary's country of birth, performed by people with no formal education. Rather, the petitioner, however, bases its decision to hire a budget analyst upon its goal of business expansion. In its June 25, 2003 letter, the company asserts that its founders would hire the beneficiary "having one goal in mind: be [sic] the biggest distributor of authentic hand made rugs in the world." Without documentation, counsel's appeal brief asserts that having a budget analyst is needed for the company to maintain its \$5 million inventory and to keep producing annual sales of \$3.5 million. Hiring a budget analyst enables the company to maintain "an efficient budgetary system so that buying and selling merchandise can be planned." When asked for greater detail of the duties, the petitioner assigned percentages to the same generalized job duties. It estimated that the beneficiary would spend 30 percent of his time on drafting a budget, 20 percent on budget management, 20 percent on financial forecasting, 15 percent on profit analysis, and 15 percent on cost-benefit analysis and "alternative funding methods."

Such a percentage breakdown does little to illuminate the petitioner's reasons for hiring a budget analyst at this juncture of the petitioner's corporate growth. It is also unclear why a less skilled worker could not perform most of the tasks. By contrast, the court in *Unico American Corp.*, at 7, found the position was "not simply business programming of the type that can be handled by someone with much less experience." The petitioner has not established the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) and (4).

Nor do petitioner's two affidavits of others in the industry support the petitioner's argument that hiring a budget analyst is common in the industry. Both of the affiants declare that a bachelor-level budget analyst is the education required; meanwhile, neither of them state if their own businesses use budget analysts on staff or if their use is commonplace in the industry; neither affiant establishes his expertise for giving an opinion on the use of budget analysts in similar businesses. The petitioner has not established the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) and (3).

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.

As to the beneficiary's eligibility for a change of status from B-1 (temporary visitor for business) to H-1B specialty occupation worker, that decision is not subject to appeal. 8 C.F.R. § 214.1(c)(5).

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.