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U.S. Citizenship
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Services

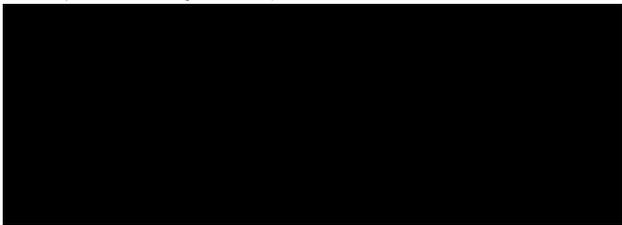


FILE: WAC 02 135 50086 Office: CALIFORNIA SERVICE CENTER Date: *SEP 02 2004*

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.

Mari Johnson

RP Robert P. Wiemann, Director
Administrative Appeals Office

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prevent clearly unwarranted
invasion of personal privacy**

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 temporary and permanent staffing agency that seeks to employ the beneficiary as an administrative assistant. 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. On appeal, counsel states that the proffered position qualifies as a specialty occupation.

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 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 an administrative assistant. Evidence of the beneficiary's duties includes the Form I-129; the attachments 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 improving workflow; creating or improving systems for recordkeeping, forms, and personnel budgets; conducting studies to improve the measurement of performance; and documenting and preparing personnel reports. The petitioner stated that a candidate must possess a bachelor's degree in business or social science with two years of 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). Referring to the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*), the director found that the duties of the proffered position resemble those performed by an administrative assistant, a position that does not require a bachelor's degree. The director found unpersuasive the submitted approval notices, and stated that the petitioner failed to submit requested quarterly wage reports for the last four quarters. Essentially, the director stated that the evidence of record failed to show that the job offered could not be performed by an experienced person whose educational training fell short of a baccalaureate degree.

On appeal, counsel states that the proffered position qualifies as a specialty occupation. Counsel contends that the beneficiary will be responsible for different aspects of administrative operations to increase efficiency by maximizing productivity via manpower and procedures and will design and implement corporate programs such as personnel recruitment and placement, employee relations, performance appraisal, promotions, training and career development, evaluating jobs, and salary structuring. Counsel furthermore contends that the beneficiary will establish systems for billing, collections, and budget planning and control. In summary, counsel claims that the beneficiary will manage company operations and future branches and will create programs that are geared to achieve targeted production, future capital outlays, and aggressive business ventures. According to counsel, the proffered position bears no rational relationship to a secretary or administrative assistant because the petitioner needs an administrative assistant of professional caliber. Citing *Young China Daily vs. Chappell*, 742 F. Supp. 552 (N.D. Cal. 1989), counsel claims that in that case the crucial element was whether the petitioner-employer actually needs or would normally use a professional since a large employer could hire a professional in similar circumstances. Counsel also cites to *Matter of Unico American Corp. vs. Watson*, CV No. 896958 (C.D. Cal. March 19, 1991) to state that in that case the alien's qualifications satisfied the employer-petitioner's job requirements instead of satisfying the requirements of the industry. Counsel emphasizes that instead of using the director's rigid standard, an employer-petitioner's job duties and needs must be examined in determining whether a position requires the services of a professional. Accordingly, counsel claims the beneficiary is the best candidate to fill the proffered position.

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 first 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)).

In determining whether a position qualifies as 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. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations.

Counsel's delineation of the proffered position differs from the petitioner's description. The petitioner stated that the beneficiary will improve workflow by simplifying reporting procedures, creating or improving record keeping, forms control, and personnel budgetary needs; "conduct studies on how to improve work measurements or performance standards"; document and prepare reports on "personnel movements"; "coordinate activities of administrative personnel"; study and recommend cost saving methods; prepare budgets and operational reports; "review the staffing structure"; "coordinate training seminars"; supervise, direct, and give job assignments to administrative personnel; direct, administer, and coordinate such functions as payroll, filing, and establishing budgets; and "analyze and formulate procedural and policy improvements." The petitioner's submitted job announcement is very brief, stating that the candidate must interview job applicants; create systems for recordkeeping; monitor and supervise other personnel; and participate in the hiring, orientation and performance appraisal of employees.

Conversely, counsel elevates the duties of the position by claiming that the beneficiary will formulate and implement corporate programs such as employee recruitment and placement, employee relations, performance appraisal and promotion systems, training and career development, job evaluations, and salary structuring. Counsel furthermore claims that the beneficiary will manage the company operations and its future branches, and create programs geared to achieve targeted production, capital outlays, and aggressive business ventures. Nowhere in the record does the petitioner describe the proffered position as entailing these duties. Accordingly, the statements of counsel on appeal are not evidence and thus are not entitled to any evidentiary weight. See *INS vs. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

A careful review of the *Handbook* discloses that the duties of the proffered position are performed by office and administrative support supervisors and managers who are charged with ensuring that an organization operates efficiently. Although specific functions of office and administrative support supervisors and

managers vary considerably, they share many common duties. For example, supervisors perform administrative tasks to ensure that their staffs can work efficiently. Office and administrative support supervisors and managers may act as liaisons between the clerical staff and the professional, technical, and managerial staff. This may involve implementing new company policies or restructuring the workflow in their departments. They must also keep their superiors informed of their progress and any potential problems; this communication often involves research projects and progress reports. Because supervisors and managers have access to their department's performance records, they may compile and present data for use in planning or designing new policies.

The *Handbook* reports that most firms fill office and administrative support supervisory and managerial positions by promoting office or administrative support workers from within their organizations. In the denial letter, the director reported that the *Handbook* states that employers do not require a bachelor's degree for office or administrative support workers. Consequently, administrative support supervisory and managerial positions would also not require a bachelor's degree. The petitioner therefore fails to establish the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) because a baccalaureate or higher degree or its equivalent in a specific specialty is not the normal minimum requirement for entry into administrative support supervisory and managerial positions.

Counsel's reliance on *Young China Daily* is misplaced. In the case, the court held that the Immigration and Naturalization Service, now CIS, relied on inappropriate factors in denying the case such as the size of the plaintiff, the amount of the proffered salary, and the absence of a prior record of hiring professionals for the position. Thus, counsel's claim, that the crucial element in *Young China Daily* was whether the particular employer actually needs or would normally use a professional to fill those duties, is not on point. In a side note, CIS did not rely on inappropriate factors in denying the instant petition.

The case *Matter of Unico American Corp.* is not persuasive. The statute plainly defines the term "specialty occupation" and the regulation specifically indicates the requirements that a petitioner must establish.

There is no evidence in the record that would establish the second criterion - that a specific 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. Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position.

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. The petitioner has submitted no evidence in the record that would establish the fourth criterion. As previously mentioned, the *Handbook* clearly reports that the duties of the position are performed by office and administrative support supervisors and managers, positions that do not require a bachelor's degree.

The AAO notes that although the director's denial letter stated that the submitted approval notices were unpersuasive, the record does not contain any approval notices. Nor does the record contain any statements by counsel or the petitioner about approval notices. In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Consequently, the AAO has evidence of approval notices to consider.

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.