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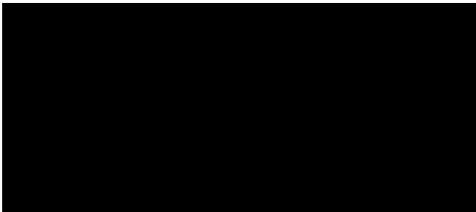
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FILE: WAC 03 267 51412 Office: CALIFORNIA SERVICE CENTER Date: DEC 22 2005

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 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 textile manufacturer and distributor. It seeks to extend the employment of the beneficiary in the proffered position as a merchandise analyst. The director denied the petition based on his determination that the petitioner had failed to establish that its proffered position was a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) counsel's response to the director's requests for evidence; (3) the director's denial letter; and (4) Form I-290B, with counsel's brief and documentation. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, a petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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 one 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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a 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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. 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 nor 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.

The petitioner states that it is seeking the beneficiary’s services as a merchandise analyst. Evidence of the beneficiary’s duties includes: the Form I-129; and a June 20, 2004, response to the director’s request for evidence.

In the response to the director’s request, the petitioner stated that the beneficiary’s duties would entail: (1) formulating merchandising policies; and (2) coordinating merchandising activities including: analyzing and determining mark-up and mark-down percentages to ensure profit; partnering with buyers to produce merchandising strategies and formulating in-store merchandising solutions; formulating promotional pricing decisions and buying strategies; performing in-depth analysis on results; budgeting for all areas of merchandising; developing and implementing procedures for merchandising company’s products; negotiating terms and conditions with buyers in regards to merchandising agreements, measuring and analyzing customers and buyers satisfaction with the merchandise and preparing summary reports for management; forecasting, tracking and providing analysis on merchant allowances; producing required executive-level reports utilizing operating performance measures and metrics to analyze business performance as it relates to sales results, promotional spending, net margins, vendor performance and inventory levels, conducting research on demands in the marketplace; planning, designing, and coordinating data/information and reporting for merchandise management systems database; conducting research on potential buyers and customers to modify and improve the merchandise. The petitioner indicated that the duties of the position are fully professional in that they require the application of a general body of knowledge normally obtained in an academically recognized course of study leading to a bachelor’s degree or equivalent in Merchandise Marketing. Additionally, in response to the director’s request for evidence, the petitioner asserted that the proffered position was similar to that of a merchandise manager.

The director found that the duties reflect those of a merchandise manager as described in the Department of Labor’s *Occupational Outlook Handbook* (the *Handbook*). The director noted that the *Handbook* revealed that the position of a merchandise manager, purchasing manager, buyer and purchasing agent are occupations that do not require a baccalaureate level of education in a specific specialty as a normal minimum for entry into the occupation. The director noted that the submitted internet job postings were sufficient evidence to establish that a degree requirement is common to the industry in parallel positions among similar organizations. The director found that the proffered position is not more unique or complex than other similar

positions within the same industry. The director noted that without additional evidence showing the unique or complex nature of the position, or how this position differs from other similar positions within the same industry, the petitioner did not meet this criterion. The director noted that the record contained no corroborating documentation to establish claims that it hired only individuals with bachelor's degrees.

Further, the director stated that the petitioner's creation of a position with an obligatory bachelor's degree requirement will not conceal the fact that the position is not a specialty occupation. The director found that the petitioner had placed no information in the record with regard to the specialized and complex nature of the position. The director concluded that the proffered position was not a specialty occupation.

On appeal, counsel contends that the proffered position is not a merchandise manager but a merchandise analyst. Counsel attempts to differentiate the duties of the proffered position from the description in the *Handbook* of a merchandise manager. Counsel asserts that the job description clearly demonstrates that the petitioner's needs are well beyond that of a merchandise manager. Counsel asserts that the proffered position meets two of the four criteria. Counsel contends that the requirement of a baccalaureate degree or higher is common to the industry. Additionally, counsel asserts that the employer normally requires a 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 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.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1192 (S.D.N.Y. 1989)).

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.

Upon review of the record, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation. The AAO routinely consults the *Handbook* for information about the duties and educational requirements of particular occupations. The duties of the proffered position resemble those of a purchasing agent as described in the *Handbook*. The *Handbook* indicates the following duties:

Purchasing managers, buyers, and purchasing agents evaluate suppliers on the basis of price, quality, service support, availability, reliability, and selection. To assist them in their search for the right suppliers, they review catalogs, industry and company publications, directories, and trade journals. Much of this information is now available on the Internet. They research the reputation and history of the suppliers and may advertise anticipated purchase actions in order to solicit bids. At meetings, trade shows, conferences, and suppliers' plants and

distribution centers, they examine products and services, assess a supplier's production and distribution capabilities, and discuss other technical and business considerations that influence the purchasing decision. Once all of the necessary information on suppliers is gathered, orders are placed and contracts are awarded to those suppliers who meet the purchaser's needs. Contracts often are for several years and may stipulate the price or a

narrow range of prices, allowing purchasers to reorder as necessary. Other specific job duties and responsibilities of purchasing managers, buyers, and purchasing agents vary by employer and by the type of commodities or services to be purchased.

Purchasing specialists employed by government agencies or manufacturing firms usually are called purchasing directors, managers, or agents; buyers or industrial buyers; or contract specialists. These workers acquire materials, parts, machines, supplies, services, and other inputs to the production of a final product. Some purchasing managers specialize in negotiating and supervising supply contracts, and are called contract or supply managers. Purchasing agents and managers obtain items ranging from raw materials, fabricated parts, machinery, and office supplies to construction services and airline tickets. The flow of work—or even the entire production process—can be slowed or halted if the right materials, supplies, or equipment are not on hand when needed. To be effective, purchasing specialists must have a working technical knowledge of the goods or services to be purchased.

According to the *Handbook*:

Purchasers and buyers determine which commodities or services are best, choose the suppliers of the product or service, negotiate the lowest price, and award contracts that ensure that the correct amount of the product or service is received at the appropriate time.

Purchasing specialists who buy finished goods for resale are employed by wholesale and retail establishments, where they commonly are known as buyers or merchandise managers. Wholesale and retail buyers are an integral part of a complex system of distribution and merchandising that caters to the vast array of consumer needs and desires. Wholesale buyers purchase goods directly from manufacturers or from other wholesale firms for resale to retail firms, commercial establishments, institutions, and other organizations. In retail firms, buyers purchase goods from wholesale firms or directly from manufacturers for resale to the public. Buyers largely determine which products their establishment will sell. Therefore, it is essential that they have the ability to predict what will appeal to consumers. They must constantly stay informed of the latest trends, because failure to do so could jeopardize profits and the reputation of their company. Buyers also follow ads in newspapers and other media to check competitors' sales activities, and they watch general economic conditions to anticipate consumer buying patterns. Buyers working for large and medium-sized firms usually specialize in acquiring one or two lines of merchandise, whereas buyers working for small stores may purchase the establishment's complete inventory.

Many merchandise managers assist in the planning and implementation of sales promotion programs. Working with merchandise executives, they determine the nature of the sale and purchase items accordingly. Merchandise managers may work with advertising personnel to create an ad campaign. For example, they may determine in which media the advertisement

will be placed—newspapers, direct mail, television, or some combination of all three. In addition, merchandise managers often visit the selling floor to ensure that goods are properly displayed. Often, assistant buyers are responsible for placing orders and checking shipments.

Similarly, the beneficiary will participate in ensuring partnering with buyers to produce merchandising strategies and formulate in-store merchandising solutions; formulate promotional pricing decisions and

buying strategies conducting research on potential buyers and customers to modify and improve the merchandise.

The *Handbook* reports:

Qualified persons may begin as trainees, purchasing clerks, expeditors, junior buyers, or assistant buyers. Retail and wholesale firms prefer to hire applicants who have a college degree and who are familiar with the merchandise they sell and with wholesaling and retailing practices. Some retail firms promote qualified employees to assistant buyer positions; others recruit and train college graduates as assistant buyers. Most employers use a combination of methods.

Educational requirements tend to vary with the size of the organization. Large stores and distributors, especially those in wholesale and retail trade, prefer applicants who have completed a bachelor's degree program with a business emphasis.

The petitioner fails to establish the first criterion because the *Handbook* states that large stores and distributors prefer, but do not require, applicants with bachelor's degrees with a business emphasis and that retail and wholesale firms prefer, but do not require, applicants who have a college degree, though not necessarily in a specific specialty. The *Handbook* explains that a bachelor's degree is not required for a merchandising manager position. Accordingly, the petitioner has not established that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the proffered position.

In his response to the director's request for evidence, counsel stated that the position of merchandise analyst is similar to that of merchandise manager in the Department of Labor's *Dictionary of Occupational Titles* (the *DOT*), which gives the position an SVP rating of 7. The *DOT* is not 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. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience, and it does not specify the particular type of degree, if any, that a position would require. For this reason, the AAO does not rely on the *DOT* information.

The AAO notes that the letter submitted on appeal as evidence that companies in the textile manufacturing normally require a baccalaureate degree fails to establish that the petitioner's requirement of a bachelor's degree is common to the industry in parallel positions among similar organizations, which is the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). The president of L.A. Printex indicates that in its industry the merchandise analyst plays a key role and the duties for the position normally require a bachelor's degree. The AAO notes that the letter did not indicate that L.A. Printex employs a merchandise analyst and did not

indicate whether a bachelor's degree in a specific specialty is required. For these reasons, the letter fails to establish that a requirement of a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations.

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. Again, the *Handbook* reveals that the duties of the proffered position are performed by a merchandising manager, a position that does not require a bachelor's degree in a specific specialty.

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. Counsel contends that the position of merchandise analyst requires the theoretical and practical application of a body of highly specialized knowledge, and the petitioner normally requires a degree or its equivalent for the position. Counsel's assertions are insufficient to meet this criterion. The record contains no corroborating evidence. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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. It cannot be concluded 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 not distinguished its position for merchandise analyst from the position of purchasing managers, buyers and purchasing agents as described in the *Handbook*. Once again, the *Handbook* reveals that the proffered position is performed by merchandising managers, an occupation not requiring a bachelor's degree in a specific specialty.

The petitioner noted that CIS approved another petition that had been previously filed on behalf of the beneficiary. The director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. If the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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.

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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.