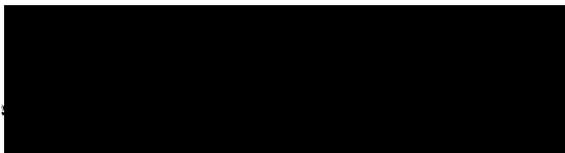


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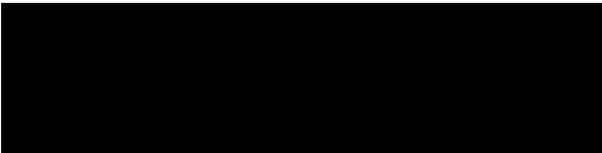
DA
FEB 23 2005

FILE: EAC 03 235 55549 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, Director
Administrative Appeals Office

DISCUSSION: The director of the Vermont 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 retailer of leather handbags and goods, with five locations in the Washington metropolitan area. It seeks to hire the beneficiary as a strategic management analyst. The director denied the petition based on his determination that the proffered position was not 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 request for evidence; (3) the director's denial letter; and (4) Form I-290B, with additional documentation. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the petitioner's 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 strategic management analyst. Evidence of the beneficiary’s duties includes: the Form I-129, with letters from both the petitioner and counsel dated August 6, 2003; and counsel’s August 29, 2003 response to the director’s request for evidence.

At the time of filing, both the petitioner and counsel specified the following to be the duties of a strategic management analyst:

- Analysis of sales and financial data;
- Implementation of promotional strategies;
- Determination of which product lines to promote and which to discontinue;
- Management of inventories;
- Ordering of products; and
- Hiring and firing of staff.

To determine whether the duties just described are those of 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; and 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 considered by the AAO when determining these criteria include: whether the Department of Labor’s (DOL) *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports 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. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

In his denial, the director noted that the evidence provided by the petitioner in its initial filing failed to establish its position as a specialty occupation, specifically stating that the above duties did not appear to require the theoretical and practical application of a body of specialized knowledge, and the attainment of a baccalaureate degree in a specific field of study. As the deficiencies in the record were not corrected by counsel's response to his request for evidence, the director determined that the petitioner had failed to establish that its proffered position qualified as a specialty occupation, as defined in section 214(i)(1) of the Act.

Following its own review of the duties of the proffered position and the 2004-2005 edition of the DOL *Handbook*, the AAO concludes that the position described by the petitioner is not that of a management analyst whose duties focus on the analysis and development of management strategies, duties significantly more complex than those assigned to the proffered position. The *Handbook* describes the occupation of management analyst as follows:

As business becomes more complex, the Nation's firms are continually faced with new challenges.... Management analysts, often referred to as management consultants in private industry, analyze and propose ways to improve an organization's structure, efficiency, or profits....

...The work of management analysts and consultants varies with each client or employer, and from project to project.... In all cases, analysts and consultants collect, review, and analyze information in order to make recommendations to managers.

After obtaining an assignment or contract, management analysts first define the nature and extent of the problem. During this phase, they analyze relevant data, which may include annual revenues, employment, or expenditures, and interview managers and employees while observing their operations. The analyst or consultant then develops solutions to the problem. In the course of preparing their recommendations, they take into account the nature of the organization, the relationship it has with others in the industry, and its internal organization and culture. Insight into the problem often is gained by building and solving mathematical models.

While the petitioner stated in its August 6, 2003 letter of support that it required the beneficiary to "conceive and execute plans for the growth of the individual retail outlets and supervise our expansion plans as they are implemented," the specific duties listed by the petitioner do not focus on the development of a corporate growth strategy. Instead, they appear to be those of an individual who is responsible for managing the day-to-day operations of a retail business. Accordingly, the AAO finds the duties of the petitioner's proffered position to more closely resemble the responsibilities of a sales worker supervisor, whose employment is described by the *Handbook* as follows:

Sales worker supervisors oversee the work of sales and related workers.... Sales worker supervisors are responsible for interviewing, hiring, and training employees, as well as for preparing work schedules and assigning workers to specific duties. Many of these workers hold job titles such as sales manager or department manager....

Sales worker supervisors in large retail establishments, often referred to as department managers, provide day-to-day oversight of individual departments, such as shoes, cosmetics, or housewares in large department stores; produce and meat in grocery stores; and sales in automotive dealerships. These workers establish and implement policies, goals, objectives, and procedures for their specific departments.... Sales worker supervisors also review inventory and sales records, develop merchandising techniques, and coordinate sales promotions....

In small or independent companies and retail stores, sales worker supervisors not only directly supervise sales associates, but also are responsible for the operation of the entire company or store....

As the AAO has found that the proffered position is closely aligned to that of sales worker supervisor, it turns to the *Handbook's* discussion of the educational requirements for this occupation to determine whether the attainment of a baccalaureate or higher degree, or its equivalent, is normally the minimum requirement for entry into the field:

Sales worker supervisors usually acquire knowledge of management principles and practices -- an essential requirement for a supervisory or managerial position in retail trade -- through work experience. Many supervisors begin their career on the sales floor as salespersons, cashiers, or customer service representatives. In these positions, they learn merchandising, customer service, and the basic policies and procedures of the company.

The educational backgrounds of sales worker supervisors vary widely. Regardless of the education they receive, recommended courses include accounting, marketing, management, and sales, as well as psychology, sociology, and communication. Supervisors also must be computer literate....

Supervisors who have postsecondary education often hold associate's or bachelor's degrees in liberal arts, social sciences, business, or management. To gain experience, many college students participate in internship programs that usually are developed jointly by individual schools and firms.

Based on the *Handbook's* discussion of the range of backgrounds that may prepare individuals for employment as sales worker supervisors, including its statement that many supervisors qualify for employment based on prior experience, the AAO concludes that the proffered position does not meet the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO now turns to a consideration of whether the petitioner, although unable to establish its proffered position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under one of the three criteria remaining: a degree requirement is the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position; or the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree. A review of the record finds the petitioner to have submitted no evidence to establish that its degree requirement is a standard within its industry or that its proffered position is more specialized and complex than other sales worker supervisor jobs. Although counsel asserted in his August 6, 2003 letter that the

position's complexity and specialization met the requirements of the fourth criterion, the AAO does not find his statements to be persuasive. In the absence of documentation to support them, the assertions of counsel do not constitute evidence and will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988).

Counsel has, however, submitted evidence in response to the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) -- whether the petitioner normally requires a degree or its equivalent for its position.

To determine a petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. In the instant case, counsel, in his response to the director's request for evidence, submitted job postings for the proffered position, as well as evidence that the employee "in the position" holds degrees at the baccalaureate level from a foreign university. However, these materials do not establish that the petitioner normally requires a degree or its equivalent for its position.

The job postings provided by counsel state the educational requirements for the position as either a bachelor's degree or a two-year degree with five years of experience, without specifying the field in which these degrees must be awarded. However, to prove that a job requires the theoretical and practical application of a body of specialized knowledge as required by Section 214(i)(1) of the Act, a petitioner must establish not that the position requires the attainment of a generic bachelor's or higher degree, but that the position requires the attainment of a bachelor's or higher degree in a field of study directly related to the specialty. When a job can be performed by a range of degrees or a degree of generalized title without further specification, the position does not qualify as a specialty occupation. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). Further, the language of the job posting itself undermines the petitioner's ability to establish that it normally imposes a baccalaureate or higher degree for employment in the position by clearly stating the petitioner's willingness to employ experienced individuals with two-year degrees.

Like the copies of the job postings, the copies of the two degree certificates and the petitioner's payroll records also fail to establish the petitioner's hiring practices regarding its position. Although counsel stated that the individual awarded the degree certificates is "in the position," there is no documentation in the record identifying her as holding a specific job, stipulating her responsibilities, or distinguishing her from the petitioner's other employees listed on the same payroll record. As already discussed, the assertions of counsel, when they are unsupported by documentation, cannot serve as evidence. *Matter of Obaigbena*. The AAO also finds the record to lack any documentation to establish that the degrees awarded the individual by the University of Jodhpur are the academic equivalent of U.S. baccalaureate or higher degrees. Finally, the AAO notes that neither of the degrees -- one in education and one in the arts -- appear to be in a specialty directly related to the proffered position of strategic management analyst, as described by the petitioner.

At the time of filing, counsel also asserted that the proffered position qualified as a specialty occupation based on a prior AAO determination that the position of strategic management analyst was parallel to those of a management analyst and a market analyst which impose baccalaureate degree requirements. Counsel's assertions are not persuasive, however. The fact that the AAO may have previously determined that a position

with an identical title was a specialty occupation is not a basis for approving this position. As already noted, CIS does not rely on a position's title when determining whether a particular job qualifies as a specialty occupation, but focuses instead on the specific duties of the position. In the instant case, regardless of the title assigned to the position by the petitioner, the duties of the proffered position are not an amalgam of those of a management and a market analyst, but those of a sales worker supervisor. Further, every petition filing is a separate proceeding with a separate record and CIS is limited to the information contained in that record in reaching its decision. 8 C.F.R. §§ 103.2(b)(16)(ii) and 103.8(d).

Therefore, for reasons related in the preceding discussion, 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.