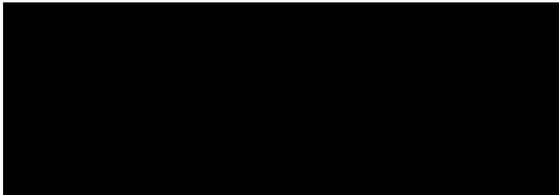


ORIGINAL COPY



U.S. Citizenship
and Immigration
Services

Identification information related to
prevention of terrorism
invasion of personal privacy



DA

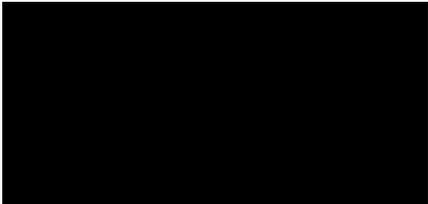
JUN 21 2005

FILE: [Redacted] Office: CALIFORNIA 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 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 an international freight forwarding company that seeks to employ the beneficiary as a chief operating officer. 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 proposed position is 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 a chief operating officer. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail communicating with shippers and agents at point of destination to ascertain requirements and logistics and maintaining, enhancing, and developing systems and procedures consistent with these needs; monitoring the operation of procedures and coordinating corrective actions when necessary; and providing training and support to workers. The petitioner stated that a candidate for the proffered position must possess a bachelor's degree or its equivalent in transportation, physics, or a related field such as mathematics, and have experience in the field.

The director determined that the proffered position was not a specialty occupation. Referring to the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*), the director stated that it reveals that the proposed position is similar to a shipping and receiving manager or supervisor, which is an occupation that does not require baccalaureate-level education as a normal, industry-wide requirement for entry into the occupation. The director stated that in examining whether a titled position is a specialty occupation, the actual duties to be performed are determinative and not the title, and that the proposed duties and stated level of responsibility do not indicate complexity or authority that is beyond that normally encountered in the occupational field. The director found that the evidence does not indicate that the petitioner normally requires applicants to possess a baccalaureate.

On appeal, counsel states that the proposed position is a specialty occupation; that it is improper for the director to selectively determine the nature of the position; that the overall requirements and scope of the position, such as the policy and strategy functions, involve higher level responsibilities; and that the position described by the petitioner differs from the one described by the director.

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 in a specific specialty is the normal minimum requirement for entry into the particular position; a specific 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, 1102 (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.

In response to the request for evidence, the petitioner did not submit a more detailed explanation of the proposed position's specific duties, the percentage of time to be spent on each duty, the level of responsibility, and the type of employees to be supervised. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). Because the petitioner did not submit this evidence, the AAO cannot perform a meaningful analysis of the proposed position's duties and determine whether they require baccalaureate-level education. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Accordingly, based on this discussion, the petitioner fails to establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the particular position.

As already discussed, 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 petitioner does not require a narrow range of baccalaureate degrees that are directly related to the proposed position; it accepts degrees in diverse fields such as transportation and physics, even though a physics degree is unrelated to the proposed position, which involves the operations of an international freight forwarding company. Thus, the petitioner does not require a bachelor's degree in a specific specialty that is directly related to the proposed position.

To establish the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) - that a specific degree requirement is common to the industry in parallel positions among similar organizations - the record contains a job posting from Emery Forwarding. The posting's duties concentrate on sales; thus, they differ from the proposed position, which involves operations. Furthermore, although Emery Forwarding requires a bachelor's degree; it does not state that the degree must be in a specific specialty. The posting also does not indicate whether Emery Forwarding is similar in size and scope to the petitioner, a small international freight forwarding company. Thus, the petitioner fails to establish that a degree requirement is common to the industry in parallel positions among similar organizations.

No evidence shows the proffered position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. As already discussed in this decision, because the petitioner did not submit requested evidence regarding the proposed position's duties, the AAO cannot perform a meaningful analysis of the duties and determine whether they require baccalaureate-level education. In addition, the petitioner does not require a bachelor's degree in a specific specialty that is directly related to the proposed position.

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's October 13, 2003 letter states that the prior export manager, who holds the U.S. equivalent to a master's degree in physics, had an approved H-1B petition. Counsel also refers to a copy of an Application for Alien Employment Certification for an export manager.

Counsel's assertions and the referenced evidence is not persuasive. 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 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. As already discussed, the petitioner did not submit requested evidence regarding the proposed position's duties; thus, the AAO cannot perform a meaningful analysis of the duties and determine whether they require baccalaureate-level education. Furthermore, as already discussed, the petitioner does not require a bachelor's degree in a specific specialty that is directly related to the proposed position. Finally, the AAO notes that the duties and job title indicated in the submitted Application for Alien Employment Certification differ significantly from those of the proposed position; thus, the positions are not the same. For these reasons, 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 already discussed, because the petitioner did not submit requested evidence regarding the proposed position's duties, the AAO cannot perform a meaningful analysis of the duties and determine whether they require baccalaureate-level education. Furthermore, as already discussed, the petitioner does not require a bachelor's degree in a specific specialty that is directly related to the proposed position. As such, the petitioner fails to satisfy the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.

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.