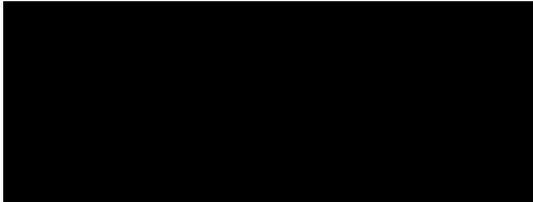


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FILE: LIN 03 175 54106 Office: NEBRASKA SERVICE CENTER Date: JUN 30 2005

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:
[Redacted]

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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director 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 chain of Chinese restaurants that seeks to employ the beneficiary as a business analyst. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a) 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 submits a brief.

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.

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 documents. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a business analyst. Evidence of the beneficiary's duties includes the I-129 petition; the petitioner's May 6, 2003 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: directing, developing, researching and analyzing the petitioner's business operations; analyzing, developing and implementing a budget plan; overseeing the budget; ensuring financial constraints and cost controls are properly implemented; reviewing and analyzing the current business plan; researching and developing new business strategies and operating procedures and presenting a new or revised business plan to corporate officials for approval; ensuring that personnel and facility operations are compliant with corporate rules and government regulations; researching and analyzing current market trends; creating or modifying existing marketing strategies to ensure the most effective and efficient means of marketing; researching potential locations for new restaurants; overseeing the start-up of new locations; developing training programs for new store managers and employees; creating instructional materials, quality control guidance manuals and health and safety inspection checklists for managers and staff; directing, monitoring and organizing store training programs; analyzing effectiveness of training programs; and directing recruiting of personnel. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in economics and administration.

The director found that the proffered position was not a specialty occupation.

On appeal, counsel asserts that the position is a marketing manager and that a bachelor's degree is normally the minimum requirement for the position. Counsel also states that there is no requirement in the regulations for the bachelor's degree to be in a specific specialty to establish a position as a specialty occupation. Counsel states that the job description focuses on business, marketing and economics. The AAO notes that except for the last page of the appeal, counsel continually references a different beneficiary, with a degree from a different university, than the beneficiary of the current petition.

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 turns first to 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 Department of Labor's *Occupational Outlook Handbook (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)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The AAO does not concur with counsel on appeal, who states that the position is a

marketing manager. While the position description includes an element of marketing, it is not the primary duty of the proffered position. The director found that the duties of the proffered position lacked specificity, making it difficult to determine what the beneficiary would be doing. The director found that the beneficiary might be managing one of the restaurants, a position which does not require a bachelor's degree. The AAO finds that the proffered position does include restaurant management among its duties, but that the position is broader than just a restaurant manager. The position is primarily one of general management within a small business, and, as such, it encompasses a wide range of duties. The description in the top executives entry in the *Handbook* states that operations managers "plan, direct, or coordinate the operations of companies or public and private sector organizations. Their duties include formulating policies, managing daily operations and planning the use of material and human resources, but are too diverse and general in nature to be classified in any one area of management or administration." The *Handbook* indicates that "formal education and experience of top executives varies as widely as the nature of their responsibilities. Many top executives have bachelor's or higher degree in business administration or liberal arts." The *Handbook* clearly states that a bachelor's degree *in a specific specialty* is not a prerequisite for entry into this field.

Regarding counsel's argument that the regulations do not require that a degree be in a specific specialty, the AAO disagrees. The regulations define a specialty occupation as being "an occupation which requires theoretical and practical application of a body of highly specialized knowledge . . . 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." 8 C.F.R. § 214.2(h)(4)(ii).

Counsel and the petitioner provided numerous Internet postings for a variety of positions including marketing manager, financial analyst, pricing and product analyst, and proposal analyst, among others. There is no evidence, however, to show that the employers issuing those postings are similar to the petitioner, or that the advertised positions are parallel to the instant position. Thus, the advertisements have little relevance.

The record does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. The proffered position is newly created, and, therefore, the petitioner is not able to meet this criterion.

Finally, the AAO turns to the criterion 8 C.F.R. § 214.2(h)(iii)(A)(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.

To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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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.