

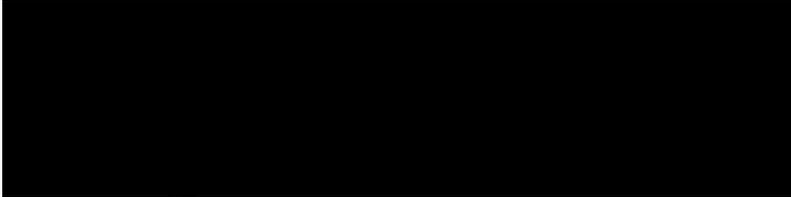
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U.S. Citizenship
and Immigration
Services

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MAR 21 2005



FILE: SRC 03 181 52788 Office: TEXAS SERVICE CENTER Date:

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 retails frames. It seeks to employ the beneficiary as an operations manager. 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 on the basis that the proffered position did not meet the definition of a specialty occupation. On appeal, counsel states that the proffered 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 an operations manager. 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 managing sales activities; directing staffing, training, and performance evaluations to develop and control the sales program; reviewing the market to determine customer needs, volume potential, price schedules, and discount rates; developing sales campaigns; directing product simplification and standardization to eliminate unprofitable items; analyzing and controlling expenditures; preparing periodic sales reports. The petitioner stated that the beneficiary might direct product research and development, and recommend or approve the budget expenditures and appropriations for research and development. The petitioner seeks to employ the beneficiary who, Josef Silny & Associates, Inc., concluded, holds the educational equivalent to a U.S. bachelor's degree in economics.

The director determined that the proffered position is not a specialty occupation. Referring to the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*), the director stated that it shows that the educational requirements of administrative services managers varies widely. After taking into consideration the size, scope, and complexity of the petitioner's organization and how the sales manager will be used by the petitioner, the director stated that a bachelor's degree would not be the minimum requirement for entry into the proffered position as it relates to the framing business.

On appeal, counsel states that the *Dictionary of Occupational Titles (DOT)* shows that the proffered position qualifies as a specialty occupation. Referring to two cases, counsel asserts that case law rejects the view that for a job to be professional, the industry and the employer must require a degreed individual.

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.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 September 17, 2003 request for additional evidence, counsel's October 8, 2003 letter sought to correct, due to a clerical error, the title of the proffered position, as shown on the Form I-129, from "general manager" to "sales manager." This change would correspond with the labor condition application, submitted with the initial petition, which shows the job title as "sales manager." The AAO will accept the job title as "sales manager."

Counsel asserts that the proffered position is a specialty occupation because of information in the *DOT*. However, 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. The DOL has replaced the *DOT* with the *Occupational Information Network (O*Net)*. Both the *DOT* and the *O*Net* provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. The *Handbook* provides a more comprehensive description of the nature of a particular occupation and the education, training, and experience normally required to enter into and advance within the occupation. For this reason, CIS is not persuaded by a claim that the proffered position is a specialty occupation simply because of information in the *DOT*.

The *Handbook* reveals that the proffered position is comparable to a sales manager. The *Handbook* reports that sales managers direct a firm's sales program. They assign sales territories, set goals, advise sales representatives on ways to improve their sales performance, maintain contracts with dealers and distributors, and analyze sales statistics to determine sales potential and inventory requirements and monitor the preferences of customers. The *Handbook* explains that a wide range of educational backgrounds is suitable for entry into sales managerial jobs, but many employers prefer those with experience in related occupations and a broad liberal arts background. For marketing, sales, and promotions management positions, some employers prefer a bachelor's or master's degree in business administration with an emphasis in marketing.

The petitioner therefore fails to establish 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) because the *Handbook* indicates that employers do not require a bachelor's degree in a specific specialty for sales managerial jobs. Accordingly, the petitioner cannot 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.

There is no evidence in the record to establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations. The AAO finds unpersuasive counsel's reference to two cases and assertion that case law rejects the view that for a job to be professional, the industry and the employer must require a degreed individual. On its face, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) explicitly provides that the specific degree requirement must be common to the industry among organizations that are similar to the petitioner; thus, the industry and the employer must both have the same degree requirement.

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* relays that employers do not require a specific baccalaureate degree for sales managers.

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 regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) 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. Because the *Handbook* explains that employers do not require a specific baccalaureate degree for sales managers, the petitioner cannot establish 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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.