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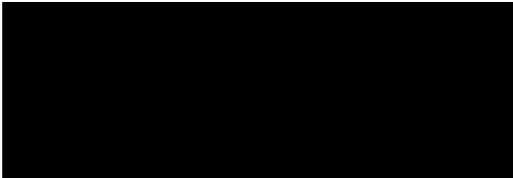
FILE: LIN 03 273 55140 Office: NEBRASKA SERVICE CENTER Date:

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 Nebraska 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 corporation operating five businesses: a delicatessen, a catering service, a video store, a cellular telephone operation and an export-import company. It seeks to hire the beneficiary as a general business manager to run its combined operations. The director denied the petition because he determined that the proffered position did not meet the criteria for a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) counsel's response to the director's request for evidence; (3) the director's denial letter; and (4) Form I-290B, with counsel's brief. 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 establishing that its proffered position is a specialty occupation, 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 general business manager. Evidence of the beneficiary's duties includes: the Form I-129; a September 12, 2003 letter of support from the petitioner; and counsel's November 17, 2003 response to the director's request for evidence, which includes an October 27, 2003 letter from the petitioner further describing the duties of its position.

In its October 27, 2003 letter, the petitioner listed the following duties for its position of general business manager, indicating the percentage of the beneficiary's time involved in performing them:

- Direct and coordinate the activities of the petitioner's five business branches, supervising employees, monitoring the flow of goods from producers and sellers to obtain optimum efficiency and economy, and maximizing profits while expanding the existing business (40 percent);
- Plan and develop organizational policies and goals, and implement them through subordinate personnel; direct and coordinate promotions services in developing markets; and increase market share and ensure a competitive position in the industry, especially a new client base (20 percent);
- Review operating and sales reports and respond to changes in market, taking suitable measures to maintain the petitioner's position in the current industry, including new product lines, special promotions activities or extra business plans; assist petitioner in determining and choosing between contracts from production distribution companies; and negotiate prices and terms of payment for delivered goods (20 percent);
- Confer with personnel and clients and maintain good business relations with producers and distributors from European countries, especially Poland (10 percent); and
- Make recommendations to the petitioner as to how to distribute funds and improve business operations.

To make its determination whether the employment just described qualifies as a specialty occupation, the AAO turns 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; 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. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

A review of the duties of the proffered position finds them to be closely aligned to the responsibilities of top executives, specifically those of general and operations managers. As discussed in the 2004-2005 edition of the DOL *Handbook*, pages 64-65:

All organizations have specific goals and objectives that they strive to meet. Top executives devise strategies and formulate policies to ensure that these objectives are met. Although they have a wide range of titles -- such as chief executive officer, chief operating officer, board chair, president, vice president, school superintendent, county administrator, or tax commissioner -- all formulate policies and direct the operations of business and corporations, nonprofit institutions, governments, and other organizations

General and 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 materials and human resources, but are too diverse and general in nature to be classified in any one area of management or administration, such as personnel, purchasing, or administrative services. In some organizations, the duties of general and operations managers may overlap the duties of chief executive officers.

In that the proffered position appears closely aligned to that of a general or operations manager, the AAO turns to the *Handbook's* discussion of whether the occupation normally requires a baccalaureate or higher degree, or its equivalent, for entry into the profession. The *Handbook* reports the following educational requirements for those seeking employment as a general or operations manager:

The formal education and experience of top executives varies as widely as the nature of their responsibilities. Many top executives have a bachelor's or higher degree in business administration or liberal arts

Because many top executive positions are filled by promoting experienced, lower level managers when an opening occurs, many top managers have been promoted from within the organization. In industries such as retail trade or transportation, for instance, it is possible for individuals without a college degree to work their way up within the company and become managers. However, many companies prefer that their top executives have specialized backgrounds and, therefore, hire individuals who have been managers in other organizations.

In that the *Handbook* finds that top executive positions impose no specific degree requirement on individuals seeking employment, the petitioner cannot establish that its proffered position, which is closely aligned to that of a general or operations manager, requires the beneficiary to hold a baccalaureate or higher degree, or its equivalent. Accordingly, it cannot establish its proffered position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel interprets the opening sentences in the *Handbook's* discussion as evidence that top executives are required to have the minimum of a baccalaureate or higher degree in business administration or the liberal arts. However, the statement that many top executives have college degrees is not synonymous with the "normally required" standard imposed by the first criterion. While the *Handbook* indicates that top management positions may be filled by individuals with a broad range of degrees, its subsequent discussion of the training and education needed for such employment clearly states that companies also hire executives based on lower-level experience within their own organizations or management experience with another business.

However, even if the *Handbook* had indicated that degrees in business administration and the liberal arts were normally required for employment as a top executive, the petitioner could not use them to establish its proffered position as a specialty occupation under first criterion. When a range of degrees, e.g., the liberal arts, or a degree of generalized title without further specification, e.g., business administration, can perform a job, the position does not qualify as a specialty occupation. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). 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 that the position requires the attainment of a bachelor's or higher degree in a specialized field of study. As already noted, CIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) to require a degree in a specific specialty that is directly related to the proffered position.

Turning to the second criterion at 8 C.F.R. § 214.2(h)(iii)(A) -- that a specific degree requirement is common to the industry in parallel positions among similar organizations or that the proffered position is so complex or unique that it can be performed only by an individual with a degree in the specific specialty -- the AAO has reviewed the three employer statements submitted by counsel in response to the director's request for evidence. On appeal, counsel contends these statements from local businesses establish the petitioner's degree requirement as the norm within its industry and that the director erred in finding otherwise. Counsel, however, has failed to consider the specific requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) for establishing a baccalaureate or higher degree as an industry norm. To meet the burden of proof imposed by the regulatory language, a petitioner must establish that its degree requirement exists in parallel positions among similar organizations.

Of the local businesses providing statements -- a pastry shop/delicatessen, a delicatessen, and an import-export business -- none is similar to the petitioner with its combined operation of delicatessen, video store, cellular telephone, catering, and import-export activities. While each represents some aspect of the petitioner's business, none states it manages the type of diverse operations for which the petitioner seeks a general business manager. Further, the descriptions of the positions included in these statements are not

specific enough to determine whether the employment discussed is parallel to the duties of the proffered position. Only one of the statements provides even a cursory discussion of the duties of the referenced employee. Finally, the statements do not identify the specific degrees awarded to the employees they describe and only one statement is documented with a diploma, although that diploma does not indicate the field in which the degree was awarded. Accordingly, while they are relevant to this proceeding, these statements do not satisfy the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO also notes that in response to the director's request for evidence, counsel contended that, in the petitioner's locale, a bachelor's degree plus special knowledge is the industry standard for management-related positions. However, counsel's assertions with regard to the hiring practices of local businesses cannot establish the petitioner's degree requirement as an industry norm. The assertions of counsel, in the absence of documentation, do not constitute evidence and do not meet the petitioner's burden of proof in this proceeding. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988).

Therefore, the evidence submitted by the petitioner regarding the employment practices of other businesses is insufficient to establish its degree requirement as an industry norm. Further, the AAO also concludes that the record before it does not establish that petitioner's position qualifies as a specialty occupation under the second prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) -- the position is so complex or unique that it can be performed only by an individual with a degree. It finds no evidence that would support such a finding. Accordingly, the petitioner cannot establish its position as a specialty occupation under either prong of the second criterion.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; and 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 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, the petitioner has submitted a statement attesting to its previous employment of a general business manager who held a master's degree in accounting and business and that it is this position it now seeks to fill. However, in the absence of supporting documentation, this statement does not establish that the petitioner normally requires a degree or its equivalent for its position. Simply going on record without supporting documentary evidence is not sufficient for the purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The fourth criterion requires the petitioner to establish that the nature of the proffered position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in the specialty. The position described by the petitioner would require the beneficiary to oversee multiple and diverse businesses. However, a review of the duties of the proffered position does not lead to a conclusion that they would require the beneficiary to possess a higher degree of knowledge and skill than what would normally be expected of top managers who routinely oversee

a range of demanding and complex business activities. Therefore, the AAO finds that the position does not qualify as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position meets the requirements for 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.