

Identifiers are deleted to
protect privacy information
involved in personal privacy
PUBLIC COPY

U.S. Department of Homeland Security
20 Massachusetts Ave. NW, Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

D2



FILE: EAC 03 186 51358 Office: VERMONT SERVICE CENTER Date: 001 01 2003

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 materials 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 service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a wholesale distributor of gasoline. It seeks to employ the beneficiary as a manager of operations and to classify him 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 ground that the record failed to establish that the proffered position qualifies as 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.

As provided in 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 evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's decision; and (5) Form I-290B and an appeal brief. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner describes itself as a wholesale distributor of gasoline, lubricants, and petroleum products in the Pennsylvania and New Jersey area. The business was established in November 2002, had five employees at the time the petition was filed in June 2003, and according to the petitioner earned revenues of \$750,000 in 2003. The petitioner proposes to hire the beneficiary as a part-time (20 hours/week) manager of operations, a position described in the response to the RFE as responsible for “direct[ing] the operations of distribution, warehousing, and sales of wholesale petroleum products in accordance with policies, principles, and procedures established by the company.” The duties of the proffered position, and the percentage of time required by each duty, are listed by the petitioner as follows:

- 15% Confers with other personnel to establish quality control standards, develop budget and cost controls, and to obtain data regarding types, quantities, specifications, and delivery dates of products ordered.
- 15% Confers with customers and representatives of associated industries to evaluate and promote improved and expanded services in area.
- 15% Develops plans for efficient use of materials, machines, and employees.
- 15% Reviews production costs and product quality, and modifies production and inventory control programs to maintain and enhance profitable operation of division.
- 15% Reviews operations of competing organizations, and plans and directs sales program to develop new markets, using sales aids, advertising, promotional programs, and field services.
- 15% Plans and directs operations activities and establishes priorities for products in keeping with effective operations and cost factors.
- 10% Conducts staff meetings, prepares reports.

Though not appearing in the above list, an additional duty mentioned elsewhere in the job description is “ensur[ing] implementation of environmental safety requirements with regard to highly flammable and toxic gasoline products.” The petitioner states that the performance of the foregoing duties requires at least a baccalaureate degree in business administration.

In his decision the director declared that the job duties listed by the petitioner were too vague to indicate what the beneficiary would be doing on a daily basis or to establish that a baccalaureate degree in a particular field of study was necessary to perform the duties. Given the vagueness of the job duties, and considering the scope and nature of the petitioner’s business operations, the director was not persuaded that the beneficiary would be performing the services of an operations manager, as described in the Department of Labor (DOL)’s *Occupational Outlook Handbook (Handbook)*. The petitioner did not establish that it or other comparable employers require at least a baccalaureate degree or its equivalent in a specific field of study for similar positions, the director continued, or that the duties of the proffered position are so specialized and complex that their performance is usually associated with baccalaureate or higher level knowledge. The director concluded that the proffered position does not qualify as a specialty occupation under any of the criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal counsel asserts that the director erred in finding that the job duties are too vaguely described to classify the proffered position as that of a manager of operations, or that the duties do not require the services of an individual with a specialty degree. Counsel asserts that the position requires knowledge of marketing and distribution processes, with a heavy emphasis on safety measures due to the volatility of gasoline, as well as an understanding of complex technical devices and equipment used in gasoline storage and distribution. Counsel reiterates that a bachelor's degree in business administration is the minimum educational requirement for the position, and cites a series of cases for the proposition that a company's size or past hiring practices are not dispositive of its current need for an H-1B employee if the employer can document that a proffered position is professional level and requires the services of an individual with a specialty degree. Counsel asserts that the petitioner previously hired an individual with a bachelor's degree in business administration for the manager of operations position.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the DOL *Handbook* as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered are whether the *Handbook* indicates a degree is required by the industry; 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*, 764 F.Supp. 1095, 1102 (S.D.N.Y. 1989)). CIS also analyzes the specific duties and complexity of the position at issue, with the *Handbook's* occupational descriptions as a reference, as well as the petitioner's past hiring practices for the position. See *Shanti, Inc. v. Reno, id.*, at 1165-66.

Based on the description of the proffered position in the record, the AAO is persuaded that the duties reflect those of an operations manager, a sub-category of the *Handbook's* broad occupational category called "top executives." The duties of an operations manager are described as follows in the DOL *Handbook*, 2004-05 edition, at 65:

. . . [O]perations 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 . . . operations managers may overlap the duties of chief executive officers.

The *Handbook* describes the educational background and experience of top executives, including operations managers, as follows:

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 Some top executives in the public sector have a background in public administration or liberal arts. Others might have a background related to their jobs 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.

Id. at 66. While the foregoing excerpt indicates that some operations manager positions may require baccalaureate or higher degrees in a specific specialty, it is not the normal minimum requirement for entry into such a position. The AAO concludes that the proffered position does not meet the first alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), because a baccalaureate degree in a specific specialty is not the normal minimum requirement for entry into the position.

With regard to the second alternative criterion of a specialty occupation, there is no evidence in the record that a degree requirement in a specific specialty is common to the petitioner's industry in parallel positions among similar organizations. Nor does the evidence of record demonstrate that the proffered position is so complex or unique that a degree in a specific specialty is required to perform the job. Accordingly, the proffered position does not qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2 (h)(4)(iii)(A)(2).

As for the third alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), the petitioner asserts that it previously hired an individual, [REDACTED] with a bachelor of science in business administration for the proffered position. There is no documentation in the record showing in what capacity Mr. [REDACTED] worked for the petitioner. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Furthermore, the employer's requirement of a bachelor's degree in business administration does not meet the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) because a degree of such generalized title, without further evidence of a specific course of study closely related to the proffered position, does not establish that the employer normally requires a baccalaureate or higher degree in a specific specialty, or its equivalent, for the position. *See Matter of Michael Hertz Associates*, 19 I&N Dec. 558, 560 (Comm. 1988).

Finally, the record does not show that the duties of the proffered position are so specialized and complex that they require knowledge at the level of a baccalaureate or higher degree. The only duties distinguishing the proffered position from those of most other operations managers are those involving environmental safety requirements for highly flammable and toxic gasoline products. The petitioner has not shown that the performance of those duties, or any of the other job duties, requires knowledge associated with a degree in a specialty field. Indeed, the petitioner's statement that the proffered position requires a bachelor's degree in business administration, without a particular major or area of concentration, appears to contradict the assertion that a degree in a specific specialty is required. Accordingly, the position does not meet the fourth alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons discussed above, the record does not establish that the proffered position meets any of the criteria enumerated in 8 C.F.R. § 214.2(h)(4)(iii)(A) to qualify as a specialty occupation. The petitioner has not established that the beneficiary will be coming temporarily to the United States to perform

services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

ORDER: The appeal is dismissed. The petition is denied.