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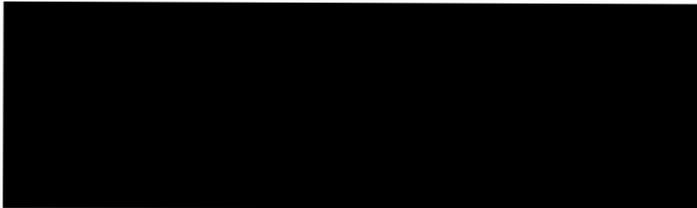
FILE: WAC 02 148 50833 Office: CALIFORNIA SERVICE CENTER Date: MAR 22 2006

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.

for Michael T. Kelly
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the California Service Center denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on motion to reopen or reconsider. The motion will be granted. The previous decision shall be affirmed. The petition will be denied.

The petitioner is a distributor of Karaoke equipment who seeks to employ the beneficiary as a business office 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 is not a specialty occupation.

On September 15, 2004, the AAO denied the petition, finding that the proposed position failed to qualify as a specialty occupation. The AAO stated that the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) reveals that the duties of the offered position are essentially those of top executives/general and operations managers, and that the *Handbook* reports that the formal education and experience of top executives varies as widely as the nature of their responsibilities. The AAO stated that the *Handbook* indicates that:

Many top executives have a bachelor's or higher degree in business administration or liberal arts. Other executive positions, however, are filled by promoting experienced, lower level managers.

Based on the *Handbook's* information, the AAO concluded:

[I]t is possible to obtain a position as a general or operations manager without a college degree by promotion from within the organization based upon performance alone.

The AAO determined that the petitioner failed to establish one of the criteria under 8 C.F.R. § 214.2(h)(4)(iii)(A).

On motion to reconsider, counsel states that the director misclassified the proposed position and that the criteria under 8 C.F.R. § 214.2(h)(4)(iii)(A) were misapplied. Counsel refers to *Young China Daily vs. Chappell*, 742 F. Supp. 552 (N.D. Cal. 1989) and states that the case indicates that the size of an employer bears no rational relationship to the need for a professional. Counsel references *Unico American Corp. v. Watson*, 1991 WL 11002594 (C.D. Cal. Mar 19, 1991) and states that it conveys that the employer's job duties and needs must be addressed in determining whether a position requires the services of a professional. Referencing *Matter of Portugues do Atlantico Information Bureau, Inc.* 19 I&N Dec. 194 (Comm. 1984), counsel asserts that it indicates that a baccalaureate degree is not always required for an alien to qualify for H-1B status as long as the alien possesses the combination of education and experience that is needed for the particular position.

The AAO grants the motion to reconsider.

Counsel's reference to *Unico American Corp.* is not persuasive, as the district court's decision is unpublished. In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719. In addition, as the published decisions of the district courts are not binding on the AAO outside of that particular proceeding, the unpublished decision of a district court would necessarily have even less persuasive value.

Nevertheless, the AAO will consider the relevance and merits of *Unico American Corp.* to the instant petition. The issue in *Unico American Corp.* concerned whether the management information systems (MIS) programmer position offered to the beneficiary required the services of a professional in the computer industry. The AAO found that the MIS programmer position was not professional in nature, as it involved only routine programming and duties. In reaching its conclusion, the AAO relied on the Department of Labor's *Occupational Outlook Handbook's* (the *Handbook*) description of specific vocational preparation (SVP) levels. According to the AAO, the SVP level revealed that the proposed position did not require a bachelor's degree holder. The plaintiff said that the submitted evidence demonstrated that it is a sophisticated company with sophisticated data processing needs, procedures, and equipment. The district court agreed with the plaintiff, finding that the submitted job description and company letters established the need for a professional MIS programmer with a baccalaureate degree in computer science. The court stated that the letter from the plaintiff's vice-president of the data processing division described the MIS programmer position as requiring a "bachelor[']s degree in computer science or related field and at least 3 years of programming experience"; and that the letter stated that the position required a wide range of analysis and design responsibility. In the decision, the court stated that in denying the petition the AAO had applied a rigid standard in determining the plaintiff's needs, and failed to consider the overwhelming evidence demonstrating that the plaintiff needed "someone highly skilled in the computer science field." The court discussed the appropriateness of second-guessing the plaintiff's business judgment.

The facts in the instant petition are distinguishable from *Unico American Corp.* In *Unico American Corp.*, the plaintiff required a baccalaureate degree in a focused area of study: computer science or a related field. With the proposed position, the educational requirement is not in a concentrated area of study, as it encompasses the humanities or the sciences.

The petitioner's November 15, 2002 letter relayed that the office manager position requires a bachelor's degree in the "humanities or sciences." The document entitled "Job Announcement" listed this educational requirement as well as the requirement of at least five years of related experience. The AAO notes that the humanities, also referred to as the liberal arts, encompass the branches of knowledge such as philosophy, literature, and art, which are concerned with human thought and culture. The petitioner's requirement of a bachelor's degree in the "sciences" is not specific, as the sciences include diverse fields such as computer science, animal science, atmospheric science, biology, biotechnology, horticulture, astronomy, chemistry,

geosciences, physical science and physics, and food science. By accepting a baccalaureate degree in the humanities or the sciences, the petitioner does not require a narrow and concentrated field of study for the proposed position. In addition, the petitioner does not explain how a baccalaureate degree in the humanities or the sciences would directly relate to the duties of a business office manager.¹

On motion, counsel states that *Unico American Corp.* indicates that the job duties and the needs of the employer must be addressed in determining whether a position requires the services of a professional. In the September 15, 2004 decision, the AAO reviewed the proposed job duties, finding that they resemble those of top executives/general and operations managers, and that the *Handbook* conveys that “[m]any top executives have a bachelor’s or higher degree in business administration or liberal arts.”

After reviewing the record, the AAO finds that the petitioner does not explain how a baccalaureate degree in the humanities or the sciences is related to a business office manager for a distributor of Karaoke equipment. An educational requirement of a bachelor’s degree in the humanities or the sciences comport with the *Handbook’s* information about the educational background of top executives/general and operations managers. As such, the AAO correctly concluded that based on petitioner’s job description, the proposed position does not need a baccalaureate degree in a specific specialty.

Counsel’s reference to *Young China Daily* is not persuasive, as the AAO’s decision was not based on the petitioner’s size. It was based on an evaluation of the proposed duties, which the AAO concluded did not qualify the proffered position as a specialty occupation.

With respect to *Matter of Portugues do Atlantico Information Bureau, Inc.*, counsel states:

The petitioner submits that in *Matter of Portugues do Atlantico Information Bureau, [Inc.], supra*, “it was clear from earlier cases that a baccalaureate degree is not required in every case in order for an alien to qualify for H-1 status, as long as the alien possesses a combination of education and experience which equip him or her with the ‘knowledge of an advanced type’ that is essential to perform the duties of the profession in question.”

The above paragraph relates to the beneficiary’s qualifications for the proposed position. This is similar to *Tapis Int’l vs. INS*, 94 F.Supp. 2d 172 (D. Mass. 2000). In *Tapis Int’l*, the petitioner sought to employ a

¹ As stated in the AAO’s September 15, 2004 decision, section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term “specialty occupation” as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent). In the decision, the AAO stated that the petitioner must establish that the proposed position qualifies as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A), and that 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.

showroom manager and required a bachelor's degree in business administration or marketing in addition to specialized experience or training in the design field. The petitioner sought to qualify the proposed position as a specialty occupation under the "or its equivalent" language of the statute and the regulations. In the case, the district court found that the petitioner's educational and work experience requirement together constituted the equivalent of a specialized baccalaureate degree. The court reached this conclusion because a specific degree was not available in "interior design showroom management." According to the court:

[B]y including the "or its equivalent" language, the statute and regulations recognize that the needs of a specialty occupation can be met through education, experience, or some combination of the two.

In *Tapis Int'l*, the petitioner required a bachelor's degree in business administration or marketing, which relate to the showroom manager position. With the instant petition, the petitioner requires a bachelor's degree in the humanities or sciences; however, the petitioner does not explain how its educational requirement relates to a business office manager for a distributor of Karaoke equipment. Thus, the petitioner cannot establish that the proposed position qualifies as a specialty occupation under the "or its equivalent" language of the statute and the regulations.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation.

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 petition is denied. The previous decision of the AAO, dated September 15, 2004, is affirmed.