



U.S. Citizenship  
and Immigration  
Services

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

PUBLIC COPY



02

FILE: SRC 04 245 51965 Office: TEXAS SERVICE CENTER Date: OCT 05 2006

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 documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas 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 sells women's clothing, has two employees, and a gross annual income of \$700,000. It seeks to continue its employment of the beneficiary as a sales manager.<sup>1</sup> Accordingly, the petitioner 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).

On April 29, 2005, the director denied the petition determining that the record did not establish that the proffered position is a specialty occupation. On appeal, counsel for the petitioner asserts that a store manager (wholesaler) position is a specialty occupation. The issue in this matter is whether the petitioner has established that the proffered position is a specialty occupation.

The record contains: (1) the Form I-129 filed September 29, 2004 with supporting documentation; (2) the director's January 28, 2005 request for evidence (RFE); (3) counsel's April 4, 2005 response to the director's RFE with documentation; (4) the director's April 29, 2005 denial decision; and, (5) the Form I-290B and counsel's brief, and previously submitted documentation, in support of the appeal. The AAO reviewed the record in its entirety before issuing its 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:

- (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

---

<sup>1</sup> The petitioner's August 12, 2004 letter appended to the Form I-129 states that the proffered position is a business operations manager. The AAO observes that the critical element is not the title of the position nor an employer's self-imposed standards, but whether the position as described 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.

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.

On the Form I-129, the petitioner states that the proffered position is that of a "sales manager." In the August 12, 2004 letter appended to the Form I-129 petition, the petitioner stated:

As the Manager of Business Operations, [the beneficiary] has served as the right hand man of the President of the corporation. He has been a key factor in our expansion goals. He has assisted in the administration of corporate books; dealing with administrative problems and developing and implementing more efficient methods of operation and administrating [sic] the store. He is in charge of administrating [sic] payroll, records management, security, supplies[,] and inventory. He has developed a budget for the store's operations that has played a crucial role in the store's growth and success for the past few years.

[The beneficiary] has supervised the store employees and trained crucial personnel. He has also established polices [sic] on how to operate the day[-]to[-]day activities of the business. [The beneficiary] reports directly to the President of the corporation, and in some instances where the President is not available, [the beneficiary] is responsible for overseeing all of the store's operations, negotiating and contracting with suppliers on behalf of the President.

On January 28, 2005, the director observed that the petitioner's description of the position of sales manager did not comprise a specialty occupation. The director requested evidence that it is the industry standard to require a baccalaureate degree and evidence that the petitioner had hired individuals in the past to perform the position and that a baccalaureate degree had been required.

In an April 4, 2005 response, prior counsel indicated that the Department of Labor's *Occupational Outlook Handbook (Handbook)* reported that the duties of the position of operations manager overlapped with the

duties of a chief executive officer. Counsel provided an excerpt from the *Handbook* relating to top executives. Counsel also provided copies of two letters authored by university professors. The April 11, 2002 letter authored by [REDACTED], Professor of Marketing at Seattle University proffered an opinion on the beneficiary's work experience and professional training as it related to the equivalent of a baccalaureate degree; the requirement of a bachelor's degree for the position described in this matter as a business operations manager; and the beneficiary's qualifications for the position. Professor [REDACTED] opined that given the nature of the petitioner and the duties enumerated in the job description, the title of the position should be "store manager" and that such a position is regarded as a goal for students who graduate with a bachelor's degree in business and that a bachelor's degree is customarily required for the position. The second letter, also dated April 11, 2002, authored by [REDACTED] Associate Professor of [REDACTED] Seattle Pacific University, proffered an opinion on the beneficiary's work experience and its equivalent to a bachelor's degree in business administration specializing in marketing and indicated that marketing/retail management (Business operations manager) jobs are professional positions requiring the equivalent of a bachelor's degree specializing in marketing or retail management.

On April 29, 2005, the director determined that the evidence in the record did not establish that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into a sales manager position as it related to the petitioner or to the petitioner's industry; that the record did not establish that a degree is common to the industry in parallel positions among similar organization, or that the position is so complex or unique that only an individual with a degree could perform the position; or that the petitioner had established that the proffered position realistically required a bachelor's degree in a specific discipline. The director concluded that the petitioner had failed to establish that the position is a specialty occupation.

On appeal, new counsel for the petitioner referenced the two letters submitted by the university professors and asserted that the letters stated that the position of store manager required a baccalaureate degree. Counsel also presented four job announcements for the positions of store manager for a retail store, an operations manager for a footwear company, a store sales manager for a retail store, and a cosmetic department manager for a store. Two job announcements listed a bachelor's degree in an unspecified discipline in the education field of the job announcement; one job announcement indicated that two or more years in the retail industry could replace the bachelor's degree; one job announcement indicated that an associate's degree or equivalent work experience was acceptable. Counsel also submitted four letters from retail businesses indicating that each business would like a person with a bachelor's degree or the equivalent in the position of store manager. Counsel also provided a copy of the petitioner's undated letter indicating that it needed a store manager who possessed a baccalaureate degree in business administration.

The AAO does not find the evidence submitted persuasive. The AAO routinely consults the *Handbook* for information about the duties and educational requirements of particular occupations. The AAO finds that the description of the proffered position's duties is essentially that of a sales supervisor who "ensure[s] that customer's receive satisfactory service and quality goods. They also answer customers' inquiries, deal with complaints, and sometimes handle purchasing, budgeting, and accounting." The AAO notes additionally, that the proffered position may incorporate some administrative duties including payroll, records management, security, supplies, inventory, and budget. However, the petitioner has not sufficiently described the actual tasks associated with these administrative duties to identify an occupation associated with them. The *Handbook* reports that sales supervisors usually acquire knowledge through work experience and that the

educational backgrounds for this position vary widely. The *Handbook* reports that educational requirements for administrative services managers also vary widely. The petitioner's general description of the proffered position and the nature of the petitioner's business do not demonstrate that the proffered position itself requires the services of an individual who has a baccalaureate or higher degree or its equivalent.

The AAO acknowledges counsel's reference to the two letters submitted by the university professors in support of the proposition that the position of store manager requires a baccalaureate degree. However, the opinions of both professors stand more for the authors review of the beneficiary's qualifications and note only in passing that the proffered position requires the educational equivalent of a baccalaureate degree. Moreover, neither professor substantiates their conclusory statement that the proffered position requires the services of an individual with a baccalaureate or higher degree in a specific specialty. The record does not contain documentary or anecdotal evidence supporting their conclusions. Moreover, neither professor gives sufficient details about the complexity of the duties in relation to the petitioner's wholesale or sales business to substantiate his conclusions. There is an inadequate factual foundation established to support the opinions. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). In this matter, the petitioner has not established the specific nature of the proffered position, has not explained why the routine duties of a sales or administrative manager would require the attainment of a baccalaureate or higher degree, and has not otherwise demonstrated that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the proffered position. The petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO now turns to a consideration of whether the petitioner may qualify the proffered position under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), whether a degree requirement is the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree. A review of the evidence of record finds it insufficient to establish the proposed duties comprise a position that is identifiable with an industry-wide educational standard, or distinguishable, by its unique nature or complexity, from a similar but non-degree-requiring position. The AAO has considered the four job announcements submitted and determines that the job announcements do not provide sufficient information to enable the AAO to conclude that the businesses advertising the positions are similar to the petitioner in size, number of employees, or level of business. Going on the 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 190 (Reg. Comm. 1972)). Nor are the duties of the proffered position sufficiently similar to the descriptions in the advertised positions. Thus, the record does not show that the proffered position is a parallel position. The record is insufficient to establish that a degree requirement is common to the industry in parallel positions among similar organizations. The petitioner has not established the first prong of the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(2). Moreover, the job announcements submitted do not require that the successful candidate have a baccalaureate or higher degree.

The AAO has also considered the four letters from retail businesses indicating that each business would like a person with a bachelor's degree or the equivalent in the position of store manager. These letters do not identify any store managers with baccalaureate degrees hired by these businesses, nor do the letters describe

the duties their store managers perform. The letters are not supported by documentary evidence establishing the credentials of the store managers in their employ. Again, going on the 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. at 165. Thus, the record does not contain adequate evidence demonstrating that these businesses "routinely employ and recruit only degreed individuals," in a specific discipline. The petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations.

The petitioner in this matter does not seek to establish the second prong at 8 C.F.R. § 214.2(h)(iii)(A)(2) which requires that the proffered position is of such complexity or uniqueness that it can be distinguished from other positions within the same industry. Thus the petitioner has not established the second prong of this criterion. The AAO is not persuaded that the nature of the specific duties of the proposed position is more specialized and complex than that of a typical store manager or that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree in a specific discipline.

In this matter, the petitioner has not provided evidence to establish the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(2).

The record also fails to demonstrate that the petitioner has a history of recruiting and hiring degreed candidates for the proffered position. To determine whether the petitioner has fulfilled the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(3), 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. The record suggests that the petitioner has not employed anyone in the proffered position prior to offering the position to the beneficiary.

The AAO acknowledges that the beneficiary was previously approved for H-1B status on the basis of a petition filed by the same petitioner. However, prior approvals do not preclude CIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The AAO notes that each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). When making a determination of statutory eligibility CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). This record of proceeding does not indicate whether the director reviewed the prior record and the rationale for the prior decision. However, if that record contained the same evidence as submitted with this petition, the CIS would have erred in approving the previously filed petition. CIS is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

In this matter, the petitioner has not provided evidence to establish the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(3).

The AAO now turns to the fourth criterion and whether the petitioner has established that the duties of the proffered position are sufficiently specialized and complex to require knowledge usually associated with the attainment of a baccalaureate degree in a specific discipline and, therefore, establish the proffered position as a specialty occupation under the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). The duties of the proffered position show that the tasks relate primarily to the routine tasks of a store supervisor or an administrative services manager. The petitioner has not provided evidence that the tasks associated with the proffered position require the application of specialized or complex knowledge associated with the attainment of a baccalaureate degree or higher degree. In this matter, the petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4).

Although the petitioner has not established that the proffered position is a specialty occupation, the AAO observes that the petitioner has not established that the beneficiary is qualified to perform the duties of a specialty occupation. The letters submitted on the beneficiary's behalf in an effort to establish that his work experience is equivalent to a four-year degree are insufficient. The petitioner has not provided evidence that either Professor Obermiller or Professor [REDACTED] officials who have the authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university that has a program for granting such credit. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). The AAO finds specifically that the petitioner has not provided evidence that the beneficiary's work experience coupled with his education is sufficient to establish that he is qualified to perform the duties of the specialty occupation. When evaluating a beneficiary's qualifications under the fifth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C), CIS considers three years of specialized training and/or work experience to be the equivalent of one year of college-level training. In addition to documenting that the length of the beneficiary's training and/or work experience is the equivalent of four years of college-level training, the petitioner must also establish that the beneficiary's training and/or work experience has included the theoretical and practical application of the specialized knowledge required by the specialty occupation, and that the experience was gained while working with peers, supervisors, or subordinates who have degrees or the equivalent in the specialty occupation. The petitioner must also document recognition of the beneficiary's expertise in the specialty, as evidenced by one of the following: recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation; membership in a recognized foreign or U.S. association or society in the specialty occupation; published material by or about the alien in professional publications, trade journals, books or major newspapers; licensure or registration to practice the specialty in a foreign country; or achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation. In this matter, the petitioner has failed to provide this information. For this additional reason, the petition will be denied.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.

• SRC 04 245 51965

Page 8

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