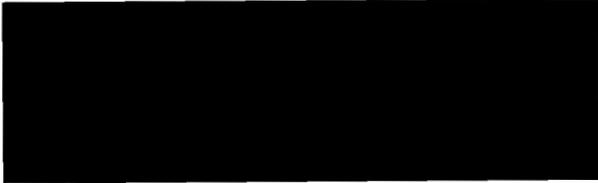




U.S. Citizenship
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02

FILE: LIN 04 253 52651 Office: NEBRASKA SERVICE CENTER Date: **SEP 28 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 nonimmigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a retail sales and real estate management company. It engages in the business of consulting with independently-owned retail convenience and gas stations regarding their operations and profitability. It desires to employ the beneficiary temporarily in the United States on a part-time basis as an assistant efficiency analyst, at an annual salary of \$28,314 per year, for three years. The director determined that the petitioner did not establish that the proffered position qualifies as a specialty occupation as enumerated in the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A) and denied the petition.

Counsel submits a brief in support of the appeal. In his brief, counsel states that the petitioner has established that the position qualifies as a specialty occupation. Counsel also states that the nature of the proposed duties requires knowledge associated with the attainment of a bachelor degree or higher degree in the specific specialty.

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), defines an H-1(b) temporary worker as:

an alien . . . who is coming temporarily to the United States to perform services in a specialty occupation described in section 214(i)(1) . . . and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 212(n)(1). . . .

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.

Similarly, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) provides that:

Specialty occupation means 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.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A) establishes four standards, one of which an occupation must meet to qualify as a specialty occupation:

- (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-290B and supporting documentation; (2) the director’s denial letter; (3) the director’s request for additional evidence; (4) the petitioner’s response to the director’s request; and (5) Form I-129 and supporting documentation. The AAO reviewed the record in its entirety before issuing the decision.

The Petition for a Nonimmigrant Worker (Form I-129) was filed on September 15, 2004. The petitioner is seeking the beneficiary’s services as an assistant efficiency analyst. The petition at Section 1 describes the proposed duties as gathering data, analyzing and listing possible improvements for more efficient operations of various business ventures and office procedures.

The letter submitted in support of the petition states that in the proffered position, the beneficiary will be responsible for collecting data on various daily aspects of operating retail convenience and gas stations, analyzing them using the aid of computer programs, preparing proposals on some alternatives for improving operations and efficiency and submitting the proposals to the efficiency expert for further analysis and improvement selection.

The duties of the proffered position are described as follows in the petitioner’s response to the director’s request for evidence (RFE):

1. Sales tracking – The beneficiary will be responsible for tracking all sales that take place at various time intervals of the business day. All this information will then be entered into computer software for aid in the analyzing of sales, inventory tracking and forecasting. The beneficiary will then be able to determine the quantity of sales on a daily and/or weekly basis, establish the appropriate amount of inventory purchasing and its timing for minimizing inventory storage at the end of the cycle and maximizing the purchase automation process.

2. Inventory tracking – The beneficiary will perform data analysis to provide management with the appropriate turnover rate for particular items.

3. Purchasing – The beneficiary’s data gathering and analysis will provide management with a breakdown of sales and inventory depletion for use in strategic inventory restocking. The breakdown may also include forecasting of future demand levels and profitability levels of various items, including newly introduced products.

4. Store Layout – The beneficiary will provide suggested improvements in store layout to maximize efficiency and profitability.

5. Time Measurements – The beneficiary will be responsible for measuring the amount of time it takes to accomplish certain tasks.

6. Customer Queuing – The beneficiary will help management determine the appropriate number of employees to schedule per shift.

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).

The AAO turns first 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; 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 typically considered are whether the Department of Labor (DOL)’s *Occupational Outlook Handbook (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*, 712 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 whether the degree requirement is common in the industry in parallel positions among similar organizations and the petitioner’s past hiring practices for the position. *See Shanti, Inc. v. Reno*, at 1165-66.

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The petitioner states that the proffered position is that of an assistant efficiency analyst. The AAO does not agree with the director that the duties of the proffered position are primarily those of a management analyst. The AAO finds that the beneficiary’s duties in the proffered position primarily parallel the responsibilities of a purchasing manager. The duties also include those the *Handbook* describes for a general and operations manager. The *Handbook*, 2006-07 edition, gives the following information about the nature of the work of a purchasing manager:

Purchasing managers, buyers, and purchasing agents make up a key component of a firm's supply chain. They buy the goods and services the company or institution needs to either resell to customers or for the establishments own use. . . . In order to accomplish these tasks successfully, purchasing managers, buyers, and purchasing agents study sales records and inventory levels of current stock, identify foreign and domestic suppliers, and keep abreast of changes affecting both the supply of, and demand for, needed products and materials. . . . Purchasing managers usually handle the more complex or critical purchases and may supervise a group of purchasing agents handling other goods and services. . . .

The *Handbook*, 2006-07 edition, gives the following information about the training of a purchasing manager:

Qualified persons may begin as trainees, purchasing clerks, expeditors, junior buyers, or assistant buyers. Retail and wholesale firms prefer to hire applicants who have a college degree and who are familiar with the merchandise they sell and with wholesale and retailing practices. Some retail firms promote qualified employees to assistant buyer positions; others recruit and train college graduates as assistant buyers. Most employers use a combination of methods.

The *Handbook*, 2006-07 edition, gives the following information about the nature of the work of a general and operations manager:

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. . . .

The *Handbook*, 2006-07 edition, gives the following information about the training of a general and operations manager:

. . . . In industries such as retail trade . . . it is possible for individuals without a college degree to work their way up within the company and become managers. . . .

Therefore, a baccalaureate or higher degree or its equivalent is not normally the minimum requirement for entry into this particular position. The *Handbook*, 2006-07 edition, does not state that a bachelor's degree in a specific specialty is required to perform the duties of the occupation. Further, the petitioner has not demonstrated that the duties of the proffered position would require a bachelor's degree in a precise and specific course of study that relates directly and closely to the position in question. Therefore, while the petitioner may require a bachelor's degree, the proffered position does not require a bachelor's degree, or its equivalent, in a specific specialty for entry into the occupation. Thus, the information contained in the record of proceeding does not establish that the position is a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

The record does not include any evidence that a degree requirement is common to the industry in parallel positions among similar organizations. The record does not include any evidence from firms, individuals, or professional associations regarding an industry standard, or documentation establishing that a baccalaureate degree in a specific specialty is common in the proffered position among similar retail organizations. As evidence of a degree requirement being common among similar organizations, the petitioner provided a job posting from Abercrombie & Fitch for an industrial engineer. However, Abercrombie & Fitch is a clothing retailer while the petitioner provides management services for mini-markets and gas stations. Abercrombie & Fitch is advertising for an industrial engineer position and the job duties are not similar to those of the proffered position. The petitioner also submits a job posting from Blue Cross & Blue Shield for a process engineer. Blue Cross & Blue Shield is an insurance company and the job duties of the advertised position are not similar to the duties of the proffered position. The other job postings, submitted from companies engaged in the business of global manufacturing, supplying automotive foam products and the air express industry, fail to show a similarity to the petitioner's business and to the proffered position. Therefore, the petitioner has not demonstrated that a degree requirement is common to the industry in parallel positions among similar organizations under the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides a petitioner the opportunity to show that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty. The record does not include any evidence or documentation establishing the complexity or uniqueness of the proffered position.

The AAO turns next to consideration of the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). The record does not contain evidence of the petitioning entity's past employment history of hiring persons with a degree or its equivalent for the position. The petitioner states that it previously hired in the proffered position an individual holding a degree in management information systems. The petitioner did not submit a copy of the previous employee's degree or employment records establishing that it previously employed him in the position of efficiency analyst. Simply 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)). Further, the beneficiary presently holds a bachelor's degree in industrial engineering, which is not a degree related to management information systems. Consequently, the petitioner has not established that the employer normally requires a degree in a specialty field or its equivalent for the position. The petitioner has not established the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The AAO now considers the merits of the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). The Petition for a Nonimmigrant Worker (Form I-129) reflects that the petitioner employs four persons. Form I-129 also reflects the petitioner's gross annual income as of the petition's filing date is \$600,000. There are no tax returns of record, or contracts between the petitioner and the 15 mini-markets/gas stations to which it provides management consulting. There is no evidence of the petitioner's real estate consulting business in the record. The petitioner has not presented any evidence to show that the skills utilized in its daily operations are so specialized and complex that the knowledge required to perform the duties of the proffered position is usually associated with the attainment of a baccalaureate or higher degree, or its equivalent, in a specific specialty. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the

burden of proof in these proceedings. *Matter of Soffici*. Therefore, the petitioner has not established the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As related in the discussion above, the petitioner has not established the proffered position is a specialty occupation. Accordingly, the decision of the director shall not be disturbed.

The petitioner has not established that the proffered position qualifies as a specialty occupation. Thus, the beneficiary's qualifications are immaterial.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

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