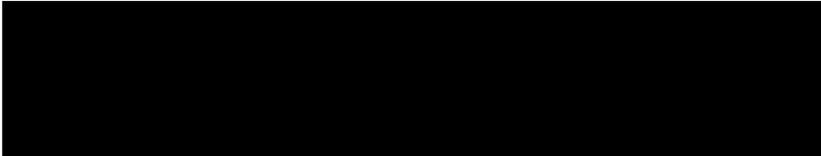


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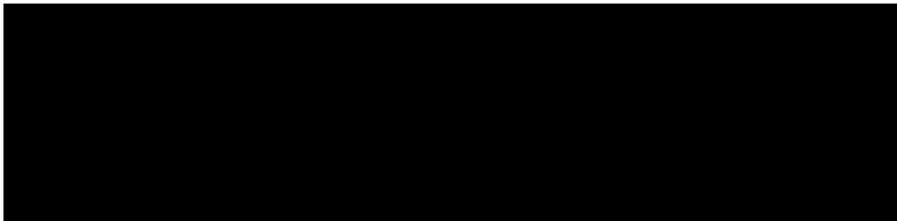
FILE: EAC 03 254 56516 Office: VERMONT SERVICE CENTER Date: **JAN 18 2007**

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, Chief
Administrative Appeals Office

DISCUSSION: The director of the Vermont 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 retail supermarket that seeks to continue the beneficiary's employment as a business manager 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 determined that the petitioner had submitted contradictory wage evidence and had failed to establish that the beneficiary would be paid the prevailing wage for the position as required by the terms of the labor condition application (LCA) and by 8 C.F.R. § 214.2(h)(4)(iii)(B)(2). The director determined further that the record lacked corroborative evidence to establish that the beneficiary previously performed the described position duties for the petitioner pursuant to a past H-1B nonimmigrant visa petition approval, or that the beneficiary would be employed in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Act. The petition was denied accordingly.

Counsel asserts on appeal that federal tax evidence contained in the record establishes that the petitioner paid the beneficiary the prevailing wage for his profession. Counsel asserts further that the described position's duties establish that the proffered position is a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129, Petition for Nonimmigrant Worker (Form I-129) and supporting documentation; (2) the director's request for additional evidence (RFE); (3) counsel's response to the director's request; (4) the director's denial letter; and (5) Form I-290B, Notice of Appeal to the AAO, with counsel's brief and additional documentation. The AAO reviewed the record in its entirety before issuing its decision.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(2), provides that a petitioner must submit a statement that it will comply with the terms of the LCA for the duration of the alien's period of authorized stay.

The present record contains contradictory and unexplained wage evidence paid to the beneficiary during his previous term of H-1B employment with the petitioner. The director notes in his decision that the prevailing wage for the proffered position is over \$32,000 a year. The 2003, payroll earnings statements contained in the record reflect that the beneficiary earned between \$9.24 and \$9.70 an hour in 40 hour a week, full time wages. It is noted that the statements reflect significant additional overtime work hours, paid at the rate of \$13.80 an hour. The full-time, 40-hour-a-week wage earned by the beneficiary equates to an annual salary of around \$20,000, clearly less than the required prevailing wage. The 2002, Form W2, federal tax evidence contained in the record reflects that the beneficiary earned \$26,941.24 for the year. This is also less than the prevailing wage for the proffered position. Concerns regarding the petitioner's failure to establish that it paid the beneficiary the prevailing wage for the proffered position were raised by the director in his RFE. In response to these concerns, the petitioner stated simply that a payroll error had been committed. No further explanation was provided in response to the RFE or on appeal, and no evidence has been submitted to corroborate or establish that a payroll error was committed.

On appeal counsel asserts that recent 2004 payroll earnings statements contain the beneficiary's correct pay history, and reflect that the beneficiary is paid the prevailing wage for the proffered position. The record contains bi-weekly payroll statements for January, February and March 2004. Unlike the previous 2003, payroll

statements contained in the record, the 2004, payroll statements do not contain any information to indicate the number of hours that the beneficiary worked, or the full-time and/or overtime wages that he was paid per hour. Furthermore, it is noted that all twelve of the new 2004 payroll statements contain the identical year-to-date earnings amount of \$9783.95. Moreover, the twelve 2004, payroll earning statements are numbered in uninterrupted, consecutive order (██████████ through ██████████), giving the impression that the payroll statements were created at the same time. Each of these serious concerns was discussed in the director's denial decision. However, the concerns were neither acknowledged nor explained on appeal.

The AAO finds that the wage evidence contained in the record contains material discrepancies and presents serious questions as to the validity of the evidence. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Moreover, any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In the present matter, no objective or explanatory evidence has been presented. Accordingly, the AAO finds that the petitioner has failed to establish that it has paid the beneficiary the prevailing wage for the proffered position.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988). The wage evidence contained in the record indicates that the beneficiary was previously not paid the prevailing wage. Thus, the AAO finds unreliable the petitioner's statement that it will comply with the terms of the LCA for the duration of the alien's authorized period of stay under 8 C.F.R. § 214.2(h)(4)(iii)(B)(2).

Furthermore, the AAO agrees with the director's determination that the petitioner has failed to establish it will employ the beneficiary to perform services in a specialty occupation, as set forth in section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b); 8 C.F.R. § 214.2(h)(1)(ii)(B).

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 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.

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.

In order 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.

Counsel asserts that the proffered business manager job description reflects that the position is a specialty occupation pursuant to the Department of Labor’s *Occupational Outlook Handbook (Handbook)*. Counsel indicates further that because the petitioner’s previous business manager petition was approved by CIS on the beneficiary’s behalf, the present position qualifies as a specialty occupation as well.

Evidence of the beneficiary’s duties includes: 1) the Form I-129; 2) the petitioner’s initial letter of support; and 3) the petitioner’s response to the director’s RFE containing a description of the petitioner’s business and a description of the proffered position’s duties and responsibilities. The petitioner indicates that the duties of the proffered position would require the beneficiary to:

Utilize the theories and knowledge in international trade, international marketing, and international commerce, to effectively arrange and direct import/export activities of Bogopa; analyze letters of credit to ensure compliance with import/export procedures and international standards; negotiate and renegotiate contracts with foreign wholesalers/retailers to establish outlets; analyze and review statistics on present Korean distribution base spanning the New York Metropolitan area; analyze foreign consumer behavior and economy to determine expansion potential and supply and demand of various types of produce; analyze international commerce and trade potentials for import and export activities to and from Korea; work with

Chief Executive, advisory services and project managers assessing all incoming and outgoing work or project opportunities from a commercial viewpoint; ensure all external activities are covered by secure transactual terms and conditions; research new major income generation strategies and opportunities for Bogopa and work with the senior staff on appropriate action; develop a strategy for small/medium giving to sustain a level of regular income from commercial or private sources.

To determine whether the employment described qualifies as a specialty occupation, 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; 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 *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, reports that 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)).

The petitioner has stated that the proffered position is that of a business manager, and that the position requires a bachelor's degree in business administration in organizational behavior or a related field. Counsel asserts that the proffered position is also known as that of an export manager and storage and distribution manager, as described in the U.S. Department of Labor's *Dictionary of Occupational Titles (DOT)*.

The AAO finds that the *DOT* is not a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. The *DOT* describes an occupation's duties and gives the occupation a standard vocational preparation (SVP) rating. The *DOT* provides only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. The SVP rating assigned by the *DOT* is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not describe how those years are to be divided among training, formal education, and experience, and it does not specify the particular type of degree, if any, that a position would require. Accordingly, the *DOT* information contained in the record does not establish the proffered position as a specialty occupation under the first criterion.

To determine whether the duties of the proffered position support the petitioner's characterization of its employment, the AAO turns to the 2006-2007 edition of the *Handbook*. It is noted that the *Handbook* does not discuss the profession of a business manager or export manager and storage and distribution manager. The described duties appear, however, to contain elements of the purchasing manager and marketing manager duties discussed in the *Handbook*. Both positions allow for a wide variety of educational backgrounds and do not require a bachelor's degree for entry into the field.

The AAO finds that in the present matter the petitioner has failed to provide sufficient specificity about the job duties in the context of the petitioner's business operations. The AAO is thus unable to determine

whether the duties of the position in question are of a complex or unique nature such that the position would require the beneficiary to possess a bachelor's degree in management or a related field.

The petitioner indicated at the time of filing that it operates a retail supermarket. The petitioner indicated further that the beneficiary has performed the described business manager duties for the petitioner since January 2001, pursuant to CIS approval of a previous H-1B visa petition. In an RFE, the director asked the petitioner to submit corroborative evidence showing that the beneficiary has performed the described duties at the petitioner's place of business. In response to the RFE, however the petitioner submitted only a generic description of the proffered position duties (discussed above), and the petitioner submitted payroll information to establish the beneficiary's wages over the past four years. No other evidence or information was submitted to corroborate the claim that the beneficiary has performed, or would perform the described duties.

The regulation at 8 C.F.R. § 214.2(h)(9)(i) allows the director to request "such other evidence as he or she may independently require to assist his or her adjudication." In the present matter, CIS must adjudicate whether the duties of the proffered position require a four-year degree in a specialty by analyzing those duties in the context of the petitioner's business operations. The requested evidence regarding the beneficiary's actual job duties and performance over the last four years would corroborate the petitioner's statements on the Form I-129, and on appeal. However the petitioner did not provide the requested evidence.

Going on record without supporting documentation is not sufficient to meet 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 assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The AAO finds that the record lacks evidence to support the contention that the beneficiary would perform the duties of a business manager requiring a level of knowledge that can only be obtained through a baccalaureate degree in management or a related field. As generically described, the duties of the proffered position are those of a purchasing manager or marketing manager, neither of which requires a degree in a specialty. The petitioner has failed to describe actual duties previously performed or to be performed by the beneficiary in relation to the petitioner's retail supermarket, that would require knowledge obtained by a specific baccalaureate degree. The petitioner has therefore failed to establish that the proffered position is a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(A) – which requires a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

To establish the proffered position as a specialty occupation under the second criterion at 8 C.F.R. § 214.2(h)(4)(A), the petitioner must prove 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.

The petitioner submitted several import/export manager position announcements with bachelor's degree requirement in business, to establish that the proffered position can only be performed by an individual with a degree. The petitioner failed, however, to submit evidence to corroborate the assertion that the proffered

position is similar to that of an import/export manager, or to establish that the beneficiary has or will perform duties similar to those of an import/export manager. Accordingly, the record does not establish the proffered position as a specialty occupation based on an industry-wide degree requirement. Nor does the petitioner submit evidence establishing the position's complex and unique nature. The petitioner has thus failed to establish eligibility under the second criterion.

To determine whether a proffered position may be established as a specialty occupation under the third criterion – which states that the employer normally requires a degree or its equivalent for the position – the AAO reviews the petitioner's past employment practices, as well as the histories of those employees with degrees who previously held the position. In the instant case, the petitioner asserts, through counsel that it previously employed the beneficiary, a degreed individual in the proffered position. The record contains no evidence to establish that any employee other than the beneficiary worked as a business manager for the petitioner or held a degree in management or a related field, as required for classification as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Furthermore, counsel's contention that the proffered position is a specialty occupation because CIS previously approved a similar petition for the petitioner on the beneficiary's behalf also fails to establish the position as a specialty occupation. The present record of proceeding does not contain all of the supporting evidence submitted to the service center in the prior case. In the absence of all of the corroborating evidence contained in that record of proceeding, the documents submitted in the present matter are not sufficient to enable the AAO to determine whether the position offered in the prior case was similar to the position in the instant petition.

Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In 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). Although the AAO may attempt to hypothesize as to whether the prior case was similar to the proffered position or was approved in error, no such determination may be made without review of the original record in its entirety. If the prior Form I-129 petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petition would have been materially erroneous. CIS is not required to approve 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). Neither CIS nor any other 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).

The fourth criterion requires the petitioner to establish that the nature of the specific duties of its position is so specialized and complex that the knowledge required to perform these duties is usually associated with the attainment of a baccalaureate or higher degree. As previously discussed, the AAO finds no evidence to indicate that the beneficiary has previously performed, or will perform specialized and complex duties at the supermarket requiring a baccalaureate degree in a specialty. As a result, the record fails to establish that the proffered position meets the specialized and complex threshold of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For reasons related in the preceding discussion, the petitioner has failed to establish the proffered position as 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.