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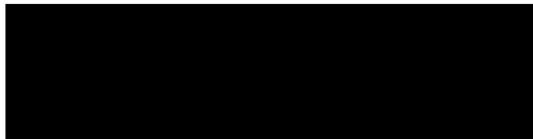
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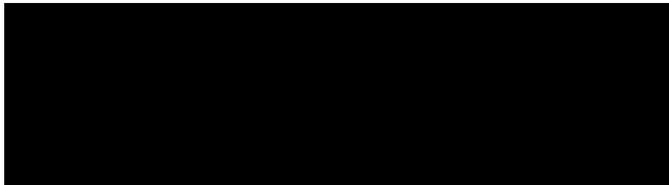
FILE: LIN 05 159 52992 Office: NEBRASKA SERVICE CENTER Date:

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.

James Blunzinger, for

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director of the 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 manufacturer of concrete and masonry products that seeks to employ the beneficiary as a regional sales 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 because the proffered position is not a specialty occupation and the beneficiary is not qualified to perform a specialty occupation.

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

The first issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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.

Citizenship and Immigration Services (CIS) consistently 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.

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.

The petitioner seeks the beneficiary's services as a regional sales manager. Evidence of the beneficiary's duties includes: the petitioner's April 18, 2005 letter in support of the petition and counsel's January 20, 2006 response to the director's request for evidence. As stated by the petitioner, the proposed duties are as follows:

Oversee the petitioner's sales, marketing and advertising functions at a corporate level. Supervise seven outside sales managers and the staff of the marketing and advertising departments. Oversee the petitioner's sales distribution and establish related sales programs, advertising, and marketing campaigns. Centralize the petitioner's sales program and establish new sales territories, sales quotas, and goals for the petitioner's sales staff.

In response to the director's RFE, the petitioner submitted the following job description:

1. Conduct thorough market research and analysis required to identify all prospective customers in the locally defined territory who fit the profile for purchasing the petitioner's products.
 - a) Assess the market and create a strategic sales management process that would include project tracking tools to monitor critical factors such as: market size, volume of work in

the market by product line, projects bid on, projects not bid on, sales won, sales lost, and individual sales representative performance.

- b) Contribute to and participate in new product development, assessing product demands in the market and communicating ideas and needs to appropriate employees.
 - c) Calculate/quantify the expected business in the market/territory and develop reasonable, but stretch budgets to capture that business by market and product offering.
 - d) Set specific goals for each sales person regarding product mix, new business development, and existing customer growth and retention.
 - e) Establish action plans, timelines, promotional and training activities to support these objectives.
 - f) Prepare an annual budget, using appropriate business methods to monitor and take corrective action on budget variances.
2. Set and manage specific, challenging sales objectives and processes for and with each sales representative.
-
3. Lead, manage and motivate a sales team responsible for the petitioner's product sales.
-
4. Lead and participate in business development and customer relations.
-
5. Establish standard sales operations to assist the sales representatives and to ensure consistency and historic tracking of information throughout the organization.

....

The director found that the proposed regional sales manager position does not require a bachelor's degree. Citing the Advertising, Marketing, Promotions, Public Relations and Sales Managers Category in the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent in a specific specialty. The director concluded that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states that the director erroneously denied the petition and disregarded the evidence. Counsel cites the DOL's Bureau of Labor Statistics (referring to the DOL's *Handbook*), and the *O*Net* to state that most employers require a bachelor's degree in a specific field of study for a sales manager position. Counsel also states that the degree requirement is common to the industry in parallel positions among similar organizations, and that Middle State University now offers a four-year degree in Concrete Industry Management. Counsel states further that the proposed duties, which include supervising more than 15 employees, performing the sales and marketing activities in eight of the petitioner's locations, and overseeing a marketing budget of over \$300,000, are so complex as to require a bachelor's degree in sales, marketing, or a related field.

Preliminarily, the AAO disagrees with counsel's interpretation of the *O*Net* and the SVP rating and their applicability to a determination that a position is a specialty occupation. The AAO does not consider the *O*Net* to be 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 *O*Net* 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 *O*Net* and SVP ratings are meant to indicate the total number of years of vocational preparation required for a particular occupation and do not describe how those years are to be divided among training, formal education, and experience and do not specify the particular type of degree, if any, that a position would require. Counsel also acknowledges that these sources are not primary evidence of a degree requirement.

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). Therefore, the proffered position is not 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; 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 often considered by CIS when determining these criteria include: whether the *Handbook* 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 AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The AAO does not find that the proffered position is a specialty occupation. No evidence in the *Handbook*, 2006-07 edition, under the category of Advertising, Marketing, Promotions, Public Relations, and Sales Managers, indicates that a baccalaureate or higher degree in a specific specialty is required for a sales manager position. A wide range of educational backgrounds is suitable for entry into sales manager jobs, but many employers prefer individuals with related experience and a broad liberal arts background. In addition, the petitioner did not provide the amounts of its gross annual income and net annual income, as requested in Part 5 of the petition. Nor did the petitioner provide any evidence in support of its

claim of 120 employees, such as federal income tax returns and quarterly wage reports. 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)). Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(1).

Regarding parallel positions in the petitioner's industry, counsel submits job descriptions from two of the petitioner's competitors, which specify the requirement of a bachelor's degree in sales, marketing, or a related field. Three of the position descriptions are for a residential design specialist, an account manager, and an engineered wall sales representative for Anchor Block Company, which has numerous manufacturing facilities and is one of the oldest and largest concrete block manufacturers in the Midwest. The petitioner has not demonstrated that the business publishing these job descriptions is similar to the petitioner in size, number of employees, or level of revenue. As discussed above, the record contains unsubstantiated claims regarding the basic financial information of the petitioner's business and, therefore, the business publishing these job descriptions may not be established as parallel to the petitioner. Another position description is for an operations manager, with duties that entail determining manufacturing methods, recommending design modifications, preparing feasibility studies for purchasing or building manufacturing equipment, and formulating new manufacturing processes and procedures. The petitioner, however, has not demonstrated that the proffered position is similar to the operations manager position in the job listing. Again, 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)). The record also does not include sufficient evidence from individuals, firms, or professional associations regarding an industry standard. Accordingly the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations.

In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. In the instant petition, the petitioner has submitted insufficient documentation to distinguish the proffered position from similar but non-degreed employment. The AAO acknowledges counsel's assertion that the four-year degree in Concrete Industry Management offered by Middle State University is evidence of the degree requirement for a regional sales manager position. Counsel, however, does not substantiate her assertion with an explanation of how the proposed duties correspond to or rely upon particular courses in this four-year degree. The petitioner has failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. As counsel does not address this issue on appeal, it will not be discussed further. The evidence of record does not establish this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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.

Counsel states, on appeal, that the proposed duties, which include supervising more than 15 employees, performing the sales and marketing activities in eight of the petitioner's locations, and overseeing a marketing budget of over \$300,000, are so complex as to require a bachelor's degree in sales, marketing, or a related field. The petitioner, however, has not established that they exceed in scope, specialization, or complexity those usually performed by sales managers, an occupational category that does not require a baccalaureate or higher degree in a specific specialty. Further, as indicated earlier in this decision, the petitioner's claim to employ 120 workers is not substantiated, and no other evidence of record establishes the complexity of the proposed duties in relation to the petitioner's business.

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

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. If the alien does not possess the required degree, the petitioner must demonstrate that the alien has experience in the specialty equivalent to the completion of such degree, and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The director also found that the beneficiary was not qualified to perform the duties of a specialty occupation because the evidence of record does not establish that her education, training, and/or experience are equivalent to a U.S. bachelor's degree. On appeal, counsel asserts that the director improperly disregarded the credentials evaluation. Counsel also asserts that the beneficiary is qualified for the position because her over 29 years of progressive experience is equivalent to a U.S. bachelor's degree, as demonstrated by the credentials evaluation.

The petitioner has not provided evidence that the beneficiary meets any of the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(C)(1), (2), or (3). Thus the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4).

When determining a beneficiary's qualifications under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), the AAO relies upon the five criteria specified at 8 C.F.R. § 214.2(h)(4)(iii)(D). A beneficiary who does not have a degree in the specific specialty may still qualify for H-1B nonimmigrant visa based on:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

The petitioner submitted an August 30, 2004 evaluation of the beneficiary's academic qualifications and experience.

The academic evaluation is based on the beneficiary's 29 years of employment experience, her two credit hours from the British Columbia Institute of Technology, and her 30 credit hours from Simon Fraser University in Burnaby, B.C., Canada. The evaluator notes that the beneficiary has the equivalent of one year of university-level credit from an accredited university/community college in the United States. The evaluator concludes that the

beneficiary has the equivalent of a U.S. bachelor's degree in business administration with a concentration in marketing, based on her education and 29 years of progressive employment experience in the field of business administration.

When attempting to establish that a beneficiary has the equivalent of a degree based on his or her combined education and employment experience under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), however, a petitioner may not rely on a credentials evaluation service to evaluate a beneficiary's work experience. A credentials evaluation service may evaluate only a beneficiary's educational credentials. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). To establish an academic equivalency for a beneficiary's work experience, a petitioner must submit an evaluation of such experience from an official who has 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). In this matter, the petitioner has not submitted such documentation.

Thus, the AAO must consider whether the beneficiary's work experience coupled with her education is sufficient to establish that she is qualified to perform the duties of the specialty occupation. In this matter it is not. When evaluating a beneficiary's qualifications under the fifth criterion, 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 authorities¹ 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.

On appeal, counsel for the petitioner asserts that the letters from the beneficiary's previous employers show the beneficiary possessed over 12 years of progressive experience. A review of the July 22, 2004 letter authored by the president of SF Concrete Technology Inc. reveals a brief description of the beneficiary's responsibilities and states that the beneficiary is a seasoned professional. A review of the January 13, 2006 letter authored by a registered professional engineer with Wilbanks King International reveals testimony that he had professional

¹ *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinion, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(i)(C)(ii).

contacts with the beneficiary since 1997 in her capacities as sales person and sales manager for Westcon of Langley and that her knowledge is a valuable addition to the professional community. The January 13, 2006 letter authored by the president of Landscape Centre Inc. contains a description of the beneficiary's job titles and testimony that the beneficiary is a leader in her field. The November 22, 2005 letter authored by the human resources specialist of Lafarge North America states that the beneficiary was employed at the business from January 1, 2002 to May 4, 2004 as a sales manager. The July 23, 2004 letter authored by the credit manager of Lafarge North America states that the beneficiary was well versed in the products, a professional in business affairs, and detail oriented. None of these letters provides the requisite information regarding the beneficiary's daily duties and the progressively responsible experience gained while working at her place of employment. Neither do the letters describe the beneficiary's peers, supervisors, or subordinates' credentials. Further, the record contains no evidence to indicate that the beneficiary's expertise has been recognized in one of the ways discussed above. Thus, the record is insufficient to establish that the beneficiary's training and/or work experience includes the theoretical and practical application of specialized knowledge required by a specialty occupation; that the beneficiary's experience was gained while working with peers, supervisors, or subordinates who have a degree or degree equivalent in a specialty occupation; or that the beneficiary's "expertise" in a specialty occupation has been recognized.

The petitioner has not submitted argument or documentation on appeal sufficient to overcome the director's decision on this issue. The petitioner has not established that the beneficiary has the requisite qualifications to perform the duties of a specialty occupation. For this additional reason, the petition will not be approved.

Accordingly, the AAO shall not disturb the director's denial of the petition.

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. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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.