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U.S. Citizenship
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SEP 05 2007

FILE: WAC 05 222 50003 Office: CALIFORNIA 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 Blazinger, 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 retail business that sells wireless devices, accessories, and services in its 25 stores. It seeks to employ the beneficiary as a branch operations evaluation 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.

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) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B, with counsel's brief. The AAO reviewed the record in its entirety before reaching its decision.

The 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 branch operations evaluation manager. Evidence of the beneficiary's duties includes: the petitioner's August 2, 2005 letter in support of the petition and the petitioner's January 18, 2006 response to the director's request for evidence. In an August 2, 2005, letter the petitioner's CEO described the proposed duties as follows:

The beneficiary will visit each store and evaluate the adequacy of return of investment our organization made in that store. He will examine the business methods and accounting books, summarize his findings into reports, and confer with upper management regarding his recommendations.

In response to the director's RFE, the petitioner's CEO further described the proposed duties as follows:

The beneficiary will visit the petitioner's expanding locations to ensure that they adhere to the petitioner's administrative policies and physical appearance requirements. As the petitioner's business model becomes increasingly complex, including the addition of new computer databases, a foreign back office, new commissions models, and more employees, the proffered position likewise becomes more complex. The beneficiary will ensure that each of the petitioner's outlets performs efficiently and is capable of installing new methodologies.

The beneficiary will spend approximately 30 hours per week at the petitioner's locations and 10 hours at the petitioner's headquarters in Anaheim preparing reports and meeting with management. While he will not directly supervise any employees, he will be in a position of power over all store employees, including store and sales managers. His level of responsibility is that of a high-level manager, as he will report to the CFO and the CEO.

The beneficiary will determine whether the stores not adhering to company standards can be salvaged and, if so, take necessary action. He will make decisions that govern the other employees' tenure, salaries, and bonuses, and report their successes and failures to management.

The director found that the proposed branch operations evaluation manager duties do not require a bachelor's degree. Citing 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 asserts, in part, that the service center's decision to compare the proffered position to that of a sales manager is incorrect, that the proffered position is more similar to the positions of management analyst or property manager, positions that are far more likely to constitute a specialty occupation. Counsel also asserts that the proffered position qualifies as a specialty occupation under the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), that 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 submits letters from similar businesses as supporting documentation.

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. On appeal, counsel states that the proffered position is more similar to the positions of management analyst or property manager, positions that are far more likely to constitute a specialty occupation. The AAO does not concur with counsel that the proffered position is that of a management analyst, which in private industry generally requires a master's degree in business administration or a related discipline.

See the *Handbook*, 2006-07 edition. It is noted that the beneficiary does not hold a master's degree in business administration or a related discipline. Further, although the petitioner asserts that the beneficiary holds a U.S. bachelor's degree in business administration, the evidence of record does not contain evidence in support of the petitioner's assertion. The AAO also does not concur with counsel that the proffered position is that of a property manager, whose duties entail handling the financial operations of the property, ensuring that rent is collected and that mortgages, taxes, insurance premiums, payroll, and maintenance bills are paid on time. In addition, although most employers prefer to hire college graduates for property management positions, various educational backgrounds are acceptable including liberal arts. See the *Handbook*, 2006-07 edition.

Counsel and the petitioner limit their descriptions of the proposed duties to generic terms that do not convey either the content of the actual work that the beneficiary would perform or that the actual work performance would involve the critical and practical application of a bachelor's degree level of knowledge in a specific specialty, as required by statute and regulation to establish a specialty occupation. For instance, on appeal, counsel states that the beneficiary will "[assess] the profitability of a number of different stores, each with its own idiosyncrasies," "spend one-fourth of his time at the corporate headquarters compiling his data in reports and presentations," and "make recommendations to executives regarding these stores and their potential shuttering." The record of proceeding, however, neither provides examples of such documents and activities nor establishes that the beneficiary's work on these documents and activities would require the beneficiary to apply at least a bachelor's degree level of knowledge in a specific specialty. The same pattern follows with all the duty descriptions in the record. They consist of generalized functions that do not establish the level of knowledge that would be required when actually performed for this particular petitioner's business. No evidence in the *Handbook* indicates that a baccalaureate or higher degree, or its equivalent, is required for a branch operations evaluation manager position, as described in the instant petition. 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, the record contains letters from a CFO and a CEO of similar businesses who both assert that a branch operations evaluation manager is a professional position that is common in the wireless industry. They, however, do not provide any evidence in support of their assertions nor do they state that they actually employ a branch operations evaluation manager in their own businesses. In addition, they do not rely on industry surveys, data or other documentation to reach the conclusion that the position requires a bachelor's degree in a field related to business management. 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 *Handbook* is a compilation of results of nationwide industry questionnaires, surveys and personal interviews by the DOL, and indicates that there is no specific degree requirement for entry into the field. The AAO may, in its discretion, use as advisory opinions 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).

The record does not include sufficient evidence from firms, individuals, or professional associations regarding an industry standard. 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. As described above, the petitioner has not identified any complex or unique duties that are specifically pertinent to the petitioner's business operations that would require knowledge associated with a bachelor's degree in a specific discipline. 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 beneficiary's duties, which entail overseeing the functioning of 25 retail stores, are so complex as to require a bachelor's degree. Again, the general iteration of the proposed duties by counsel and the petitioner cannot, without further detail, establish that the proffered position's duties are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. As previously observed, the description of the petitioner's proffered position is general and provides no understanding of how the duties relate to the specific needs of the petitioner. To the extent that they are depicted in the record, the duties are not so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree in a specific specialty. The petitioner has failed to provide sufficient information regarding the proffered position to enable the AAO to conclude that the duties are specialized or complex. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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

Although the director did not make a specific determination regarding the eligibility of the beneficiary to perform H-1B level services, the AAO observes beyond the decision of the director, that the record contains only an unofficial copy of the beneficiary's transcripts and a general certificate of completion of preliminary requirements for degree certification containing no addressee. The record does not contain a copy of the beneficiary's U.S. bachelor's degree or other evidence demonstrating the beneficiary's qualifications as required by 8 C.F.R. § 214.2(h)(4)(iii)(C). 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). For this additional reason, the petition will not be approved.

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.

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