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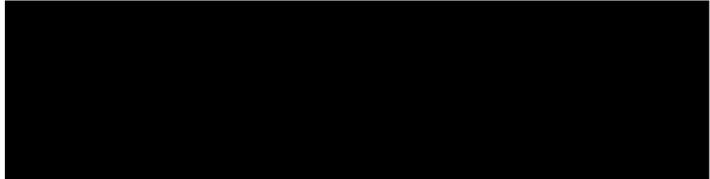


FILE: SRC 05 243 50452 Office: TEXAS SERVICE CENTER Date: **SEP 10 2007**

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 service center director 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 chemical lawn care service that seeks to employ the beneficiary as a lawn care specialist manager. It endeavors to classify him 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 does not qualify as a specialty occupation, because the beneficiary is not qualified to perform the duties of a specialty occupation, and because a properly certified labor condition application (LCA) was not submitted with the Form I-129. On appeal, counsel submits a brief asserting that the offered position qualifies as a specialty occupation, that the beneficiary is qualified to perform the duties of a specialty occupation, and that a properly certified LCA was submitted with the filing of the Form I-129.

The first issue to be discussed in this proceeding is whether the proffered position qualifies as a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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:

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

The petitioner is seeking the beneficiary’s services as a lawn care specialist manager. Evidence of the beneficiary’s duties was set forth in attachments to the Form I-129 and in the petitioner’s response to the director’s request for evidence. According to this evidence the beneficiary would:

- Manage and maintain commercial and residential accounts;
- Determine lawn treatments/mixture of chemicals to be used in both commercial and residential accounts;
- Monitor timing and quality of lawn care maintenance services;
- Ensure customer satisfaction by providing direction and support to lawn care specialists for tactical and strategic projects;
- Train, coach and counsel lawn care specialists to promote employee development and professional growth;
- Regularly undertake performance appraisal of subordinates to identify training needs and areas for improvement;
- Use project management/leadership/facilitation skills to achieve business results within project/process deadlines; and
- Develop and manage a plan to achieve project goals by monitoring project processes, identifying gaps, and initiating process improvement projects to close gaps and measure project results.

The petitioner requires a bachelor's degree in a science field for entry into the proffered position.

The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook (Handbook)* for information about the duties and educational requirements of particular occupations. The duties of the proffered position are essentially those noted for general/operations managers, with some additional duties as supervisor of landscaping workers. The *Handbook* notes that the formal education and experience of general managers varies as widely as the nature of their responsibilities. Many have a bachelor's or higher degree in business administration or liberal arts, while others obtain their positions by promotion from lower level management positions. Thus, it is possible to obtain a position as a general or operations manager without a college degree by promotion from within the organization based upon performance alone. There are generally no minimum educational requirements for landscaping worker supervisors. It is apparent from the *Handbook* that a baccalaureate or higher degree, in a specific specialty, is not the minimum requirement for entry into the offered position. Positions requiring a college degree are filled from a wide range of educational disciplines. A degree in a specific specialty, however, is not required. The petitioner has failed to establish the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner does not assert that a degree requirement is common to the industry in parallel positions among similar organizations, and offers no evidence in this regard. As such, it has failed to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner states that it normally requires a degree for the proffered position. The petitioner, however, offered no evidence in support of this statement. The educational credentials of former employees may be established by providing copies of the employees' degrees, or other documentation from the universities where the degrees were obtained. Simply 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)). Further, 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 (5<sup>th</sup> Cir. 2000). The critical element is not the title of the position or 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. To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id* at 388. The petitioner has not established the criterion at 8 C.F.R. § 14.2(h)(4)(iii)(A)(3).

Finally, the petitioner has not established that the duties of the offered position are so complex or unique that they can only be performed by an individual with a degree in a specific specialty, or that the duties are so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The duties detailed by the petitioner are general in nature and, as described by the petitioner, do not contain duties that require baccalaureate level education in a

specific educational discipline to perform them. For example, the following duties are general managerial duties that would be performed by all managers in the petitioner's industry:

- Manage and maintain commercial and residential accounts;
- Monitor timing and quality of lawn care maintenance services;
- Ensure customer satisfaction by providing direction and support to subordinates;
- Train, coach and counsel lawn care specialists to promote employee development and growth;
- Conduct performance appraisals; and
- Use management skills to achieve business results within project deadlines.

The record does not establish that these duties are any more unique, specialized or complex than those performed by general managers in the industry who do not possess a baccalaureate level education, or by those who have degrees in a wide range of unrelated disciplines. The petitioner has failed to establish the referenced criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) or (4).

The petitioner has failed to establish that the offered position meets any of the criteria listed at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the AAO shall not disturb the director's denial of the petition.

The director also found a credentials evaluation submitted on behalf of the beneficiary established that the beneficiary had a foreign degree equivalent to a degree in hotel management from an accredited university in the United States, and that the degree was unrelated to the duties of the proffered position. On appeal, the petitioner submitted a new evaluation which states that the beneficiary's foreign education is equivalent to a bachelor's degree in agricultural science from an accredited university in the United States. The petitioner did not, however, submit copies of the beneficiary's university transcripts to verify this course of study, or to explain the conflict between the degrees cited in the two credentials evaluations submitted. The evaluations, therefore, are of little evidentiary value. CIS 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, CIS 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 petitioner has not established that the beneficiary is qualified to perform the duties of a specialty occupation.

Finally, the director noted that the petitioner had failed to submit a properly certified LCA with the filing of the Form I-129 petition.

Title 8, Code of Federal Regulations, part 214.2(h)(4)(iii)(B)(1) provides that the petitioner shall submit with an H-1B petition "a certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary." The regulations further provide:

Before filing a petition for H-1B classification in a specialty occupation the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

8 C.F.R. § 214.2(h)(4)(i)(B)(1).

Pursuant to 8 C.F.R. § 103.2(b)(12), “an application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed. . . .” The Form I-129 petition was filed September 2, 2005.<sup>1</sup> The LCA submitted was certified for employment from March 29, 2004 to August 13, 2005, and did not authorize employment as of the filing of the Form I-129. The director then submitted a request for evidence (RFE) requesting, in part, that the petitioner submit a properly certified LCA. In response to that request the petitioner submitted an LCA certified on February 6, 2006, subsequent to the filing of the initial petition. For this additional reason, the petition must be denied.

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 failed to sustain that burden.

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

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<sup>1</sup> The form I-129 was initially submitted for filing on July 27, 2005, but was not accepted by the service center and returned to the petitioner for failure to pay the required Anti Fraud Fee.