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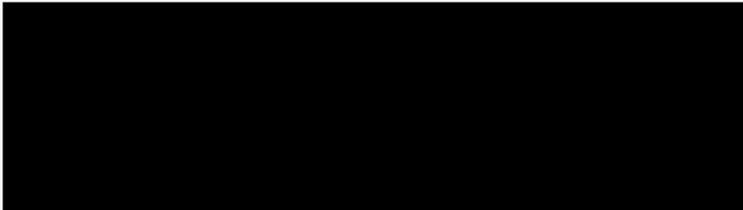
FILE: EAC 06 142 50683 Office: VERMONT SERVICE CENTER Date: JAN 02 2008

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.

Ra Michael T. Kelly
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, 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 imports, exports, and distributes Brazilian furniture and seeks to employ the beneficiary as a sales manager.¹ 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 petitioner failed to establish that the proffered position qualifies for classification as a specialty occupation. On appeal, counsel contends that the director erred in denying the petition, and that the proposed position qualifies for classification as 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 additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, a 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 Immigration and Nationality Act (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

¹ The Texas Comptroller of Public Accounts has determined that "this corporation is not in good standing as it has not satisfied all state tax requirements." See <http://ecpa.cap.state.tx.us/coa/servlet/cpa.app.coa/CoaGetTp>; thus, the petitioner's status as a U.S. employer is in question.

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) 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 proposed position.

The petitioner states that it is seeking the beneficiary’s services as a sales manager. Evidence of the beneficiary’s duties includes: the petitioner’s April 3, 2006 letter of support; the petitioner’s letter in response to the director’s RFE; the petitioner’s letter in support of the appeal; and counsel’s appeal brief in response to the director’s RFE. The duties described in the petitioner’s letter in support of the appeal include the information provided in the other documents and states the following duties for the position of sales manager:

Manages sales activities of establishment: Directs staffing, training, and performance evaluations to develop and control sales program. Directs and coordinates sales distribution by establishing sales territories, quotas, and goals and advises dealers, distributors, and clients concerning sales and advertising techniques. Analyzes sales statistics to formulate policy and assists in promoting sales. Reviews market analyses to determine customer needs, volume potential, price schedules, and discount rates, and develops sales campaigns to accommodate goals of company. Eliminates unprofitable items from sales line. Analyzes and controls expenditures. Prepares periodic sales report showing sales volume and potential sales.

This position does not involve the sales manager to conduct any of the company’s day-to-day sales activity. The specific duties for the position requires [sic] the sales manager to direct staffing, training, and perform evaluations of our independently contracted sales

representatives. The sales manager will devote approximately 30% of his time on the above duties. The sales manager, however, will devote approximately 70% of his time establishing new sales territories, quotas, and goals to direct and coordinate our sales distribution, collecting and analyzing sales data, conducting market research, and preparing periodic sales reports in order to formulate sales policies, sales and marketing campaigns, and determine customer needs to ensure the goals of the company are being met...

In his appeal brief counsel refers to language in the director's RFE stating that "the service usually considers this position to be a specialty occupation." 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). The AAO withdraws the director's comments on this issue.

In determining whether a proposed position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty, as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

The *Handbook's* discussion of the duties of advertising, marketing, promotions, public relations, and sales managers states the following:

Sales managers direct the firm's sales program. They assign sales territories, set goals, and establish training programs for sales representatives (See the *Handbook* statement on sales representatives, wholesale and manufacturing). Sales managers advise the sales representatives on ways to improve their sales performance. In large, multiproduct firms, they oversee regional and local sales managers and their staffs. Sales managers maintain contact with dealers and distributors. They analyze sales statistics gathered by their staffs to determine sales potential and inventory requirements and to monitor customers' preferences. Such information is vital in the development of products and the maximization of profits.

The AAO now turns to the *Handbook's* discussion of the qualifications necessary for entry into the field. The *Handbook* states the following with regard to the educational qualifications required for sales managers:

A wide range of educational backgrounds is suitable for entry into advertising, marketing, promotions, public relations, and sales managerial jobs, but many employers prefer those with experience in related occupations plus a broad liberal arts background. A bachelor's degree in sociology, psychology, literature, journalism, or philosophy, among other subjects, is acceptable. However, requirements vary, depending upon the particular job.

For marketing, sales, and promotions management positions, some employers prefer a bachelor's or master's degree in business administration with an emphasis on marketing. Courses in business law, economics, accounting, finance, mathematics, and statistics are advantageous. . . .

Most advertising, marketing, promotions, public relations, and sales management positions are filled by promoting experienced staff or related professional personnel. For example, many managers are former sales representatives, purchasing agents, buyers, or product, advertising, promotions, or public relations specialists. In small firms, where the number of positions is limited, advancement to a management position usually comes slowly. In large firms, promotion may occur more quickly.

Thus, the proposed position does not qualify for classification as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires a showing that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the position. The *Handbook* indicates that most sales manager positions are filled on the basis of experience. Moreover, the fact that some employers “prefer” a degree or that individuals possessing degrees “should have the best job opportunities” does not rise to this criterion’s standard of employers normally requiring at least a bachelor’s degree or its equivalent in a specific specialty. As such, sales managers do not qualify as specialty occupations under the first criterion.

The *Handbook* also notes that a bachelor’s degree in a wide range of educational backgrounds is suitable for entry into sales managerial positions, however, when a range of degrees, e.g., the liberal arts, or a degree of generalized title without further specification, e.g., business administration, can perform a job, the position does not qualify as a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). To prove that a job requires the theoretical and practical application of a body of specialized knowledge as required by Section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor’s or higher degree in a specialized field of study. Again, CIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) to require a degree in a specific specialty that is directly related to the proposed position.

Counsel’s reference to and assertions about the relevance of information from *O*Net* are not persuasive in establishing the proposed position as a specialty occupation. Neither the *O*Net*’s specific vocational preparation (SVP) rating nor a Job Zone category indicates that a particular occupation requires the attainment of a baccalaureate or higher degree, or its equivalent, in a specific specialty as a minimum for entry into the occupation. An SVP rating and Job Zone category are meant to indicate only the total number of years of vocational preparation required for a particular position. Neither classification describes how those years are to be divided among training, formal education, and experience, nor specifies the particular type of degree, if any, that a position would require.

For all of these reasons, the proposed position does not qualify for classification as a specialty occupation under the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the position.

Nor does the proposed position qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations.

In response to the RFE, counsel submitted five industry standard letters from different companies that claim to be in the same industry as the petitioner. The letters are essentially identical and appear to have been written by the same person, thus lessening their evidentiary weight. Further, the letters do not provide enough information about the companies so as to determine if they are similar to the petitioner. The Form I-129 states that the petitioner has three employees and although all of the companies claim to be “relatively small,” the companies vary quite a bit in size.² While one author does not state a number of employees for his company, the other authors claim that their companies have 7, 150, fewer than 200, and 220 employees. The AAO is unable to determine whether any of these companies are similar to the petitioner. The authors of the letters do not cite industry trade data or surveys in support of their conclusions. Although the letters do state that their companies require a bachelor’s degree in business administration or the equivalent for a sales manager position and include the name of an employee who has a degree,³ none of them include a copy of such employee’s degree or proof of employment. Simply going on record without supporting documentary evidence is not sufficient for the purpose 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)).

Counsel’s citation of *Young China Daily v. Chappell*, 742 F. Supp. (N.D. Calif. 1989) does not satisfy the first prong of the second criterion in this matter. While the size of a company does not, in and of itself, determine its need for a given position, its size, scope, and scale of operations do have a direct and substantial bearing on the question of whether it is “similar” to another organization. Moreover, the AAO notes that the court in *Young China Daily* made only the narrow ruling that the duties of a graphic designer at a small newspaper do not necessarily differ from those at a major newspaper. This does not lead to the general conclusion in this case that the skills required to be a sales manager for the petitioner require a degree in a specific field.

Accordingly, the proposed position does not qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) requires the petitioner to establish that the duties of the proposed position are so complex or unique that only an individual with a degree can perform them. The

² In its letter in support of the appeal, the petitioner states that “we have also planned to increase our independently contracted sales representatives to a total of nineteen (19) for our planned growth and expansion plan.” However, the petitioner did not provide evidence or a timeframe for this expansion.

³ The AAO notes that one of the authors lists himself as “currently employed” in the position of sales manager and signs the letter as “export manager.”

nature of the duties of the proposed position, as set forth in the petition, does not support such a finding. In the appeal brief, counsel states that the job duties are so “unique and complex that only a person with a bachelor’s degree in business can perform the duties” because “the position will involve advanced mathematics, data gathering, statistical sampling, market research, and the preparation of sales reports about 70% of the time.” However, the record contains no documentation to support a finding that the proposed position is more complex or unique than sales manager positions at other, similar organizations. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Therefore, the petitioner has not established that the proposed position qualifies as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor does the proposed position qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a showing that the petitioner normally requires a degree or its equivalent for the proposed position. To determine a petitioner’s ability to meet this criterion, the AAO normally reviews the petitioner’s past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees’ diplomas.

To determine whether a proffered position may be established as a specialty occupation under the third criterion, which requires that the employer demonstrate that it normally requires a degree or its equivalent for the position, the AAO usually reviews the petitioner’s past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees’ diplomas. The petitioner has not shown that it has previously hired personnel with a bachelor’s degree requirement for the position of sales manager. Although the petitioner states that it has required a bachelor of science for the position since its formation, the record of proceeding only contains the president’s diploma from the Superior Business School in Brazil. In her decision, the director noted that the record of proceeding does not contain an equivalency evaluation for the president’s degree. Counsel did not submit an evaluation on appeal. Because the president received his degree at a school in Brazil, the AAO cannot determine if his degree is equivalent to a United States baccalaureate from an accredited college or university. Furthermore, the president has performed the duties of the proffered position while acting as president of the company and therefore, the position held by the president is not comparable to the proffered position.

In his appeal brief, counsel cites *Unico American Corp. v. Watson* ___ F. Supp. ___, CV No. 896958 (C.D. Cal. March 19, 1991), the unpublished decision of a federal district court in California, and states that in relation to the petitioner’s requirements for the position, CIS should “give deference to the employer’s view.” Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. Absent documentation, the assertions of counsel will not satisfy the petitioner’s burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO notes that while a petitioner may believe that a proffered position requires a degree, that opinion cannot establish the position as a specialty occupation. Moreover, 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. Were CIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. *See Defensor v. Meissner*, 201 F. 3d at 384. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

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

To the extent that they are depicted in the record, the duties of the proposed position do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. There is no information in the record to support a finding that the proposed position is more specialized and complex than the general range of sales manager positions for which the *Handbook* indicates no requirement for the highly specialized knowledge associated with at least a bachelor's degree in a specific specialty. Therefore, the evidence does not establish that the proposed position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petitioner has failed to establish that the position qualifies for classification as a specialty occupation under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A). Accordingly, the AAO will 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.