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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 01 274 51923 Office: CALIFORNIA SERVICE CENTER Date: FEB 06 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

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, Director
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 gift shop that seeks to employ the beneficiary as a president. 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. On appeal, counsel submits a brief.

Section 214(i)(l) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184 (i)(l), 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.

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 proffered position.

The record of proceeding before the AAO contains: (1) 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) Form I-290B and supporting documentation. The AAO reviewed the record in its entirely before issuing its decision.

The petitioner is seeking the beneficiary's services as a president. Evidence of the beneficiary's duties includes: the Form I-129; the letter accompanying the Form I-129; and the petitioner's response to the

director's request for evidence. According to this evidence, the beneficiary would perform duties that entail, in part: setting pricing policies for merchandise; coordinating activities of nonmerchandising departments; developing and implementing, through subordinate managerial personnel, policies and procedures for business operations, customer personnel, and community relations; negotiating and approving contracts; and reviewing operating and financial statements and sales records to increase profits and merchandising objectives. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree.

The director found that the proffered position was not a specialty occupation because the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A). The director stated that, given the petitioner's type of business and revenue, and the beneficiary's duties and the number and kind of employees under the beneficiary's management, the job's responsibilities appear to be general managerial duties combined with some purchasing agent duties. As such, the proffered position would not require professional skills and, therefore, is not a specialty occupation.

On appeal, counsel states that the proffered position is a specialty occupation because it meets three criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 considers first 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.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

With respect to the duties of the proffered position, the petitioner had submitted an amended petition in response to the request for evidence. AAO will disregard the amended petition. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 § C.F.R. 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary is a specialty occupation. *See Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

Counsel claims that the petitioner satisfies the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) because the proffered position has been assigned a specific SVP rating in The Department of Labor's *Dictionary of Occupational Titles* (*DOT*) (4th Ed., Rev. 1991). However, the *DOT* is not a persuasive source of information regarding whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation. The Department of Labor has replaced the *DOT* with the *Occupational Information Network* (*O*Net*). Both the *DOT and O*Net* provide 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 Department of Labor's *Occupational Outlook Handbook* (*Handbook*) provides a more comprehensive description of the nature of a particular occupation and the education, training and experience normally required to enter into an occupation and advance within that occupation. For this reason, CIS is not persuaded by a claim that the proffered position is a specialty occupation simply because the Department of Labor has assigned it a specific SVP rating in the *DOT*.

Another of counsel's claims is that the *Handbook* demonstrates that the position of president normally requires a bachelor's degree, and that *Hong Kong T.V. Video Program, Inc. v. Ilchert*, 685 F. Supp. 712 (N.D.Cal. 1988), supports this claim.

Counsel's claims are not persuasive. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The AAO does not concur with counsel that the proffered position is analogous to that of a president. None of the beneficiary's job duties entails the level of responsibility of a president. A review of the *Handbook* reveals that, in light of the beneficiary's duties and the nature of the petitioner's business operations, the proffered position resembles a sales worker supervisor. In retail stores, sales worker supervisors are responsible for the operation of the entire store. According to the *Handbook*, sales worker supervisors usually acquire knowledge of management principles and practices through work experience. Counsel's reliance on *Hong Kong T.V.* to support her claim that the position is a specialty occupation is misplaced. The court in the case determined that a position might be considered a profession based on the complexity of a position's duties alone. In the instant petition, the beneficiary's duties parallel those of a sales worker supervisor at a retail establishment.

To establish the second criterion - that a degree requirement is common to the industry in parallel positions among similar organizations - counsel submits Internet postings. The AAO finds the postings are immaterial: the beneficiary's job duties and the petitioner's business operations differ significantly from the postings.

No evidence is in the record that would show the proffered position is so complex or unique that it can be performed only by an individual with a degree or that the petitioner normally requires a bachelor's degree for the proffered position.

The AAO now turns to 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) – the nature of the specific 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. Based on the initial job description, the beneficiary's duties are performed by sales worker supervisors; consequently, candidates would not require a bachelor's degree to perform the proffered position's duties.

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