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U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

D2

FILE: SRC 02 016 55847 Office: TEXAS SERVICE CENTER Date: MAY 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:

SELF-REPRESENTED

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.

Marin Johnson

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on motion to reopen or reconsider. The motion will be granted. The previous decision shall be affirmed. The petition will be denied.

The petitioner is a corporation in the business of importing and exporting medical equipment. In order to employ the beneficiary as a sales director for bacteriology equipment, the petitioner 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 on the basis that the proffered position did not meet the definition of a specialty occupation. The AAO affirmed the director's findings.

On motion, the petitioner annotated the Form I-290B with a statement to the effect that the AAO wrongly applied the appropriate legal standards, and issued a decision that did not comport with the evidence of record. The petitioner also contends that the evidence of record establishes that the proffered position qualifies as a specialty occupation under each criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Section 214(i)(l) of 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 AAO reviewed the record in its entirety before issuing its decision, including: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; (5) the matters submitted on appeal; (6) the AAO's decision dismissing the appeal and affirming the denial of the petition; and (7) the petitioner's motion, articulated on a Form I-290B.

The matters presented on the Form I-290B do not constitute the requirements of a motion to reopen. This is because a motion to reopen must state new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). However, the AAO recognized these matters as a motion to reconsider in accordance with 8 C.F.R. § 103.5(a)(3). Accordingly, the AAO reviewed the AAO's prior decision and the totality of evidence in the entire record to determine whether the motion merits overturning the AAO's decision on the petitioner's appeal.

In accordance with 8 C.F.R. § 103.5(a)(3), to prevail on the motion to reconsider the petitioner must establish that the AAO's decision on the petitioner's appeal was either (1) based on an incorrect application of law or CIS policy or (2) incorrect based on the evidence of record at the time of the initial decision. The motion meets neither of these standards.

The AAO decision is substantially supported by the evidence of record, and it correctly applied the law and CIS policy on determinations about a proffered position's status as a specialty occupation. Furthermore, in light of the evidence of record, the AAO would have abused its discretion and acted contrary to law and CIS policy if it had not dismissed the appeal. This is because the evidence of record does not establish that the proffered position qualified as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*) is satisfied where the evidence establishes that a baccalaureate or higher degree in a specific specialty, or the equivalent of such degree, is the normal minimum requirement for entry into the particular position. The AAO correctly determined that the evidence of record does not reach this threshold.

Next, there is no evidence or record that would qualify the proffered position under either prong of 8 C.F.R. § 214.2 (h)(4)(iii)(A)(*2*).

There is no evidence to satisfy the first prong by establishing that a degree in a specific specialty is a common requirement in the petitioner's industry in parallel positions among similar organizations.

In determining whether there is such a common degree requirement, factors often considered by CIS include: whether the Department of Labor's *Handbook of Occupational Outlooks* (*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)).

To the general extent that they are described in the record, the proffered duties do not comport with any occupation for which the *Handbook* reports a requirement for a baccalaureate in a specific specialty. Also, there are no submissions from individuals, other firms, or professional associations in the petitioner's industry.

The job vacancy announcements submitted into the record have no probative value. First and foremost, they are too few to establish an industry-wide hiring practice. Furthermore, the sampled employers do not all require a baccalaureate degree in a specific specialty.

Also, the evidence of record does not qualify the proffered position under the second prong, which provides that "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." The record does present any specific details about the petitioner's product or the beneficiary's duties with regard to it that would make the proffered position any more unique or complex than sales representative positions in general.

Next, 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 – is not a factor in this proceeding, as the evidence indicates that the petitioner had previously hired non-degreed individuals.

Finally, the evidence does not satisfy the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(*4*) – the nature of the specific duties is so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. The evidence of record does not establish anything substantially more complex or specialized than the type of duties that the *Handbook* describes for sales representatives in general, and the *Handbook* indicates that such workers do not usually need a degree in a specific specialty to perform their jobs.

In summary, because the AAO's decision was substantiated by the evidence of record and it correctly applied law and CIS policy, there is no basis for overturning that decision under the provisions for motions to reconsider at 8 C.F.R. § 103.5(a)(3). Therefore, the AAO shall not disturb the AAO's decision.

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 previous decision of the AAO, dated March 31, 2003, is affirmed. The petition is denied.