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U.S. Citizenship and Immigration Services

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MAY 13 2004

FILE: EAC 02 206 52836 Office: VERMONT SERVICE CENTER Date:

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.

Mari Johnson

to Robert P. Wiemann, Director
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 wholesale distributor of food products. It seeks to employ the beneficiary as a merchandise manager, and 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 is not a specialty occupation. On appeal, counsel submits a brief and additional information.

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

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), 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)(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.

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 field 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) 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 proceedings 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) 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 merchandise manager. Evidence of the beneficiary's duties was included with the I-129 petition, and in response to the director's request for evidence. According to this evidence the beneficiary would: maintain overall responsibility for developing and implementing complete and integrated marketing and merchandising programs and strategies to ensure increasing sales, profitability, and market share for the petitioner's products and services; participate in the development and supervision of marketing and merchandising strategies and programs to achieve sales and profit objectives for food products and other commodities; supervise the development and implementation of marketing plans; collaborate with outside companies as necessary to integrate new/or improved Asian and other food products and related commodities into marketing strategies and programs; assess and evaluate the management of all service objectives and identify potential problems and opportunities and make recommendations for appropriate course of action; develop systems for the periodic review of marginally profitable products, monitor performance, and make recommendations for the appropriate course of action, including the justifiable deletion of service lines; supervise the development and production of appropriate advertising, marketing, merchandising, and promotional materials in accordance with established budgetary, financial, quality, and other standards, guidelines and restrictions; consult and collaborate, where necessary, with company attorneys, accountants, and other outside professional services concerning advertising, sales promotion, marketing and other strategies to assure compliance with all regulatory agencies and applicable standards of law; supervise and administer advertising and marketing budgets and assure compliance with budgetary and financial guidelines; evaluate marketing programs against established performance objectives; consult with company personnel as necessary to assure maximum manpower utilization and development; establish employee performance standards and assure constructive employee appraisals and evaluations; evaluate the success of marketing and sales programs with company management and recommend adjustments and changes to achieve desired results; review and evaluate competitive food and related products, and companies marketing strategies; develop and recommend programs which will respond to current and projected competitive action; and provide input to appropriate company personnel to ensure that projects are designed to meet or exceed client needs. The petitioner requires a minimum of a bachelor's degree with a major in business administration, merchandising, marketing, advertising or a closely related field for entry into the offered position.

The director found that the offered position did not qualify as a specialty occupation and failed to meet any of the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). On appeal, counsel indicates that the offered position is a specialty occupation and satisfies the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Upon review of the record, the petitioner has failed to establish that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the offered position, or that a degree requirement is common to the industry in parallel positions among similar organizations. Factors often considered by CIS when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, reports that the industry requires a degree; whether an industry 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/Baker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991).

The AAO routinely consults the *Handbook* for information about the duties and educational requirements of particular occupations. The duties of the proffered position are varied, but essentially those noted for advertising, marketing, promotions, public relations, and sales managers. The *Handbook* notes that a wide range of educational backgrounds are suitable for entry into those positions, but that many employers prefer related experience plus a broad liberal arts background. Bachelor's degrees in sociology, psychology, literature, journalism, philosophy, or other subjects are suitable. Requirements will vary, however, depending on the duties of a particular position. For example, marketing, sales, and promotion management positions may require a bachelor's or master's degree in business administration with an emphasis in marketing. In highly technical industries such as computer and electronics manufacturing, a degree in engineering or science combined with a business degree may be preferred. In public relations management positions some employers prefer a bachelor's or master's degree in public relations or journalism. The *Handbook* further notes that most advertising, marketing, promotions, public relations, and sales management positions are filled by promoting experienced staff or related professional or technical personnel. Many managers are former sales representatives, purchasing agents, or promotions specialists. A baccalaureate or higher degree in a specific specialty, or its equivalent, is not, therefore, the minimum requirement for entry into the position. A degree in a wide range of disciplines will suffice. The petitioner has, accordingly, failed to establish the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner has also failed to establish that a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations. 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). In support of this proposition, the petitioner submitted numerous job advertisements for marketing positions. Those advertisements indicate that degrees in marketing, business administration, communications, engineering, technical fields, or other related areas are suitable for marketing management positions. These advertisements are consistent with the *Handbook* which indicates that degrees in any number of disciplines will suffice. The petitioner also produced two statements in support of its assertion that a degree was common in the industry for the offered position. One was from J.G. Kwon, President of Daifuku Trading Corp., and the other from Seung Jae Shin, Vice President of Seoul Shik Poom, Inc. Both of these companies employ merchandising managers with degrees in business administration. Again, the statements are consistent with the aforementioned advertisements and the *Handbook*. While the offered position does require a baccalaureate level education, it does not require a degree in a specific specialty.

The petitioner asserts that it normally requires a degree or its equivalent for the proffered position. 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). Assuming arguendo that this is the case, the proffered position still does not qualify as a specialty occupation. The performance of the duties of the position must still involve the theoretical and practical application of a body of highly specialized knowledge. *Cf. Defensor v. Meissner,* 201 F.3d 388 (5th Cir. 2000). This position does not. As noted above, the duties of the position are routinely performed in the

industry by individuals with educational backgrounds in a wide range of educational disciplines. There is no requirement that the education come from any particular specialty.

Finally, the proffered position's duties are not so complex or unique that they can only be performed by an individual with a degree in a specific specialty. Nor are they so specialized or complex that they are normally associated with the attainment of a baccalaureate or higher degree in a specific specialty. 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*). The duties are routine in the industry for management positions in marketing/merchandising.

The petitioner also asserts that previous agency decisions have classified the offered position as a specialty occupation. This reference will not sustain the petitioner's burden of establishing H-1B qualification in the petition now before the AAO. This record of proceeding does not contain the records of proceeding referred to by counsel. Accordingly, no comparison of the positions can be made. 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, the AAO is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

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 and the appeal shall accordingly be dismissed.

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