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U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

D2

[redacted]

FILE: WAC 04 020 53433 Office: CALIFORNIA SERVICE CENTER Date: JAN 03 2005

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.

for Michael T. Kelly
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the California 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 an importer of Brazilian specialty foods and beverages, distributing them to markets and restaurants throughout California. It seeks to hire the beneficiary as a storage and distribution manager. The director denied the petition because he determined the proffered position did not meet the criteria required for classification as a specialty occupation and that the beneficiary did not qualify to perform services in a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) the petitioner's response to the director's request for evidence; (3) the director's denial letter; and (4) the Form I-290B, with a statement from the petitioner and additional documentation. The AAO reviewed the record in its entirety before reaching its decision.

The initial issue before the AAO is the determination of whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the 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 one 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:

> An 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 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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. 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 (5th Cir. 2000). The critical element is not the title of the position nor 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.

The petitioner has asserted that it is seeking the beneficiary's services as a storage and distribution manager. Evidence of the beneficiary's duties includes: the Form I-129; an October 24, 2003 support letter from the petitioner accompanying the Form I-129; and the petitioner's December 9, 2003 response to the director's request for evidence.

In its letter of support and in response to the director's request for evidence, the petitioner stated the beneficiary's duties would be to:

- Confer with the partners of Latin American Imports to coordinate storage and distribution activities, including sales, records control and purchasing;
- Negotiate contracts, settlements and freight-handling agreements for both foreign and domestic shippers;
- Develop and implement plans for facility modification or expansion, including additional equipment purchases and changes in space allocation and structural design to accommodate Latin American Imports anticipated expansion in larger distribution areas;
- Examine invoices and shipping manifests for conformity to tariff and customs regulations, and contact customs officials to effect release of shipments;
- Schedule air and surface pickup, delivery and distribution of specialty foods; and
- Contact customers or shippers to solicit new business, answer questions about the goods and investigate complaints.

To make its determination whether the employment just described qualifies as a specialty occupation, the AAO turns to 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; and 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 considered by the AAO when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports 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)).

At the time of his denial, the director found the petitioner's proffered position to most closely resemble the occupation of purchasing managers, buyers and purchasing agents and determined that it did not meet any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Following its own review of the duties of the proffered position, the AAO concludes that the duties of the petitioner's position are not that of a purchasing manager or agent, or buyer. Instead, they generally parallel those of a transportation, storage, and distribution manager. As described in the 2004-2005 edition of the *Handbook,* transportation, storage and distribution managers plan, direct, or coordinate transportation, storage, or distribution activities in accordance with governmental policies and regulations, a description that appears closely aligned to the duties described by the petitioner. Accordingly, the AAO withdraws the finding of the director that the proffered position is that of a purchasing manager, buyer, or purchasing agent.

As proof of the degree requirement for its proffered position, the petitioner, in response to the director's request for evidence, submitted a description of the occupation of storage and distribution manager from the Department of Labor's *Online Wage Libra*ry, citing the job zone rating of 4 as proof that the occupation requires a four-year bachelor's degree. However, the AAO does not find the *Online Wage Library* to be a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. It provides 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 particular occupation. Further, a job zone rating of 4 in the *Online Wage Library* does not indicate that a bachelor's degree in a specific specialty is required.

Instead, as already discussed, the AAO relies on the DOL *Handbook* for information regarding the educational requirements associated with various occupations. In this case, the *Handbook* identifies no degree requirement for entry into the profession of transportation, storage or distribution managers. Instead, those who seek work in this field need only work experience in a related occupation to obtain employment. As a result, the AAO concludes that the proffered position does not qualify as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, the petitioner in response to the director's determination that the duties of its position were aligned to those of purchasing managers, buyers and purchasing agents, contends that these professions also qualify as specialty occupations based on the *Handbook*'s statement that some employers prefer employees with bachelor's degrees with a business emphasis while others prefer individuals with degrees in engineering, economics or one of the applied sciences. Although the AAO has withdrawn the director's finding regarding the nature of the petitioner's position, it, nevertheless, wishes to comment on the petitioner's conclusion that employers' degree preferences establish that a baccalaureate or higher degree, or its equivalent is normally the minimum requirement for entry into a particular position. Employer preference is, as stated, a hiring preference, not an employment requirement. It is not synonymous with the "normally required" language of the first criterion and, therefore, cannot serve to establish a position as a specialty occupation.

To determine whether the petitioner's position meets the second criterion – that a specific degree requirement is common to the industry in parallel positions among similar organizations or that the proffered position is so complex or unique that it can be performed only by an individual with a degree in the specific specialty – the AAO has reviewed the Internet job postings submitted by the petitioner in response to the director's request for evidence. The submitted evidence does not, however, establish that a baccalaureate or higher degree requirement is an industry norm for storage and distribution managers.

The job postings provided by the petitioner either come from businesses that are not similar to the petitioner's or do not advertise parallel positions. The petitioner is an importer of food and beverages. However, all but one job posting come from unrelated industries: four industrial manufacturers, one manufacturer of medical equipment, and two pharmaceutical firms. The posting that has been advertised by a business in the food industry provides no information as to whether the size of the business is similar to the petitioner's, nor whether, like the petitioner, it imports food products from outside the United States. Further, the job posting from the food processing business lacks a description of the position's duties that would allow the AAO to determine whether it represents a position that could be considered parallel to the proffered position.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)*(3)* and *(4)*: the employer normally requires a degree or its equivalent for the position; and 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 determine a petitioner's ability to meet the third 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. In this case, where the proffered position is newly created, the petitioner has no employment history regarding the proffered position and, therefore, cannot satisfy the requirements of the third criterion. However, in its response to the director's request for evidence, the petitioner contended that it was not required to establish that it required a bachelor's degree for the proffered position in that it had already established that a bachelor's degree was normally the minimum requirement for the proffered position and cited *Globenet Inc. v. Attorney General* 1989 WL 132041 (D.D.C.).

The findings of *Globenet Inc. v. Attorney General*, which focused on whether an intracompany transferee was qualified to adjust status to that of temporary worker of distinguished merit and ability, do not address those issues that are now before the AAO. However, the petitioner's statement that it need meet only one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to establish its proffered position as a specialty occupation is correct. In requesting information related to all four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), the director was not requiring the petitioner to establish eligibility under more than one. Instead, his purpose was to obtain all information that would assist him in fulfilling CIS' obligation to alternatively explore all four regulatory avenues before determining whether a proffered position qualifies as a specialty occupation.

In assessing whether the petitioner has met its burden with regard to the fourth criterion, the AAO has, again, reviewed the duties of the proffered position, as described by the petitioner at the time of filing and in response to the director's request for evidence. Although the petitioner has asserted that the duties of its position are complex, there is nothing in the record that leads the AAO to conclude that those duties are more specialized or complex than those normally associated with the occupation of transportation, storage and distribution manager. As a result, the AAO must conclude that the petitioner has failed to meet the requirements of the fourth and final criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO now turns to the issue of whether the beneficiary whom the petitioner seeks to employ is qualified to perform the duties of the proffered position had it been found to be a specialty occupation.

In determining whether an alien is qualified to perform the duties of a specialty occupation, CIS looks to the petitioner to establish that the beneficiary meets one of the requirements set forth at Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2) -- full state licensure to practice in the occupation, if such licensure is required; completion of a degree in the specific specialty; or experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Further discussion of how an alien qualifies to perform services in a specialty occupation is found at 8 C.F.R. § 214.2(h)(4)(iii)(C), and requires the individual to:

(1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or

(4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the

specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

As the beneficiary does not hold a U.S. or foreign degree in a specialty related to the proffered position and requires no license to perform the duties of the proffered position, the AAO will assess the extent to which his education, specialized training and/or experience may be the equivalent of a U.S. baccalaureate or higher degree and whether he has had progressively responsible experience that is directly related to the proffered position.

When a beneficiary is determined to lack the specific degree required by a specialty occupation, the AAO relies upon the five criteria specified at 8 C.F.R. § 214.2(h)(4)(iii)(D) to determine whether the individual may still qualify to perform the proffered position. A beneficiary who does not have a degree in the specific specialty may still qualify for an H-1B nonimmigrant visa based on:

(1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;

(2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);

(3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;

(4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

(5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

At the time of filing, the petitioner submitted an evaluation of the beneficiary's education and work experience from the American Evaluation Institute (AEI), authored by Professor Mathew B. Michael Clark. This evaluation finds the beneficiary's education and work experience to be the equivalent of a U.S. bachelor of science degree in management. However, a credentials evaluation service may only evaluate a beneficiary's foreign academic credentials. 8 C.F.R. § 214.2(h)(4)(iii)(D)*(3)*. As a result, the AAO will not accept the AEI's assessment of the beneficiary's work experience. An evaluation by a credentials evaluation

organization serves CIS as an advisory opinion only. Where an evaluation is in any questionable, the AAO may discount it or give it less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

Although the AAO would be willing to accept an AEI evaluation of the beneficiary's three years of foreign education, a review of the record finds no separate evaluation of the beneficiary's three years of legal study at Uniban University in San Paulo, Brazil. In that the only foreign credentials evaluation provided by the petitioner combines the beneficiary's education and work experience, the AAO will discount the evaluation in its entirety.

At the time of filing, in response to the director's request for evidence and on appeal, the petitioner presents [redacted] as an academic official with the authority to grant college-level credit for training and/or experience. As just discussed, [redacted] evaluation of the beneficiary's work experience and training finds him to have the equivalent of a bachelor of science degree in management. However, while the opinion of [redacted] relevant to this proceeding, there is no independent evidence in the record of his authority to grant college-level credit for training and/or experience on behalf of a college or university that has a program that grants college-level credit based on foreign educational credentials, training and/or employment experience. The October 31, 2003 letter signed by [redacted] of the School of Graduate and Continuing Education does not identify [redacted] as being employed by [redacted] nor does it state that he has the authority to grant academic credit on their behalf. Instead, the letter offers only that the college grants academic credit based on academic evaluations from the American Evaluation Institute.

At the time of filing and on appeal, the petitioner also asserts tha[redacted] has the authority to grant college-level credit for training and/or work experience on behalf of the University of Phoenix, and that the necessary documentation has been submitted to establish this authority. The AAO does not, however, find the petitioner's evidence to be persuasive. The on-line materials submitted in connection with the University of Phoenix do not identify [redacted] as being a university official or grant him the authority to award academic credit for training and/or work experience on their behalf. Without evidence in the file to document tha[redacted] qualifies as the "official" described at 8 C.F.R. § 214.2(h)(4)(iii)(D)*(1)*, his evaluation cannot serve as evidence that the beneficiary has the equivalent of a U.S. degree as required by 8 C.F.R. § 214.2(h)(4)(iii)(D)*(1)*.

As the record contains no other documentation that responds to the evidentiary requirements of the above criteria, the AAO next turns to 8 C.F.R. § 214.2(h)(4)(iii)(D)*(5)* – whether the equivalent of a degree in the specialty occupation has been acquired through a combination of education, specialized training and/or work experience in areas related to the specialty and if the beneficiary has achieved recognition of his expertise in the specialty occupation as a result of such training and experience.

When evaluating a beneficiary's qualifications under the fifth criterion, CIS considers three years of specialized training and/or work experience to be the equivalent of one year of college-level training. In addition to documenting that the length of the beneficiary's training and/or work experience is the equivalent of four years of college-level training, the petitioner must also establish that the beneficiary's training and/or work experience has included the theoretical and practical application of specialized knowledge required by

the specialty occupation, and that the experience was gained while working with peers, supervisors, or subordinates who have degrees or the equivalent in the specialty occupation. The petitioner must also document recognition of the beneficiary's expertise in the specialty, as evidenced by one of the following: recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation; membership in a recognized foreign or U.S. association or society in the specialty occupation; published material by or about the alien in professional publications, trade journals, books or major newspapers; licensure or registration to practice the specialty in a foreign country; or achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

Citing *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Bienkowski*, 12 I&N Dec. 17 (D.D. 1966); *Matter of Yaakov,* 13 I&N Dec. 203 (Reg.Comm. 1969); and *Matter of Devnani* 11 I&N Dec. 800 (D.D. 1966); and *Matter of Arjani*, 12 I&N Dec. 649 (Reg.Comm. 1967), the petitioner asserts that the beneficiary's combined education and work experience – 3 years of university and 13 years as the general manager of a food-related business -- qualify him to perform the duties of its self-described specialty occupation. While the beneficiary's academic background is in the study of law, the AAO acknowledges that the beneficiary's employment history could potentially be the equivalent of a four-year bachelor's degree in a field related to the proffered position. It notes, however, that when on-the-job experience is substituted for education per 8 C.F.R. § 214.2(d)(h)(4)(iii)*(5)*, it must have included the theoretical and practical application of specialized knowledge required by the specialty occupation. *See Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

To determine whether the beneficiary's 13 years of employment have included the application of such knowledge, the AAO has reviewed the evidence submitted by the petitioner which describes the beneficiary's employment history -- the August 2, 2003 and November 30, 2003 statements submitted by the beneficiary's former employer. These documents, however, provide only a cursory listing of the beneficiary's duties and, thus, fail to provide the detail necessary to determine if the beneficiary's performance of his duties required the theoretical and practical application of specialized knowledge related to the proffered position. Further, neither statement discusses whether the beneficiary's experience was gained while working with peers, supervisors, or subordinates who have degrees or the equivalent in the specialty occupation, nor do they document professional recognition of the beneficiary's experience. In that the evidence submitted by the petitioner addresses only the length of the beneficiary's employment and does not respond to the other requirements set forth at 8 C.F.R. § 214.2(h)(4)(iii)(D)*(5)*, the AAO concludes that the petitioner has failed to establish that the beneficiary's employment history, either in combination with his education or on its own, qualifies him to perform the duties of a specialty occupation.

Therefore, for reasons related in the preceding discussion, the petitioner has failed to establish both that the proffered position is a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A) and that the beneficiary is qualified to perform the duties of a specialty occupation per 8 C.F.R. § 214.2(h)(4)(iii)(C). Accordingly, even though the director's finding regarding the nature of the petitioner's position has been withdrawn, the AAO shall not disturb his 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.