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U.S. Citizenship
and Immigration
Services

PUBLIC COPY

[redacted]

JAN 25 2005

FILE: EAC 03 120 54251 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.

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 food products importer and distributor that seeks to employ the beneficiary as a merchandise manager. 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. Counsel submits the petitioner's reasons for appeal on the Form I-290B. Although counsel indicates that a further brief and/or evidence would be submitted to the AAO, nothing further has been received. The record is complete.

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 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. 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 includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail participating in the development and supervising the implementation of marketing and merchandising strategies and programs to achieve sales and profit objectives for assigned food products and related commodities; supervising the development and implementation of marketing plans; collaborating with outside companies to integrate new/or improved food products and related commodities into marketing strategies and programs; assessing and evaluating the management of all service objectives and identify potential problems and opportunities and make recommendations for appropriate course of action; developing systems for the periodic review of marginally profitable products, monitor performance, make recommendations for appropriate course of action, including the justifiable deletion of service lines; collaborate with others to coordinate and supervise all activities necessary to the introduction of new food products and related commodities, including preparatory market research, concept tests, financial analysis; 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, Certified Public Accountants and other outside professional services concerning advertising, sales promotion, marketing and other strategies to assure compliance with all regulatory agencies and applicable laws and statutes; supervise and administer advertising and marketing budgets and assure compliance with budgetary and financial guidelines and maximize cost effectiveness and utilization of funds; evaluate marketing programs against established performance objectives; consult with company personnel as necessary to assure maximum manpower utilization and development; establish well-defined 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 products, services and companies and their apparent marketing strategies, develop and recommend programs, which will respond to current and projected competitive action; provide input and guidance to appropriate company personnel to ensure that projects are designed to meet or exceed client needs at the outset..

The petitioner stated that a candidate for the proffered position must possess a bachelor's degree or its equivalent with a major or concentration in management, business administration, merchandise, marketing, or another closely and directly related major.

The director determined that the proffered position was not a specialty occupation. The director found that there was no documentation showing that the position is so complex or unique that only an individual with a bachelor's degree in a specific specialty could perform it. The record contained no documentation substantiating that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate degree in a specific field. Additionally, the director noted that it is not evident that the petitioner normally requires a bachelor's degree in a specific field for the proffered position. The director stated that CIS doubted that the requirement of a bachelor's degree in a specific specialty is a minimum requirement for entry into the particular position or is common to the industry in parallel positions among similar organizations. The duties of the proffered position are performed by a purchasing manager, buyer, or purchasing agent, and the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) explains that these occupations do not require a bachelor's

degree in a specific specialty. The director concluded that industry organizations and the petitioner prefer rather than require a bachelor's degree in a related specialty for the position of merchandise manager.

On appeal, counsel states that the petitioner has amply documented that it requires for this position, both at the present time, and in the past, an employee with a minimum of a bachelor's degree with a concentration in business administration/management. Counsel states that the petitioner has amply documented that it has a pattern and history of requiring company employees to possess a minimum of a bachelor's degree with a concentration in business administration/management. Additionally, counsel states that the petitioner has amply documented that it is a standard and common hiring practice in this industry to require an employee with a minimum of a bachelor's degree with a major/concentration in business. In conclusion, counsel contends that the petitioner has amply documented that other similarly situated companies in the same industry employ merchandise managers to perform the same type of job duties as the proffered position.

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 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)).

In determining whether a 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.

A thorough review of the *Handbook* discloses that the duties of the proffered position are performed by purchasing managers, buyers and purchasing agents. Purchasing specialists who buy finished goods for resale are employed by wholesale and retail establishments, where they are commonly known as buyers or merchandise managers. Purchasers and buyers determine which commodities are best, choose the suppliers of the product or service, negotiate the lowest price, and award contracts. In order to accomplish these tasks successfully, they study sales records and inventory levels of current stock, identify foreign and domestic suppliers, and keep abreast of changes affecting both the supply of, and demand for, needed products and materials. The *Handbook* mentions that buyers and purchasing agents evaluate suppliers on price, quality, service support, availability, reliability, and selection, and they review catalogs, industry and company publications, directories, and trade journals to find suppliers.

The *Handbook* reports:

> Qualified persons may begin as trainees, purchasing clerks, expediters, junior buyers, or assistant buyers. Retail and wholesale firms prefer to hire applicants who have a college degree and who are familiar with the merchandise they sell and with wholesaling and retailing practices. Some retail firms promote qualified employees to assistant buyer positions; others recruit and train college graduates as assistant buyers. Most employers use a combination of methods.
>
> Educational requirements tend to vary with the size of the organization. Large stores and distributors, especially those in wholesale and retail trade, prefer applicants who have completed a bachelor's degree program with a business emphasis.

The petitioner fails to establish the first criterion because the *Handbook* states that large stores and distributors prefer, but do not require, applicants with bachelor's degrees with a business emphasis and that retail and wholesale firms prefer, but do not require, applicants who have a college degree, though not necessarily in a specific specialty. Accordingly, the petitioner cannot establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the proffered position.

According to the *Handbook*:

> Many merchandise managers assist in the planning and implementation of sales promotion programs. Working with merchandise executives, they determine the nature of the sale and purchase items accordingly. Merchandise managers may work with advertising personnel to create an ad campaign.

Similarly, the beneficiary will participate in developing and supervising the implementation of marketing and merchandising strategies and programs to achieve sales and profit objectives for assigned food products and related commodities. However, the *Handbook* explains that a bachelor's degree is not required for a merchandise manager position. The petitioner, therefore, cannot establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the proffered position.

To establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations – the petitioner provided letters from four different organizations. Each letter stated that they employed a merchandise manager. Additionally, each letter stated "[i]t is a requirement for a person employed with this company in the position of merchandise manager to possess a minimum of a college bachelor's degree in a business related major." However, the petitioner did not sufficiently demonstrate that these organizations are similar to it, thus, the AAO cannot determine whether they are similar to the petitioner. The duties of the various merchandise manager positions are insufficiently detailed to make a meaningful comparison to the proffered position. Additionally, the letters do not sufficiently describe the nature of each organization. Consequently, the AAO cannot conclude that the companies are similar to the petitioner. The letters fail to establish that a specific degree requirement is common to the industry in parallel positions among similar organizations.

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. Again, the *Handbook* reveals that the proffered position is performed by merchandise managers, positions that do not require a bachelor's degree in a specific specialty.

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position. The petitioner stated the position of merchandise manager is a new position. However, the AAO notes that counsel stated "that the petitioner has amply documented that it requires for this position, both at the present time, and in the past, an employee with a minimum of a college bachelor's degree with a concentration in business administration/management." It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner employs a purchase price analyst and a technical writer. The petitioner enclosed copies of the help wanted ads to demonstrate that "this company has an established history and practice of hiring only persons with a minimum of a college bachelor's degree in an area of education that is related to the job duties that they will perform." However, the petitioner stating that it has a history of hiring employees for different positions with a bachelor's degree related to these positions does not meet the third criterion, which requires the petitioner to establish that it normally requires a degree for the proffered position.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. Once again, the *Handbook* reveals that the proffered position is performed by merchandise managers, occupations not requiring a bachelor's degree in a specific specialty.

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.