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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 03 168 52146 Office: CALIFORNIA SERVICE CENTER Date: JUL 21 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.

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 provider of web services. It seeks to employ the beneficiary as an IT personnel/recruitment 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. On appeal, counsel states that the proffered position qualifies as a specialty occupation and submits previously submitted evidence.

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 and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as an IT personnel/recruitment manager. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the petitioner's 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 administering employee benefits; complying with legislation; conducting census and testing reports; assisting employees and handling employee relations issues; dealing with the Department of Labor; coaching managers and supervisors about employee relations; managing recruitment and attending recruitment fairs; interviewing and selecting candidates, performing background checks, processing visas, and providing employee orientation; creating and implementing human resources policies and practices; updating the employee handbook; working with finance and management to design compensation programs, input payroll, and make organizational changes; and organizing events such as parties. The petitioner asserted that the proposed position requires a bachelor's degree.

The director determined that the proposed position resembled that of human resources, training, and labor relations managers and specialists as those occupations are described in the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*), and that the *Handbook* reports that baccalaureate-level training is not a normal, industry-wide minimum requirement for entry into these occupations. The petitioner was previously granted an H-1B petition on behalf of the beneficiary; but the director found the evidence failed to establish that the proposed position qualifies as a specialty occupation. The director also found the job postings unpersuasive. According to the director, the evidentiary record failed to show that the petitioner normally requires a baccalaureate or higher degree in the field for the proposed position. The director indicated that the petitioner failed to submit corroborating evidence to establish a past practice of requiring a baccalaureate degree, and cited to *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)), and stated that "[s]imply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings." The director stated that the proposed duties and stated level of responsibility did not indicate complexity or authority that is beyond what is normally encountered in the occupation field, and that the evidence of record did not persuasively show that the job offered could not be performed by an experienced person whose educational training falls short of a baccalaureate degree.

On appeal, counsel discusses the relevancy of beneficiary's prior H-1B approval notice, the nature of the petitioner's business and the beneficiary's job duties. Counsel distinguishes the facts in *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm. 1988) and *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084 (6th Cir. 1987) from those in this case. The *Handbook* indicates, counsel asserts, that employers usually seek college graduates for entry-level human resources, training, and labor relations managers and specialists positions; that many employers prefer majors in human resources, personnel administration, or industrial and labor relations while others look for college graduates with a technical or business background or a well-rounded liberal arts education; and that an advanced degree is increasingly important for some jobs. Counsel

states that accepting a bachelor's degree in a variety of fields does not mean that a position does not qualify as a specialty occupation. Counsel contends that the submitted job postings persuasively establish that the proposed position is a specialty occupation. According to counsel, the petitioner's letter and employment application, which were submitted in response to the request for evidence, establish that the petitioner normally requires a bachelor's degree for the proposed position. Counsel asserts that because the director did not request corroborating evidence of W-2 Forms, it is unfair to use the absence of a W-2 Form as a factor in denying the petition. Counsel states that the petitioner submitted all requested evidence, and distinguishes the facts of *Matter of Treasure Craft*, a case involving the sufficiency of evidence, with the case here. Counsel relays that the petitioner had previously employed someone as a staffing manager, which is similar to the proposed position, and the only evidence relating to the person is an employment application.

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.

Counsel asserts that CIS approved a similar petition that had been previously filed on behalf of the beneficiary by the petitioner. If the previous nonimmigrant petition was approved based on the same assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *Matter of Church Scientology International*. It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petition on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The prior approval does not preclude CIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

Counsel does not persuasively distinguish *Matter of Church Scientology International* and *Sussex Engg. Ltd.* from the instant case. In *Matter of Church Scientology International* a copy of an unpublished decision was used to establish a qualifying relationship between two companies; counsel in the case noted that the standards for determining qualifying relationships between entities varied from case to case. *Matter of Church Scientology International* indicates that petitions or applications need not be approved where eligibility has not been demonstrated; it states:

> [T]he Service is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous.

> *Matter of M--*, 4 I&N Dec. 532 (BIA, A.G. 1952); *Matter of Khan*, 14 I&N Dec. 397 (BIA 1973), by extension; see also *Pearson v. Williams*, 202 U.S. 281 (1906); *Lazarescu v. United States*, 199 F.2d 898 (4th Cir. 1952); United States ex rel. Vajta v. Watkins, 179 F.2d 137 (2d Cir. 1950); *Mannerfrid v. Brownell*, 145 F. Supp. 55 (D.D.C.), aff'd 238 F.2d 32 (D.C. Cir. 1956).

In *Sussex Engg. Ltd.* the court examined whether the district director acted arbitrarily and capriciously in denying 91 petitioners, while at the same time granting five H-2 petitions. The court indicated that:

> The administrative record reveals that the inconsistent action on the five petitions was due to simple agency oversight, and defendant's answer stated that action had been taken to revoke the five petitions erroneously granted. It is absurd to suggest that the INS or any agency must treat acknowledged errors as binding precedent.

Sussex Engg. Ltd. indicates that no agency must treat acknowledged errors as binding precedent. In the instant proceeding, the AAO is not required to treat acknowledge error as binding precedent and is not required to approve petitions where eligibility has not been demonstrated, merely because of a prior approval that may have been erroneous. *Matter of Church Scientology International.*

The AAO next 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.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

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. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations.

Counsel states that accepting a baccalaureate degree in a variety of fields does not mean that a position does not qualify as a specialty occupation. This is not persuasive. As conveyed earlier in this decision, 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. A review of the *Handbook* discloses that a baccalaureate degree *in a specific specialty* is not required for the occupations of human resources, training, and labor relations specialist or manager. The *Handbook* reports:

> Because of the diversity of duties and levels of responsibility, the educational backgrounds of human resources, training, and labor relations managers and specialists vary considerably. In filling entry-level jobs, many employers seek college graduates who have majored in human resources, personnel administration, or industrial and labor relations. Other employers look for college graduates with a technical or business background or a well-rounded liberal arts education.

The above passage from the *Handbook* indicates that a baccalaureate degree in a specific specialty is not required for a human resources, training, and labor relations specialist or manager in that employers accept baccalaureate degrees in various majors, including technical, business, or the liberal arts. The proposed position is similar to these occupations; thus, it also does not require a baccalaureate degree 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 particular position. 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

To establish the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*) - that a specific degree requirement is common to the industry in parallel positions among similar organizations - counsel refers to job postings, which are not persuasive. Option One Mortgage Corporation, Mervyn's, and Accredited Home Lenders do not require a baccalaureate degree in a specific specialty, and the industries of Esurance Inc., Accredited Home Lenders, Mervyn's, Option One Mortgage Corporation, Masterfoods USA differ from the petitioner, a provider of web services. The postings, therefore, fail to establish that a specific degree requirement is common to the industry in parallel positions among similar organizations.

The petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*) as no evidence in the record shows that 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 proposed position is analogous to that of human resources, training, or labor relations specialists or managers, which are occupations that do not require a baccalaureate degree in a specific specialty.

The third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner show that it normally requires a degree or its equivalent for the position. Counsel refers to and asserts the petitioner's letter and an employment application establish that the petitioner normally requires a bachelor's degree for the proposed position. The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. 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 or 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.[1] To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388. As discussed earlier in this decision, the *Handbook* reveals that the proposed position parallels that of human resources, training, or labor relations specialists or managers, which are occupations that do not require a baccalaureate degree in a specific specialty.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner demonstrate 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 in a specific specialty. Again, the *Handbook* indicates that employers do not normally require a baccalaureate degree in a specific specialty for human resources, training, and labor relations specialist or manager positions, and no evidence shows that the proposed duties are more specialized and complex than those of the general range of the aforementioned positions.

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.

[1] The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *See id.* at 387.