



U.S. Citizenship
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FILE: WAC 04 129 50551 Office: CALIFORNIA SERVICE CENTER Date: **OCT 04 2005**

IN RE: Petitioner: 
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:



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 corporation engaged in retail, wholesale, and distribution of men's, women's, and children's clothing in Hawaii. In order to employ the beneficiary as an operations manager, the petitioner filed this petition to classify the position as an H-1B nonimmigrant worker in a specialty occupation, 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).

Finding that the proposed duties "appear to be general manager duties and not those of a position requiring professional skills," the director denied the petition on the basis that the petitioner had failed to establish that the proffered position meets the definition of a specialty occupation set forth in the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel submits a brief wherein she contends that the director erred by not recognizing that the petitioner is proffering a specialty occupation position. In support of her contention, counsel refers to: the proposed duties; previously submitted Internet advertisements from other employers that had been submitted into the record; a copy of the petitioner's newspaper advertisement for the proffered position, which stated a degree requirement; and a copy of an approval notice regarding a previous H-1B petition that the petitioner has filed on behalf of a different beneficiary for the proffered position.

The director's decision to deny the petition was correct. The AAO bases its decision upon its consideration of the entire record of proceeding before it, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the director's request for additional evidence (RFE); (3) the materials submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, counsel's June 10, 2004 brief on appeal.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184 (i)(1), 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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consonant with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation:

which [1] 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 [2] 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. (Italics added.)

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) has consistently interpreted 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. Applying this standard, CIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

On appeal, counsel reiterates the information about the proffered position and its duties that counsel had previously provided in her April 30, 2004 letter of reply to the RFE. The letter states that the beneficiary would perform a “senior role” in the petitioner’s organization and would be involved in the “overall management of Quality Systems and Operational Support functions.” The letter provides this description of the position’s responsibilities and their respective share of work time:

- 40% Management of all aspects of the Quality Systems functions using a process based management approach; Interface with customers on quality and operational related issues.

- 30% Public [R]elations and Advertising -- manage agencies on a daily basis with timely reports. Coordinate annual programs with domestic & international staff to deliver tactical plan for key segments. Provide management and leadership through continuous improvement to the following direct reporting functions: Design Integrity; Materials Management (inclusive of planning, purchasing, fabrication.) Manpower and Operational budget cost and control; Supply Chain Management through an effective supplier relationship strategy;
- 20% Web Marketing -- manage agency on a daily basis with timely reports. Manage ongoing resource requirements & reviews, goal setting & contract development for global web site.
- 10% Budget & Planning – Effectively manages budget & resources. Report budget status for marketing and communications programs on a monthly basis to staff. Review of domestic and international programs and lead the annual budget planning process for communication programs.

This letter of reply to the RFE also states that the proffered position is responsible for “the clearance of import shipments in compliance with U[.]S[.] Customs regulations as well as assuring compliance with all of the export regulations,” and the letter lists the following specific duties involved in the performance of the position:

- ◆ Audit summaries from Customs Brokers and Freight Forwarders
- ◆ Resolve errors found on summaries
- ◆ Approve and monitor payments for assigned accounts
- ◆ Prepare files for accounts to ensure compliance
- ◆ Correspond with foreign vendors and purchasing [agents] to obtain Customs clearance and documentation
- ◆ Train new employees in basic procedures
- ◆ Assist manager in drafting correspondence and back up support
- ◆ Attend outside training sessions to stay current on changes
- ◆ Identify new procedures and methods to expedite clearance on import shipments, delivery to the customer and cost savings plans for the efficient and compliant operation [of] the department
- ◆ Provide customer service to new and existing customers
- ◆ Calculate quotations and provide pro-forma invoices
- ◆ Process orders
- ◆ Create export documentation and coordinate transportation
- ◆ Adjust the invoice values if necessary
- ◆ Receive, monitor and resolve customer claims

The petitioner has not satisfied the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) by establishing that the proffered position is one for which the normal minimum entry requirement is at least a bachelor's degree, or the equivalent, in a specific specialty closely related to the position's duties.

CIS recognizes the Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of a wide variety of occupations. To the extent that they are described in the record, the proffered position and its duties comport with the general or operations manager occupational category as addressed in the section on top executives, at pages 64-68 of the 2004-2005 edition of the *Handbook*.

The *Handbook* states:

General and operations managers plan, direct, or coordinate the operations of companies or public and private sector organizations. Their duties include formulating policies, managing daily operations, and planning the use of materials and human resources, but are too diverse and general in nature to be classified in any one area of management or administration, such as personnel, purchasing, or administrative services. In some organizations, the duties of general and operations managers may overlap the duties of chief executive officers.

The *Handbook* indicates, however, that operations managers and other general management positions do not normally require at least a bachelor's degree, or the equivalent, in a specific specialty. One of the "Significant Points" presented at the beginning of the *Handbook's* section on top executives is: "The formal education and experience of top executives varies as widely as the nature of their responsibilities." The following excerpt (from page 66) more fully articulates the fact that at least a bachelor's degree or its equivalent in a specific specialty is not normally a minimum requirement for managerial positions like the one proffered here:

The formal education and experience of top executives varies as widely as the nature of their responsibilities. Many top executives have a bachelor's or higher degree in business administration or liberal arts. College presidents typically have a doctorate in the field in which they originally taught, and school superintendents often have a master's degree in education administration. (For information on lower level managers in educational services, see the *Handbook* statement on education administrators.) A brokerage office manager needs a strong background in securities and finance, and department store executives generally have extensive experience in retail trade.

Some top executives in the public sector have a background in public administration or liberal arts. Others might have a background related to their jobs. For example, a health commissioner might have a graduate degree in health services administration or business administration. (For information on lower level managers in health services, see the *Handbook* statement on medical and health services managers.)

Because many top executive positions are filled by promoting experienced, lower level managers when an opening occurs, many top managers have been promoted from within the organization. In industries such as retail trade or transportation, for instance, it is possible for individuals without a college degree to work their way up within the company and become managers. However, many companies prefer that their top executives have specialized backgrounds and, therefore, hire individuals who have been managers in other organizations.

Top executives must have highly developed personal skills. An analytical mind able to quickly assess large amounts of information and data is very important, as is the ability to consider and evaluate the interrelationships of numerous factors. Top executives also must be able to communicate clearly and persuasively. Other qualities critical for managerial success include leadership, self-confidence, motivation, decisiveness, flexibility, sound business judgment, and determination.

Advancement may be accelerated by participation in company training programs that impart a broader knowledge of company policy and operations. Managers also can help their careers by becoming familiar with the latest developments in management techniques at national or local training programs sponsored by various industry and trade associations. Managers who have experience in a particular field, such as accounting or engineering, may attend executive development programs to facilitate their promotion to an even higher level. Participation in conferences and seminars can expand knowledge of national and international issues influencing the organization and can help the participants to develop a network of useful contacts.

General managers may advance to top executive positions, such as executive vice president, in their own firm or they may take a corresponding position in another firm. They may even advance to peak corporate positions such as chief operating officer or chief executive officer. Chief executive officers often become members of the board of directors of one or more firms, typically as a director of their own firm and often as chair of its board of directors. Some top executives establish their own firms or become independent consultants.

The two job vacancy advertisements submitted into the record from other firms are not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). The degrees cited by the advertisements – a generalized bachelor's degree in business administration, and a "4 year college degree" - are not in a specific specialty closely related to the proposed duties, as required by the Act and 8 C.F.R. § 214.2(h)(4)(iii)(A). To establish a proffered position as a specialty occupation, a petitioner must demonstrate that the position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close corollary between the required specialized studies and the position, the requirement of a degree of generalized title, such as business administration or liberal arts, without further specification, does not establish eligibility. The mere requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility. *See Matter of Michael Hertz, Assoc.*, 19 I&N Dec. 558, 560 (Comm. 1988). With regard to the first criterion in particular, the fact that some employers may require a bachelor's degree does not rebut or overcome the DOL

information in the *Handbook* to the effect that a bachelor's degree or its equivalent in a specific specialty is not normally a minimum requirement for the type of management position proffered here.

As the evidence of record does not establish that the proffered position is one with a normal minimum entry requirement of a baccalaureate or higher degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The petitioner has not presented evidence to satisfy the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is for a position with a requirement for at least a bachelor's degree in a specific specialty that is common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by CIS 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)).

As discussed above, the petitioner has not established that the proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. Further, the record contains no attestations from individuals or other firms or from a professional association that the position is one for which employers in the petitioner's industry have a routine practice of recruiting and hiring only persons with at least a bachelor's degree in a specific specialty. As noted earlier, the record's job advertisements from other firms are inconsequential. Not only do they not stipulate a degree in a specific specialty closely related to the proposed duties, but they are also too few to establish a common employment practice in the industry.

The fact that the petitioner has previously hired one person with a bachelor's degree in business administration with a concentration in marketing is not sufficient evidence to establish that the proffered position qualifies as a specialty occupation in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), that is, by an established history of the petitioner's recruiting and hiring for this position only persons with at least a bachelor's degree in a specific specialty closely related to the proposed duties.

The evidence of record does not establish either that this particular position is so complex or unique that it can be performed only by an individual with a degree (so as to satisfy the second alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2)), or that the specific duties are so specialized and complex that their performance requires knowledge usually associated with at least a baccalaureate degree in a specific specialty (so as to satisfy the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4)). The evidence of record does not support counsel's assertion that "the duties and the responsibility associated with the position . . . are specialized and complex and commensurate with professional specialty standing." (Brief at page 3.) Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the

assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The fact that CIS previously approved an H-1B petition filed by the petitioner for an operations manager is not relevant to any criterion. 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, CIS is limited to the information contained in the record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). Moreover, if the previous nonimmigrant petition was approved based on substantially the same evidence as contained in the current record, the approval would constitute material and gross error on the part of the director. See, e.g., *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). 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 nonimmigrant petitions on behalf of a 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).

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed.

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. Accordingly, the appeal will be dismissed.

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