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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

Dr

FILE: EAC 02 128 52660 Office: VERMONT SERVICE CENTER Date: OCT 28 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 company engaged in the design, development, production, and sales of oriental carpeting. In order to employ the beneficiary in a position that the petitioner designates product development manager, the petitioner 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 on the basis that the petitioner had failed to establish that the proffered position met the requirements of a specialty occupation as set forth in the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A). Evidence of record specifically addressed by the director includes: the Specific Vocational Preparation (SVP) code of 7 that the petitioner cites as designated by the Department of Labor's (DOL) *Dictionary of Occupational Titles* (*DOT*) for the type of position that it is proffering; a copy of the "Advertising, Marketing, Promotions, Public Relations and Sales Manager" section of DOL's *Occupational Outlook Handbook* (*Handbook*); and job vacancy announcements for product development managers that other employers have posted on the Internet.

On appeal, counsel first asserts that the director "makes reference to" the *DOT* and the *Handbook* "but fails to take into account [that] the beneficiary was previously (and currently) the holder of a[n] H-1B under the same title in a company [Dover Rug] that directly parallels the current petitioner." Counsel also states that Dover Rug "had at least 3 other Product Development Managers in the past all of which had bachelor's degrees." Counsel names two of these persons, and he provides copies of Form I-797A notices of approval of H-1B petitions for the beneficiary and one of the aforenamed persons to work at Dover Rug. Counsel contends that the present petition should be approved "[i]n the interest of fairness and justice" because the beneficiary "also previously had an H-1b approved under the same job title, same job duties and same type of company (Dover Rug Co.) in the same area." Counsel's states the second basis of the appeal as follows:

> The service claims that the job postings submitted were not comparable to the proffered position, not of similar size and scope to our organization. The service center apparently claims, then, that there could be no organization on this earth that could be of comparable size, and scope as another. This is clearly erroneous when compared with the beneficiary's previous employer. If the two organizations are not of the same size and scope, with the job titles and duties being the same, then there can be no two organizations (or jobs) ever anywhere that would fit that description. This makes 8 C.F.R. § 214.2(h) useless in determining whether a specialty occupation exists. Is it the services intent here to re-write the law [?]

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 and counsel's brief (styled as a Motion to Reopen) and its attached documents.

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)(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.

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.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title or generalized descriptions of duties. It looks primarily for evidence about the specific duties, and about the nature of the petitioning entity's business operations. 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). Neither the title of the position, abstract descriptions of its duties, nor an employer's self-imposed standards are persuasive in the critical assessment that CIS must make: whether the evidence of record establishes that performance of 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 AAO discounts counsel's reliance upon Dover Rug and its history with regard to previously approved H-1B petitions. 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). The director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petitions filed by Dover Rug. 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. If the nonimmigrant petitions referenced by counsel were approved on substantially the same evidence contained in the current record, the approvals 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. *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). A prior approval does not preclude CIS from denying an extension of an original visa petition based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). 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).

It is also noted that neither counsel nor the petitioner present documentary evidence to support their assertions of equivalency between the proffered position and positions at Dover Rug, between Dover Rug and the petitioner, or between Dover Rug petitions and the petition that is the subject of this proceeding. Simply going on record without supporting documentary evidence is not sufficient for the purpose 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)). Furthermore, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner's response to the RFE includes a job description document that states that the purpose of the proffered position is "to determine where waste and duplication could be eliminated and to make changes in our sales and marketing department in order to run a more cost effective and efficient operations [sic]." The document identifies the following duties and responsibilities:

- Setting weekly sales targets and holding meetings every day to improve the sales, to keep the sales staff motivated and to effectively develop, maintain, and expand a solid base of customers.

- Coordinate sales and marketing staff to focus on the products to continue or to discontinue and the new products to be introduced to yield better productivity and profits.

- Search new domestic and national markets for our products.

- Plan sales and marketing strategies.

- Plan advertising and promotional budgets as well as maintain all advertising and promotion accounts for all locations.

- Training and educating the sales staff about the product and how to improve the quality of service in order to get optimum results.

The evidence of record does not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), which assigns specialty occupation status to those positions for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty related to the position's duties.

Counsel's references to an SVP rating of 7 in the *DOT* and *Online Wage Library* (*OWL*) are not probative. Neither the *DOT* nor the *OWL* is a persuasive source of information regarding whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation. Their SVP ratings are meant to indicate only the total number of years of vocational preparation required for a particular position. An SVP rating does not describe how those years are to be divided among training, formal education, and experience, and it does not specify the particular type of degree, if any, that a position would require.

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of a wide variety of occupations. The AAO concurs with counsel's assessment, reflected in the *Handbook* excerpt submitted into the record, that the proffered position comports with the occupational category Advertising, Marketing, Promotions, Public Relations and Sales Manager as related in the *Handbook*.[1] However, the *Handbook* indicates that a baccalaureate or higher degree or its equivalent in a specific specialty is not normally the minimum requirement for entry into positions in this occupational category. (*See* the subsection "Training, Advancement, and Other Qualifications," at pages 24-25 of the 2004-2005 edition.)

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

The petitioner has not satisfied either of the alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The first alternative prong assigns specialty occupation status to a proffered 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)).

The director correctly determined that the record's advertisements from other firms for product development managers are not probative. The advertisers are: (1) the mortgage-lending unit of a major banking institution, Citigroup; (2) a provider of secure, outsourced e-business infrastructure services involving more than 13,000 servers within over 1,000 networks in 63 countries; (3) a manufacturer of reusable textiles, apparel, surgical, and decorative products that prefers candidates with a bachelor's degree in textile sciences; (4) the Citi credit card unit of Citigroup; and (5) Aegon, a firm whose business is not identified. The evidence of record fails to establish significant similarity between the advertised positions and the one proffered here. The educational requirements stated in the advertisements - which include degrees with unspecified majors as well as degrees in a specific specialty - are not inconsistent with the aforementioned *Handbook* information. Besides the fact that the relevance of the advertisements to the particular position proffered here has not been established, and that the advertisements do not establish a degree requirement in a specialty, the advertisements are too few to establish a position's normal hiring requirements in the industry.

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[1] See also pages 23-26 of the 2004-2005 edition of the *Handbook*, the edition which the AAO consulted in its review of this proceeding.

As already discussed, the *Handbook* does not indicate that the proffered position requires a degree in a specific specialty. There are no letters or affidavits from individuals, firms, or professional associations attesting to the minimum degree requirements for a position such as that proffered here. The job vacancy advertisements in the record from other firms are not probative. They are too few to establish a common-to-the-industry hiring practice. The advertisements also exceed the scope of evidence relevant to this criterion, as the advertisers include employers outside the petitioner's industry. The petitioner has not demonstrated that the proffered position and those advertised are parallel, as required by this criterion, and the businesses in which most of the advertisers engage suggest the opposite: they appear to be materially different from the petitioner's rug business.

The evidence of record does not qualify the proffered position under the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*), which provides a petitioner the opportunity to show that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty. Here the evidence of record does not establish either such uniqueness or complexity. No evidence in the record distinguishes the proffered position from the general range of marketing or sales management positions, for which the *Handbook* indicates that there is no normal minimum requirement for a bachelor's degree in a specific specialty.

The petitioner has not met the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*) for a position for which the employer normally requires at least a baccalaureate degree or its equivalent in a specific specialty. Counsel asserts that the petitioner "primarily hires those with college degrees or their equivalent" (at page 2 of counsel's letter of reply to the RFE), and the petitioner's August 13, 2003 letter attests that, in addition to the beneficiary, two of its employees "have a Bachelor's Degree," and that all the members of its "extended team" of independent contractors in sales "hold a Bachelor's Degree." No supportive documentation has been submitted into the record. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165. Furthermore, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534; *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506. The AAO also notes that the degree historically required by the petitioner must be in a specific specialty whose application is necessary for successful performance of the duties of the position, and cannot simply be an unspecified "bachelor's degree."

The evidence does not satisfy the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(*4*) for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The petitioner has not provided any evidence to establish that the proposed duties are any more specialized and complex than the duties of the general range of marketing or sales manager positions, and neither the *Handbook* nor any other evidence of record establishes a usual association of those positions with at least a bachelor's degree in a specific specialty.

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.

Beyond the decision of the director, it is noted that the petitioner has not established that the beneficiary is qualified to serve in a specialty occupation in accordance with 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D). The educational equivalency evaluation upon which the petitioner relies depends partly upon an assessment of the

beneficiary's work experience. However, there is no evidence that the evaluator is an official authorized by a U.S. college or university to grant college-level credit for training or experience, as required by 8 C.F.R. §§ 214.2(h)(4)(iii)(C)(*1*). For this reason also, the petition must be denied.

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.