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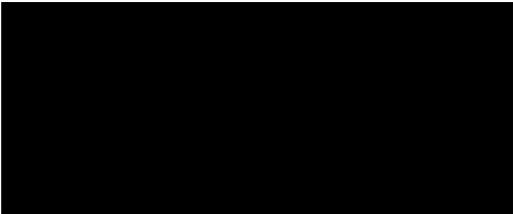


FILE: WAC 03 192 52394 Office: CALIFORNIA SERVICE CENTER Date: FEB 07 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 provides sales, marketing, importation, distribution, and customer service of garden plan, spa and cosmetic products. It seeks to employ the beneficiary as a business analyst/management consultant. 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 submits a brief and additional evidence.

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.

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 a business analyst/management consultant. 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 analyzing business development, financial management, inventory control, market research, and forecasting market expansion; planning market expansion; performing cost efficiency management; determining operating funds and calculating business expenditures to maximize profit margins and meet growth targets set by Martha Tilaar Group's (MTG) management; examining and reviewing balance sheet details, taxation reports, and economic and financial information; predicting market trends; determining the availability and quality of products based on market demand; coordinating business development and planning; assessing the company's operations regarding core product lines related to MTG's manufacturing and marketing competencies; establishing specific management procedures for improving product supply channel systems and to remove idle investment; performing technical support to diagnose, analyze, and solve specific management decision making procedural problems; ensuring use of management information to develop timely, labor saving, and simplified accounting management systems; overseeing an expanding network of distribution and supply chain systems; monitoring sales profits and growth; and performing management review of the company's operations. The petitioner stated that a candidate for the proffered position must possess a bachelor's degree or its equivalent in business administration, management, commerce, finance, accounting, economics, or marketing.

The director determined that the proffered position was not a specialty occupation. According to the director, the petitioner stated that it is in need of strategic market expansion and cost efficient management planning for garden plan, spa, and cosmetic product sales, marketing, import, distribution, quality control, and customer service operations in the United States, and that this is inconsistent with information from the State Board of Equalization which indicated that the petitioner manufactures and wholesales store and office equipment. The director stated that the petitioner failed to submit requested evidence: recent certified tax returns, Forms DE-6, and evidence that it is a viable business. The director stated that the petitioner has not established that it has managers requiring advice from a business analyst/management consultant or that its business is so complex that it would require these services.

On appeal, counsel states that the director denied the H-1B petition on erroneous grounds. Counsel states that the director found that the petitioner's description of its business was not credible because it conflicted with the State Board of Equalization information. According to counsel, this is derogatory information that was unknown to the petitioner and adversely influenced the director's decision. Counsel refers to the regulation at 8 C.F.R. § 103.2(b)(16)(i) to contend that because the director based his decision on derogatory evidence that was unknown to the petitioner, and the director did not advise the petitioner of the derogatory evidence and give the petitioner an opportunity to rebut it, the denial is improper. Counsel states that the director exceeded his authority by requesting proof of business activity. According to counsel, the request for evidence was

unclear and difficult to respond to in that it sought "certified (sic.) tax return on Forms I-129/I-140; i.e.: leases for all years occupied, telephone bills, rent (sic.)" Counsel states that there are no "Forms I-129/I-140 tax return forms," and that the "i.e." suggests that this is merely a list of acceptable forms of proof. Counsel claims that the petitioner is required to submit a labor condition application; it is not required to submit certified tax returns, Forms DE-6, or evidence that would show that it is a viable business. Referring to the submitted letter on appeal, counsel states that it shows that the petitioner was incorporated in 2002, and has been inactive. Counsel states that a startup company's inactivity does not make it ineligible to file an H-1B petition, and that the regulation does not require that a petitioner demonstrate viability. Referring to the two cases, one of which is the court decision of *Young China Daily vs. Chappell*, 742 F. Supp. 552 (N.D. Cal. 1989), counsel states that the court held that the size of a petitioner's business cannot be used to determine whether a petitioner requires the services of a professional. Counsel maintains that the petitioner requires the services of a business analyst/management consultant.

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 concurs with counsel's statement that the regulation at 8 C.F.R. § 103.2(b)(16)(i) indicates that the director erred by not advising the petitioner of the derogatory evidence obtained from the State Board of Equalization and providing the petitioner with an opportunity to rebut it. Nevertheless, the AAO notes that the petitioner failed to submit evidence on appeal that would rebut the information from the State Board of Equalization, which contradicts the nature of the petitioner's business. Given that the petitioner's job description is fashioned around MTG and its product line of garden plan, spa, and cosmetic products, the lack of evidence in the record to rebut the derogatory information is significant. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In this case, there is no evidence in the record that resolves the inconsistency of the petitioner's statement that it provides sales, marketing, importation, distribution, and customer service of garden plan, spa and cosmetic products, and the evidence from the State Board of Equalization indicating that the petitioner manufactures and wholesales store and office equipment.

Counsel states that a startup company's inactivity does not make it ineligible to file an H-1B petition, that the regulations do not require a petitioner to demonstrate viability, that the director exceeded his authority by requesting proof of business activity, and that the request for evidence was unclear and difficult to respond to. Counsel's statement is not convincing. Although the director's request for evidence was somewhat unclear, the director plainly sought federal income tax returns, DE-6 Forms, and a description of the job duties of all the petitioner's employees. The director may verify evidence of employees and income to corroborate assertions made by the petitioner on the Form I-129. Further, the director may request this evidence inasmuch as it is designed to elicit additional information regarding the nature of the proffered position, and to establish that the beneficiary is coming temporarily to the United States to perform duties in a specialty occupation. Section 101(a) of the Act, 8 U.S.C. § 1101 (a)(15)(H)(i)(b).

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.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.

The duties of the proffered position are derived from the petitioner's claim to sell, market, import, distribute, and provide customer service of garden plan, spa, and cosmetic products. As already discussed, the evidence from the State Board of Equalization indicated that the petitioner manufactures and wholesales store and office equipment. Given this material inconsistency, the AAO cannot determine what are the actual duties of the proffered position and whether they actually require 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. Accordingly, the petitioner fails to establish the first criterion at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position

To establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations - the petitioner submitted job postings. Nonetheless, as already stated, the duties of the proffered position are derived from the petitioner's claim to sell, market, import, distribute, and provide customer service of garden plan, spa, and cosmetic products. Because the information from the State Board of Equalization is inconsistent with the petitioner's alleged nature, the AAO cannot determine the actual duties of the proffered position and, hence, whether a specific degree requirement would be common to the petitioner's industry in parallel positions among similar organizations.

Given the un rebutted derogatory information contained in the record, the AAO cannot determine the actual duties of the proffered position and whether the proffered position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty.

There is no 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 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, given the derogatory information contained in the record, the AAO cannot determine the actual duties of the proffered position. Accordingly, the petitioner cannot 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.

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.