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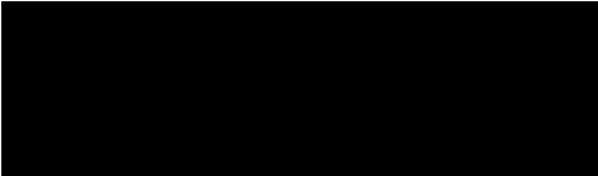
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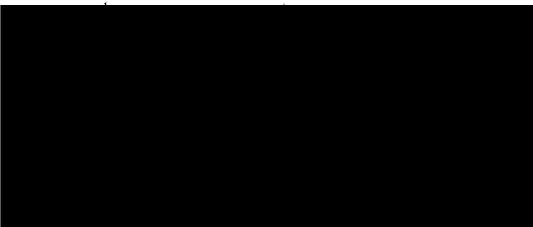


FILE: SRC 01 195 56713 Office: TEXAS SERVICE CENTER Date: JAN 18 2005

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.

be *Michael T. Kelly*
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition, and the petitioner submitted a motion to reopen and reconsider. The director declined to warrant favorable consideration of the motion and forwarded the matter to the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a travel tour operator that seeks to employ the beneficiary as a manager, customer service travel. 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: (1) the proffered position is not a specialty occupation; and (2) the beneficiary is not qualified to perform a specialty occupation. On appeal, counsel submits a brief and additional and previously submitted 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 manager, customer service travel. 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 planning, directing, and coordinating areas such as: (1) customer travel arrangements; (2) responses to customer questions and concerns; (3) communicating with suppliers, travel insurers, airline personnel, lodging providers, and emergency service providers in overseas countries; (4) employee sales to ensure cost calculations, booking, and transportation scheduling are correct; (5) production schedules and employee performance; and (6) training. The petitioner stated that a candidate for the proffered position must possess a bachelor's degree or its equivalent in business administration with an emphasis on marketing.

The director determined that the proffered position was not a specialty occupation. According to the director, the petitioner failed to establish that only a person with a bachelor's degree can perform the proposed position, and that the beneficiary was qualified to work in a specialty occupation.

On appeal, counsel asserts that the proffered position is a specialty occupation, and submits documentary evidence from Professor [REDACTED] the petitioner, and [REDACTED] of Meteor Travel to support this assertion.

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 first 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 in a specific specialty is the normal minimum requirement for entry into the particular position; a specific 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 in a specific specialty. 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 AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations.

The petitioner is a tour operator that arranges group travel to Europe and North America. A review of the *Handbook* discloses that the beneficiary's duties are performed by travel guides and travel agents. The *Handbook* states that travel guides plan, organize, and conduct long distance cruises, tours, and expeditions for individuals or groups, and reports that travel agents provide tourists with information on customs regulations, required papers such as visas, certificates of vaccinations, and passports, and currency exchange rates. According to the *Handbook*, employers do not require travel guides and travel agents to possess a bachelor's degree in a specific specialty. Therefore, 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, manager of customer service travel.

To establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations - counsel refers to documentary evidence from the petitioner, Ms. [REDACTED] of Meteor Travel, and Professor [REDACTED]. The affidavit from the petitioner's president stated that a candidate for the proffered position must possess a bachelor's degree or its equivalent. The affidavit from Ms. [REDACTED] stated:

[I]t is the usual practice in this industry to hire degreed persons to perform the level of those duties described . . . and that the minimum education requirements for individuals who would enter such a position in the group tour industry is that of a baccalaureate degree.

The opinion letter from Professor [REDACTED] stated:

I have observed that a baccalaureate degree is required as a minimum for almost every entry-level position in the current U.S. travel and tourism industry with the exception of only a few small travel agencies primarily selling air tickets. The particular position in SkiEurope, however, requires such complexity and uniqueness that I cannot imagine a person without a baccalaureate degree at least can even consider applying for the position to carry out those duties.

The affidavits and the opinion letter do not indicate that the petitioner's industry requires a bachelor's degree in a specific specialty for the proffered position; they merely point out that a candidate must possess a bachelor's degree. Thus, the petitioner fails 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 that the proffered position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Again, the *Handbook* reveals that the beneficiary's duties are performed by travel guides and travel agents, positions which do not require a bachelor's degree.

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 specific degree or its equivalent for the position. The petitioner stated that the proffered position was created in order to combine in a single position duties that were formerly handled by senior management. The petitioner also stated that its senior managers hold degrees in tourism management, business studies, marketing, and business administration.

This is not persuasive in establishing the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). 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. Again, the *Handbook* discloses that the duties of the proffered position are performed by travel guides and travel agents, and that employers do not require a bachelor's degree for these occupations. Consequently, the petitioner fails to establish 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

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. None of the proposed duties exceed the scope of those performed by travel guides and travel agents, positions that do not require a bachelor's degree. Accordingly, the petitioner cannot establish 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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 AAO notes that the record in this proceeding contains: (1) a labor condition application that the Department of Labor certified on June 25, 2001; and (2) the I-129 petition that CIS received on June 11, 2001. Regulations at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) indicate that before filing a petition for H-1B classification, the petitioner shall obtain a "certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary." Given that the petitioner filed the instant petition before it obtained the requisite certification, the petition shall be denied for this additional reason.

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.

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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.