



U.S. Citizenship
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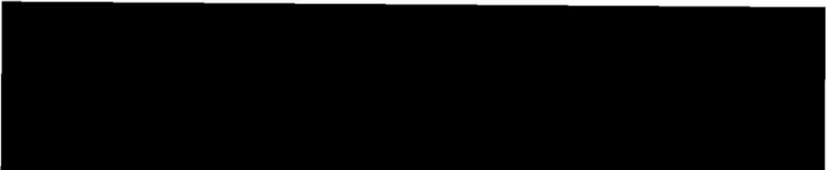


FILE: WAC 04 108 51370 Office: CALIFORNIA SERVICE CENTER Date: JUN 28 2006

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, Chief
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 The director's decision will be withdrawn and the matter remanded for entry of a new decision.

The petitioner is a BMW automobile dealership. In order to employ the beneficiary in a position that the petitioner designates "sales manager (general)," 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 any specialty occupation criterion set forth in the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A). *In part, the director determined that the proffered position is similar to the sales manager occupational category discussed in the "Marketing, Promotions, Public Relations and Sales Manager" section of the 2004-2005 edition of the Department of Labor's (DOL) Occupational Outlook Handbook (Handbook). That information indicates that entry into sales manager positions normally does not require at least a bachelor's degree or the equivalent in a specific specialty.*

On appeal, counsel maintains that the evidence of record establishes that the proffered position is a specialty occupation and that, therefore, the director's decision is incorrect. Counsel's brief includes references to the same section of the *Handbook* cited by the director, information in the DOL's *Dictionary of Occupational Titles (DOT)*, and letters from general sales managers at other automobile dealerships.

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.

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. CIS must examine the ultimate on-the-job employment of the alien to determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). CIS concentrates primarily upon the record’s evidence about specific duties that the beneficiary would perform, the nature of the petitioning entity’s business operations, the specific aspects of those operations that would occupy the beneficiary, and the specialized knowledge that the beneficiary would have to apply. CIS must determine whether the evidence establishes that performance of the specific duties that comprise 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. What the record reveals about the nature of the specific duties and the knowledge required to perform them is decisive. A position’s title is not persuasive, nor are an employer’s hiring standards that exceed the educational level required by the specific duties.

Although not a factor in its decision, the AAO notes that counsel partly depends upon a regulation that is no longer in effect. Counsel's reliance on 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(4) and (5) as quoted in the record is misplaced. Those provisions, dealing with H-1B status based upon professional standing, and the related section of the Act that they implemented, have been superceded by the specialty occupation provisions cited above. Also, counsel's references to the Specific Vocational Preparation (SVP) rating in the *Dictionary of Occupational Titles* are not probative, as that rating is not a statement that the proffered position is an occupation that requires the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

The AAO also notes that it is not bound by the prior CIS approval of an H-1B petition for the beneficiary to serve in a position similar to the one proffered here. In making a determination of statutory eligibility, the AAO 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 approval of the other nonimmigrant petition filed by a different petitioner on behalf of the beneficiary. The AAO adjudicates the proceedings before it on their own merits as demonstrated within the four corners of the records of proceeding, and it 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). 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).

The record's February 9, 2004 Job Availability posting for the proffered position includes this statement of the position's general responsibilities:

- Assumes responsibility for customer retention and profitability in the new and pre-owned vehicle departments. Fulfills responsibilities primarily through effective personnel management, knowledge of market potential, established performance standards, and a keen awareness of each department's data.

The posting listed the following as the position's specific responsibilities:

- Hires, trains, supervises, and monitors the performance of the new and pre-owned vehicle managers and finance managers;
- Participates in the preparation of the annual dealership forecast by projecting unit sales, gross profits, expenses, and operating profits for the new and pre-owned sales departments;
- Meets with sales managers to establish annual and monthly objectives for unit sales, gross profits, expenses, and operating profit;
- Ensures that sales managers understand dealership policies, procedures, and sales systems;
- Works with general manager to determine appropriate day's supply for new and used vehicle[s] and acquires vehicle inventory accordingly;

- Gives constant and timely feedback to everyone in the dealership;
- Establishes standards for displaying, merchandising and maintaining new and used vehicles;
- Ensures [that] procedure for quick disposal of over-age vehicle is followed;
- Meets with general manager to review monthly forecasts, commissions, productivity reports and the profit performance of each department as a whole and each sales person individually;
- Makes recommendations to the general manager regarding short-term and long-term advertising plans, sales promotions, staffing needs, lease promotion, and compensation plans;
- Approves all sales incentives in writing before submitting to the office;
- Addresses customer complaints [to] ensure higher level of customer satisfaction;
- Creates systems that ensure ongoing sales training, including weekly sales meetings;
- Audits all appraisals of trade-in vehicles;
- Reviews and initials all deals before they are posted;
- Facilitates new vehicle pre-delivery with service manager;
- Makes sure facility is secure, well lit, and professional in appearance;
- Attends necessary meetings;
- Actively trains a replacement for his/her position;
- Maintains a professional appearance.

In his July 13, 2004 letter of support, the vice president for recruiting and development of the automotive group that includes the petitioner among its dealerships described the requirements of the proffered position as follows:

In our organization, the General Sales Manager position requires extensive knowledge of the art of selling automobiles but[,] more importantly it requires an individual that can manage and coordinate the activities of a large staff, manage the day[-]to[-]day operations of the department as well as develop their staff through feedback and accountability. The General Sales Manager is also responsible for customer retention and profitability in the new and pre-owned vehicle departments, hiring and training sales managers, finance managers and sales people. These responsibilities are primarily fulfilled through effective business and management skills, relationship building skills, knowledge of market potential, established performance standards, and a keen awareness of each department's data. The General Sales Manager assumes the role of the General Manager in his or her absence and the next logical promotion is to a General Manager position. A General Sales Manager in our organization possesses an average of 12 years in automotive sales management and normally possesses a university degree in Business or a related field and/or related progressive experience. [The beneficiary's] newest addition to his management staff is a recent MBA graduate from Pepperdine University.

The AAO finds that, as presented in this particular record of proceeding, the combination of (1) the details about the proposed duties in the context of the petitioner's business operations and (2) the specific content of the letters from the management level at six other dealerships attesting to the educational requirements for the type of position proffered by the petitioner satisfies the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which recognizes specialty occupation status in positions with 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 petition may not be approved however, as the evidence of record does not establish that the beneficiary is qualified to perform services in the proffered specialty-occupation position in accordance with the regulations at 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D).

The documentary evidence of record about the beneficiary's qualifications consists of: (1) a two-page letter, dated July 16, 2001, from the sales director of a Ford automobile dealership in England that summarizes the beneficiary's 12 years of work for that employer from June, 1989 to the date of the letter; (2) an undated letter, written by a person who worked as the Financial Comptroller for a manufacturer of "medicated animal feed premixes predominantly for the pig and poultry sectors," that summarizes the beneficiaries' work there as a Medicines Plants Supervisor "between May 1986 and June 1989"; (3) a one-page evaluation report, dated July 30, 2001, from the [REDACTED] opining that, as a result of the beneficiary's "employment experiences from 1978 to 1989 and March of 1989 to the present (approximately 23 1/3 years), including 12+ years as a general manager," he has "the educational background the equivalent of an individual with a bachelor's degree in business management from an accredited college or university in the United States"; (4) a three-page letter, dated September 10, 2001, from a professor of Management and Information Systems (MIS) at a U.S. university who opines that the beneficiary's "professional work experience is equivalent to a U.S. Bachelor's degree in Business with specialization in Management" and that the beneficiary "meets the requirements for the position of Sales Manager for [REDACTED]. [a car dealership that is not the petitioner here]; (5) a second FIS evaluation report, this one dated September 12, 2001, that opines that, based upon the aforementioned letter from the MIS professor, the beneficiary "has an educational background the equivalent of a U.S. bachelor's degree in business with a specialization in management" and that the beneficiary therefore "has met the requirements for the Position of Sales Manager for [REDACTED] [a car dealership that is not the petitioner here]"; (6) a one-page, one-paragraph letter, dated January 22, 2003, from an automobile dealership in the United States that states that the beneficiary had been serving as its general manager from April 23, 2002"; and (7) eight certificates of training.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and
(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The degree referenced by section 214(i)(1)(B) of the Act means one in a specific specialty that is characterized by a body of highly specialized knowledge that must be theoretically and practically applied in performing the duties of the proffered position. In the context of this particular proceeding, the degree must be at least a bachelor's degree in marketing or a related specialty.

In implementing 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must meet one of the following criteria in order to qualify to perform services in a specialty occupation:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Only the fourth of the above criteria is relevant to the evidence so far presented.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating the beneficiary's credentials to a United States baccalaureate or higher degree under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) would require one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;¹
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on

¹ CIS will not accept a faculty member's opinion as to the college-credit equivalent of a particular person's work experience or training, unless authoritative, independent evidence from the official's college or university, such as a letter from the appropriate dean or provost, establishes that the official is authorized to grant academic credit for that institution, in the pertinent specialty, on the basis of training or work experience.

Noncollegiate Sponsored Instruction (PONSI);

- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;²
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that [a] the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that [b] the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. . .

The second and fourth criteria are not relevant: there is no evidence of college-level equivalency examinations, special credit programs, or certification or registration from a nationally-recognized professional association or society in the pertinent specialty.

The first and third criteria above preclude CIS from accepting the evaluations of the beneficiary's experience presented by the MIS professor and FIS. This is because (1) the evidence does not establish that any of these evaluators is, in the words of the first criterion, "an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience"; and (2), in accordance with the express language of the third criterion, CIS recognizes only so much of a credential evaluation service's opinion that is based upon a beneficiary's education alone.

It should also be noted that the evidence of record does not substantiate the MIS professor's claim to be "considered a recognized authority according to INS [now CIS] regulations." The professor has not documented that he is a recognized authority by specifying: (1) his qualifications as an expert on the awarding of U.S. business degrees on the basis of work experience gained outside the United States; (2) his experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. *See* 8 C.F.R. § 214.2(h)(4)(ii).

This leads to the question of the extent to which the evidence of record about the beneficiary's training and work experience may qualify for U.S. college-level credit by application of the provision at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) for a CIS evaluation of the evidence of record regarding (a) the beneficiary's education, specialized training, and/or work experience and (b) recognition of expertise that has been extended to the beneficiary. According to the express terms of 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), to satisfy

² The petitioner should note that, in accordance with this provision, the AAO will accept a credentials evaluation service's evaluation of *education only*, not experience.

this criterion, a petitioner must demonstrate three years of specialized training and/or work experience for each year of college-level training the alien lacks. This provision states:

[I]t must be clearly demonstrated [1] that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; [2] that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and [3] that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation³;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The documentary evidence in the record about the beneficiary's training and work experience are too generalized to clearly demonstrate that his training and/or work experience (1) involved the theoretical and practical application of specialized marketing knowledge, (2) was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation, and (3) led to the necessary recognition of expertise in the specialty.

As the director did not address the issue of beneficiary qualifications, the petition will be remanded in order for the director to render a decision on the issue. He may afford the petitioner an opportunity to provide evidence pertinent to the issue of whether the beneficiary is qualified to perform services in the specialty occupation in accordance with the regulations at 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D), and any other evidence the director may deem necessary. The director shall then render a new decision based on the

³ *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

evidence of record as it relates to the regulatory requirements for eligibility. If the new decision is adverse to the petitioner, the director shall certify it to the AAO for review.

As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision of September 24, 2004 is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.