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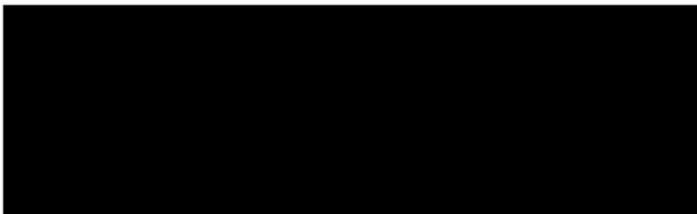
FILE: LIN 04 019 50598 Office: NEBRASKA SERVICE CENTER Date: MAR 22 2006

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
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 retails food and liquor. It seeks to employ the beneficiary as an administrative officer. 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, finding that the proposed position did not qualify as a specialty occupation, and that the beneficiary is not qualified to perform 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.

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) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

Evidence of the beneficiary's proposed duties as an administrative officer includes: the Form I-129; the attachments accompanying the Form I-129; the petitioner's support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the proposed duties involve reviewing financial and operating results to determine where the store stands relative to budgeted sales, expenses, and payroll; identifying opportunities to increase sales and profit; working with direct reports to implement merchandising plans; conducting formal "store walks" at scheduled times; working with store associates to identify the root causes of issues and inefficiencies and ensuring that direct reports develop sound plans for resolution; assessing staffing needs; interviewing and selecting staff and ensuring retention; promoting morale and coaching direct reports in people management practices that minimize associate turnover; training and developing staff to review financial and operations reports to improve results; developing talent for broad and long-term needs; and focusing on self-development and staff development activities. For customer service, the duties involve ensuring that customers are welcomed in the store, experience good store conditions, find items, and checkout in a reasonable time frame. To protect assets, the duties entail monitoring shrink and ensuring that monies are accounted for, ensuring that order and security controls are in place, conducting enforcement activities when violations occur, and ensuring proper inventory preparation and accurate inventory count. For the computer system, the beneficiary will maintain the POS computer system, perform system backups, and liaise with the supplier. The beneficiary will visit the stores of competitors. Lastly, the beneficiary will supervise the cashiers, the chief buyer, the accountant, and the sales assistants. For the proposed position, the petitioner seeks to employ the beneficiary, who has the educational equivalent of a bachelor's degree in business administration.

In the denial letter, the director cited *Matter of M--*, 4 I&N Dec. 532 (A.G. 1952; BIA 1952), and stated that CIS is not required to approve a petition where eligibility has not been demonstrated, merely because of prior approvals, which may have been erroneous. The director stated that the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*) reveals that the proposed duties reflect those of a sales worker supervisor, and that the *Handbook* indicates that that occupation does not require a bachelor's degree in a specific specialty. The director discussed discrepancies in the submitted evidence relating to the beneficiary's prior work experience, and concluded that the beneficiary is unqualified for a specialty occupation.

On appeal, counsel asserts that the proposed position qualifies as a specialty occupation as CIS previously approved a petition filed on behalf of the beneficiary by the petitioner. Counsel asserts that the beneficiary was employed with [REDACTED] for at least two years, and was with [REDACTED] Supermarket for 10 years. Counsel asserts that the proposed duties such as reviewing and analyzing management methods, devising procedures to improve workflow, implementing cost reduction, and creating new systems and revising established procedures are complex and discretionary in nature, exceeding those of a sales worker supervisor. Counsel emphasizes that the beneficiary will supervise employees, and that the petitioner grosses over \$4 million in sales. It is fundamentally unfair, counsel states, for CIS to revoke the beneficiary's status if there is no clear evidence of ineligibility.

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 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.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

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.

In the response to the request for evidence, the petitioner groups the proposed duties into several distinct areas: planning, store review, people management and development, customer service, protecting assets, computer services, and other activities. Based on evidence in the record, the AAO concurs with the director's finding that the beneficiary's proposed duties are encompassed within the description of a sales worker supervisor. The *Handbook*, a resource that the AAO routinely consults about the duties and educational requirements of particular occupations, portrays a sales supervisor as follows:

Sales worker supervisors oversee the work of sales and related workers, such as retail salespersons; cashiers; customer service representatives; stock clerks and order fillers; sales engineers; and sales representatives, wholesale and manufacturing. Sales worker supervisors are responsible for interviewing, hiring, and training employees, as well as for preparing work schedules and assigning workers to specific duties. . . .

In retail establishments, sales worker supervisors ensure that customers receive satisfactory service and quality goods. They also answer customers' inquiries, deal with complaints, and sometimes handle purchasing, budgeting, and accounting. Their responsibilities vary with the size and type of establishment. . . .

Sales worker supervisors in large retail establishments, often referred to as department managers, provide day-to-day oversight of individual departments, such as shoes, cosmetics, or housewares in large department stores; produce and meat in grocery stores; and sales in automotive dealerships. These workers establish and implement policies, goals, objectives, and procedures for their specific departments; coordinate activities with other department

heads; and strive for smooth operations within their departments. They supervise employees who price and ticket goods and place them on display; clean and organize shelves, displays, and inventories in stockrooms; and inspect merchandise to ensure that nothing is outdated. Sales worker supervisors also review inventory and sales records, develop merchandising techniques, and coordinate sales promotions. In addition, they may greet and assist customers and promote sales and good public relations.

...

In small or independent companies and retail stores, sales worker supervisors not only directly supervise sales associates, but also are responsible for the operation of the entire company or store. Some are self-employed business or store owners.

According to the petitioner, the beneficiary will supervise seven employees, which are comprised of cashiers, a chief buyer, an accountant, and sales assistants. This is similar to a sales worker supervisor who oversees the work of sales and related workers, such as retail salespersons; cashiers; customer service representatives; stock clerks and order fillers; sales engineers; and sales representatives. As described by the petitioner, the beneficiary will basically handle all store operations: overseeing and reviewing financial and operations matters, ensuring customer satisfaction, managing personnel, and maintaining the computer systems. A sales worker supervisor performs similar duties. A sales worker supervisor is described in the *Handbook* as being “responsible for interviewing, hiring, and training employees”; as ensuring “that customers receive satisfactory service”; as handling “purchasing, budgeting, and accounting”; as establishing and implementing “policies, goals, objectives, and procedures”; as reviewing “inventory and sales records”; as developing “merchandising techniques”; and as greeting and assisting customers and promoting sales. According to the *Handbook*, a sales worker supervisor in a small retail store (such as the petitioner) directly supervises sales associates and is responsible for the operation of the entire company or store. Based on the *Handbook’s* information, the proposed duties parallel those of a sales worker supervisor. The AAO does not agree with counsel’s assertion that the level of income generated by the petitioner would affect whether the proposed duties correspond to those of a sales worker supervisor.

The *Handbook* conveys that employers do not require a baccalaureate degree in a specific specialty for a sales worker supervisor. The *Handbook* states:

Sales worker supervisors usually acquire knowledge of management principles and practices—an essential requirement for a supervisory or managerial position in retail trade—through work experience. Many supervisors begin their careers on the sales floor as salespersons, cashiers, or customer service representatives. In these positions, they learn merchandising, customer service, and the basic policies and procedures of the company.

The educational backgrounds of sales worker supervisors vary widely. Regardless of the education they receive, recommended courses include accounting, marketing, management, and sales, as well as psychology, sociology, and communication. Supervisors also must be computer literate because almost all cash registers, inventory control systems, and sales quotes and contracts are computerized.

Supervisors who have postsecondary education often hold associate or bachelor's degrees in liberal arts, social sciences, business, or management. . . .

Based on the evidence in the record, and for the reasons discussed above, the petitioner fails to satisfy the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1): that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position.

The petitioner submitted no evidence to establish the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), that a specific degree requirement is common to the industry in parallel positions among similar organizations.

The second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) requires that the petitioner show that its particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. As discussed under 8 C.F.R. § 214.2(h)(iii)(A)(1), based on the evidence submitted, the proposed duties reflect of a sales worker supervisor, which is a position that does not require a baccalaureate degree in a specific specialty. Consequently, the petitioner fails to establish the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

There is no evidence demonstrating that the petitioner normally requires a degree or its equivalent for the position, the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 them is usually associated with the attainment of a baccalaureate or higher degree. As conveyed in the discussion of 8 C.F.R. § 214.2(h)(iii)(A)(1), the evidence does not support counsel's assertion that the proposed position requires a baccalaureate degree in a specific specialty. Therefore, the petitioner fails to establish this last criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel noted that CIS approved another petition that had been previously filed by the petitioner on behalf of the beneficiary. The director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. If the previous nonimmigrant petition was approved based on the same assertions that are contained in the current record, the approval 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)

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 the nonimmigrant petition on behalf of the 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 prior approval does not preclude CIS from denying an extension of the original visa petition based on a reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

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.