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U.S. Citizenship
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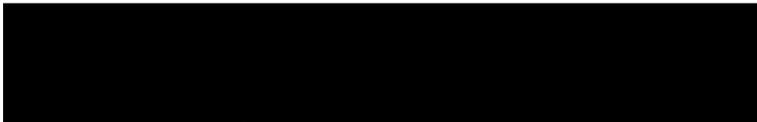


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APR 02 2007

FILE: LIN 05 135 52141 Office: NEBRASKA SERVICE CENTER Date:

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:

SELF-REPRESENTED

INSTRUCTIONS:

PUBLIC COPY

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, Nebraska 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 distributes agricultural twine products, employs two personnel, and generates approximately \$100,000 per year in gross annual income. It seeks to employ the beneficiary as an assistant director. Accordingly, 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).

On October 7, 2005, the director denied the petition determining that the record did not establish that the proffered position is a specialty occupation. On appeal, the petitioner seeks to address the pertinent issues and clarify matters. The issue in this matter is whether the petitioner has established that the proffered position is a specialty occupation.

The record contains: (1) the Form I-129 filed March 31, 2005 and supporting documentation; (2) the director's May 5, 2005 request for evidence (RFE); (3) the petitioner's July 23, 2005 response to the director's RFE and documentation; (4) the director's October 7, 2005 denial decision; and, (5) the Form I-290B and the petitioner's letter in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which 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 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.

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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The petitioner seeks the beneficiary's services to assist the director. In a March 18, 2005 letter appended to the Form I-129 petition, the petitioner stated:

This position is responsible for assisting the company owner/director in all aspects of company operations. These responsibilities will encompass a wide range of skills and follow patterns determined by the seasonal nature of the business.

Essential Functions

1. Daily discussions with the owner, to determine priorities for immediate attention.
2. Long term training and skill development in industry process.
3. Long term training and skill development in identification of equipment requirements, transportation regulations, and delivery processing.
4. Bill of lading and appropriate billing and accounts receivable processing.
5. Loading and delivery of goods to customers.
6. Sales relationships with new and existing customers.
7. Marketing and development for business expansion.
8. Bi-annual analysis of company efficiency and cost effectiveness of company operations.
9. Bi-annual analysis of inventory control and organizational efficiency.
10. Annual evaluation of computer hardware and software.
11. Leadership and oversight responsibilities designated by the director in his absence.
12. On call as assigned.
13. Other duties as assigned.

In a July 23, 2005 response to the director's RFE, the petitioner stated that the proffered position required the beneficiary to function as "director of operations" in the absence of the owner operator. The petitioner indicated that the specific skills included:

Time management and control for maintaining profit margin in a small and competitive industry;

Quarterly and annual market and sales analyses;

Corporate analyses of trends and market share changes;

Communication, management, and industry specific market analyses for use by the owner operator in sales plans and future marketing strategies based on trend change; and

Market analysis for costs, profit margin projections, and marketing strategies.

The petitioner stated that the beneficiary would also be responsible for design, creation and troubleshooting of all computer related issues including web page design, implementation and maintenance, designing and writing inventory control programs specific to the company needs, and design implementation and maintenance of voice and data networks. The petitioner allocated the beneficiary's time as follows:

Computer program design, implementation, and management – 60 percent;

Industry analysis, reports, planning and strategy – 20 percent; and

Direct sales and marketing, phone sales and contacts, order discussion, inventory control, and distribution – 20 percent.

On October 7, 2005, the director denied the petition determining that the description of duties suggested that the proffered position was for a general manager. The director found that the Department of Labor's *Occupational Outlook Handbook (Handbook)* did not report a bachelor's degree in a specialized area as a minimum requirement to perform the duties of such a position. The director also noted that the petitioner had changed the description of the position in response to the May 5, 2005 RFE to include more duties (60 percent of time) allocated to computer related duties. The director found that as this was a significant change to the proffered position, those duties could not be considered. The director concluded that the petitioner had not established that it normally required a bachelor's degree in a specialized area for the position, or that such a specialized degree requirement is common to the industry in parallel position among similar organizations, or that a specialized degree is normally the minimum requirement to perform the duties of the position, or that the duties are so complex that the position requires a bachelor's degree in a specialized area.

On appeal, the petitioner notes its opinion that the position meets all four of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), indicates that the company requires an individual with diversified skills to wear many hats with the greatest emphasis on management and computer skills for the ongoing operation and future expansion of the business, and states that it is very important that the position be filled by a person with a degree similar to the director/owner, which is in civil engineering. The petitioner includes a revised description of the beneficiary's duties, including the computer related matters under the previous heading of "other duties as assigned."

The petitioner has not provided sufficient evidence to establish that the proffered position is a specialty occupation. To determine whether a particular job qualifies as a specialty occupation, CIS does not rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. 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 nor 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. In this matter, the petitioner's description of the proffered position does not describe a position that is a specialty occupation.

The petitioner's initial description of the beneficiary's proposed duties indicated the beneficiary would have "daily discussions with the owner" and would be involved in "long term training." It is not possible to ascertain from these general statements what duties the beneficiary will be performing. It is not possible to determine if the beneficiary will be in training or will be training others. These statements are too vague to demonstrate that the duties associated with these "tasks" will require the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree in a specific specialty. The petitioner indicates that the beneficiary's essential functions will include processing bills of lading and accounts receivable, loading and delivering goods to customers, and engaging in sales relationships with customers, duties that are comparable to an administrative clerk and delivery person, occupations that do not require a bachelor's or higher degree in a specific specialty.

The petitioner also indicates that the beneficiary will participate in marketing and development for business expansion but does not provide documentary evidence of its attempt to expand its business or identify the beneficiary's tasks that would be associated with marketing or business expansion. Going on record without supporting documentary evidence is not sufficient for purposes 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)). The petitioner's indication that the beneficiary will assist in bi-annual analysis of company efficiency, cost effectiveness, inventory control, and organizational efficiency is such a broad statement that CIS is precluded from determining what skills and knowledge would be required to perform the tasks associated with the "analysis." Likewise, evaluating computer hardware and software and providing leadership in the absence of the director encompass a broad range of tasks that may or may not require a bachelor's degree or higher and may or may not require a bachelor's degree in a specific discipline as required for this visa classification.

The director properly requested documentation and clarification of the petitioner's vague description of the duties of the proffered position. The petitioner again provided a generic overview of the position without the detail necessary to determine the beneficiary's daily tasks. The AAO declines to speculate on the daily tasks the beneficiary will perform in connection with analyzing sales, trends, market changes, costs, and projections and whether the actual duties of the position comprise the duties of a market researcher or some other occupation. Again, without a more definitive description, the AAO is precluded from determining whether the proffered position requires the successful candidate to attain the specialized knowledge associated with a baccalaureate degree or higher in a specific discipline.

The petitioner's indication that the beneficiary would also be involved in web page design, implementation and maintenance, designing and writing inventory control programs, and design, implementation and maintenance of voice and data networks provides more information regarding the beneficiary's computer related tasks. However, the detail provided relates to designing programs and varies from the petitioner's initial general statement that the beneficiary would evaluate computer hardware and software. Even considering the petitioner's information provided in response to the RFE relating to computer tasks, the AAO

cannot determine that the proffered position is a position that requires a bachelor's degree or higher. The Department of Labor's *Occupational Outlook Handbook (Handbook)* reports that there are many paths available for programmers including 2-year degrees or certificates.

The record in this matter does not provide adequate information regarding the actual daily tasks of the proffered position. The AAO cannot find specific information in the record that demonstrates that the proffered position requires the theoretical and practical application of a body of highly specialized knowledge and the 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.

Specifically, the AAO finds that the petitioner has not established that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the proffered position as required by 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). Without providing a description of the specific duties included in the proffered position that are directly related to the petitioner's business the AAO is left with general information about occupations such as office clerk, computer programmer, market researcher, and operations manager. The record does not contain language or documentary evidence connecting the nonspecific duties of those occupations to the petitioner's business. Without such information, the AAO is unable to determine the tasks to be performed by the beneficiary on a day-to-day basis and, therefore, whether the proffered position's duties are of sufficient complexity to require the minimum of a baccalaureate degree or its equivalent in a directly related academic specialty. As the record in the instant matter offers no meaningful description of the proffered position's responsibilities, the petitioner has not established that the duties of the position actually incorporate the duties of these various occupations. Accordingly, the petitioner has failed to establish the proffered position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

To establish the proffered position as a specialty occupation under the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), the petitioner must prove that a specific degree requirement is common to its industry in parallel positions among similar organizations or, alternately, that the proffered position is so complex or unique that it can be performed only by an individual with a degree. A review of the evidence of record finds it insufficient to establish the proposed duties as a position that is identifiable with an industry-wide educational standard, or distinguishable, by its unique nature or complexity, from similar but non-degree-requiring positions. Without a meaningful job description, the petitioner may not establish the position's duties as parallel to any degreed positions within similar organizations in its industry or distinguish the position as more complex or unique than similar, but non-degreed, employment, as required by alternate prongs of the second criterion.

The record also does not demonstrate that the petitioner has a history of recruiting and hiring degreed candidates for the proffered position. To determine whether the petitioner has fulfilled the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(3), the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. In this matter, the petitioner indicates that it has not employed anyone in the proffered position prior to offering the position to the beneficiary. The AAO acknowledges the petitioner's opinion that it is important to the company owner/director to employ a person with a degree that is similar to his, a civil engineering degree, but a petitioner's desire does not establish the position as a specialty occupation. If CIS was limited solely to reviewing a petitioner's self-imposed

requirements, than any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. The petitioner has not provided evidence to establish the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(3).

The AAO now turns to the fourth criterion and whether the petitioner has established that the duties of the proffered position are sufficiently specialized and complex to require knowledge usually associated with the attainment of a baccalaureate degree in a specific discipline. Again, the record in this matter does not include sufficient information regarding the duties of the proffered position and how those duties relate to the petitioner's business to demonstrate that the tasks associated with the proffered position require the application of specialized or complex knowledge associated with the attainment of a baccalaureate degree or higher degree. In this matter, the petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4).

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.