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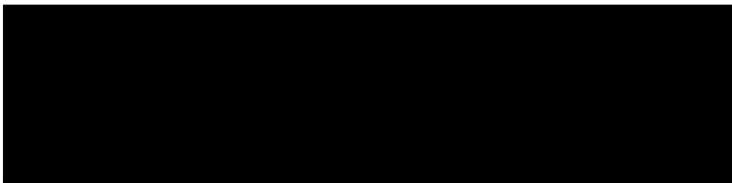
MAR 02 2007

FILE: LIN 05 152 52574 Office: NEBRASKA SERVICE CENTER Date:

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 appeal will be dismissed. The petition will be denied.

The petitioner is a five-employee community pharmacy that seeks to employ the beneficiary as a part-time Pharmacy Services Director, and endeavors to classify her 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 based on a determination that the proffered position was not 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.

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 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.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply 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.

The record of proceeding before the AAO contains: (1) Form I-129, Petition for a Nonimmigrant Worker (Form I-129) and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's denial letter; and (5) Form I-290B, Notice of Appeal to the AAO 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 part-time, pharmacy services director. Evidence of the beneficiary's duties includes: the Form I-129 and letter of support, and the petitioner's response to the director's RFE. According to the initial letter of support, the beneficiary would perform the following proffered position duties:

- Plan and implement pharmacy procedures in accordance with policies and legal requirements (10 hours per week);
- Confer with various professionals to change, modify and update pharmacy computer system (10 hours per week);
- Prepare pharmacy budget and meet with various representatives from the pharmaceutical companies and insurance companies to determine which medicine and insurance should be accepted at the pharmacy (5 hours per week);
- Report to the pharmacy president about daily operations and issues, and prepare, submit and discuss proposals and other services being performed at the pharmacy (5 hours per week).

In response to the director's request for further information regarding the proffered position's duties, the petitioner stated that the beneficiary would perform the following duties:

- Develop, track, and monitor pharmacist's compliance with quality, service, and production standards;

- Ensure pharmacy is in compliance with all applicable local, state, federal, and accrediting rules and regulations;
- Work with the President of the pharmacy to analyze operations and efficiency of the pharmacy;
- Maintain an annual budget;
- Direct implementation of local pharmacy programs and initiatives to achieve objectives;
- Provide ongoing effective communication to health plans regarding local pharmacy programs and initiatives;
- Communicate and coordinate with main customers regarding pharmacy programs

The petitioner states that the proffered position requires a baccalaureate degree in pharmaceuticals or a related field, and that the beneficiary has the equivalent of a U.S. bachelor's degree in pharmaceuticals and is thus qualified to perform the proffered position duties.

The director determined that the proffered position was not a specialty occupation. Referring to the U.S. Department of Labor's *Occupational Outlook Handbook* (the *Handbook*), the director found that the described proffered position was similar to that of a general or operations manager - positions that do not require a bachelor's degree in a specific specialty. The director found further that job announcements submitted by the petitioner failed to establish that a bachelor's degree in a particular field is the industry-wide standard for the proffered position.

To make its determination whether the employment described qualifies as a specialty occupation, the AAO turns first to the criteria set forth 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; and 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 considered by the AAO when determining these criteria include: whether the *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, 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)).

Top Executive positions are discussed on pages 67-70 of the *Handbook* (2006-2007 Edition). Specifically, the *Handbook* provides on page 68, that:

General and operations managers plan, direct, or coordinate the operations of companies or public and private sector organizations. Their duties include formulating policies, managing daily operations, and planning the use of materials and human resources, but are too diverse and general in nature to be classified in any one area of management or administration, such as personnel, purchasing, or administrative services. . . .

.....
The formal education and experience of top executives vary as widely as the nature of their responsibilities. Many top executives have a bachelor's or higher degree in business administration or liberal arts.

The *Handbook* states further on page 69 that:

Many top executive positions are filled from within the organization by promoting experienced, lower-level managers when an opening occurs.

The petitioner asserts that it would not be feasible to hire an individual without expertise in the field of pharmacy for the proffered pharmacy services director position, and that without specialized knowledge and expertise in the field of pharmacy, the beneficiary would not be able to understand the intricacies involved in the position. Counsel asserts further that the *Handbook* should not be used as an exclusive guide for determining job-related educational requirements, and counsel indicates that the specialized knowledge in pharmacy distinguishes the proffered position from a general or operations manager position.

The AAO agrees that it must fully consider a petitioner's evidence in order to determine whether the record establishes that the proffered position is a specialty occupation. The AAO appropriately reviews the evidence about the occupation in light of the *Handbook*, which serves as an authoritative, reliable and detailed source of information about the duties and educational requirements of a particular occupation.

The AAO finds that the petitioner has failed to establish that specialized knowledge and expertise in the field of pharmacy is required to perform the duties of the proffered position. It is noted that the beneficiary does not possess a pharmacist license in the state of Michigan. It is further noted that the proffered position's duties do not include specialized monitoring or management of the petitioner's pharmaceutical quality and service. Rather the proffered position's duties involve general monitoring and management of the petitioner's business operations. The duties are thus analogous to those of a general or operational manager position, as set forth in the *Handbook*. The *Handbook* reflects that educational requirements for general or operational management positions vary widely, from a broad range of bachelor's degrees to, in some cases, no degree requirement at all. Accordingly, the petitioner has failed to establish that a baccalaureate or higher degree, or its equivalent in a specific specialty is the normal minimum requirement for entry into the proffered position, as required by 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

To establish its proffered position as a specialty occupation under the second criterion, the petitioner must establish that a specific degree requirement is common to the industry in parallel positions among similar organizations, or that the proffered position is so complex or unique that it can be performed only by an individual with a degree in the specific specialty.

The petitioner has submitted several job advertisements for director of pharmacy services related positions, to establish its degree requirement as an industry norm,. However, none of the job announcements come from businesses that are similar to the petitioner, a retail, five-employee, community pharmacy. To the contrary,

the advertising companies appear to be companies involved in large-scale monitoring and management of pharmacies and programs. Furthermore, the majority of the announcements contain a state pharmacy license requirement in order to perform the positions' duties. The petitioner has thus failed to satisfy the second criterion's condition that a petitioner establish its degree requirement is common in parallel positions among similar organizations. The petitioner additionally failed to establish that the proffered position is so complex or unique that it can be performed only by an individual with a degree in the specific specialty. As previously discussed, the record demonstrates that the proffered position's duties involve monitoring and management of the petitioner's general business operations - duties analogous to those of a general or operational manager position. The *Handbook* reflects that educational requirements for general or operational management positions vary widely, from a broad range of bachelor's degrees to, in some cases, no degree requirement at all.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; and 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. To determine a petitioner's ability to meet the third criterion, CIS often reviews the petitioner's employment history, including the names and dates of employment of those employees with degrees who previously held the position, as well as the petitioner's hiring practices with regard to similar positions. In the present matter, the petitioner asserts, through counsel, that although the proffered position is new at the petitioner's location, one of the petitioner's affiliate pharmacies (Liberty Discount Drugs Inc.) previously hired a pharmacy services director who was approved for an H-1B nonimmigrant visa.

The petitioner failed to establish that a pharmacy services director position previously existed as a separate position within the petitioner's company, as required by 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). The petitioner has thus failed to establish that its normal hiring practice is to require the minimum of a baccalaureate degree for the proffered position. Furthermore, it is noted that the record contains no information regarding the petitioner's affiliate company, or the occupational basis of the previous H-1B approval referred to by counsel. The record additionally does not contain the supporting evidence submitted to the service center in the prior case. Accordingly, the AAO is unable to determine whether the position offered in the prior case was similar to the proffered position in the present matter. The AAO notes that each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is thus limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the previous case was similar to the proffered position or was approved in error, no such determination may be made without review of the original record in its entirety. It is noted, however, that if the prior petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, the approval of the prior petitions would have been erroneous.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires the petitioner to establish that the nature of its position's 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 previously discussed, the AAO does not find that the duties described by the petitioner reflect the need for a higher degree of knowledge or skill than would normally be required of a general or operational manager. The petitioner has not submitted

supporting information from the state of Michigan to establish that the duties of a pharmacy services manager require a baccalaureate degree in pharmacy. The record does not otherwise establish that such a degree is required to perform the duties of the position. The petitioner has therefore failed to establish that the proffered position is a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The burden of proof in these proceedings rests solely with the petitioner. *See* Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained its burden in the present matter. The appeal will therefore be dismissed and the petition will be denied.

ORDER: The appeal is dismissed. The petition is denied.