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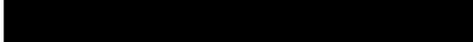
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FILE: SRC 06 093 51366 Office: TEXAS SERVICE CENTER Date: **SEP 07 2007**

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas 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 an optical retail store with three employees and a claimed gross annual income of \$424,000. It seeks to employ the beneficiary as a controller. 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 August 18, 2006, the director denied the petition determining that the record did not establish that the beneficiary is qualified to perform services in a specialty occupation. On appeal, counsel for the petitioner asserts that the beneficiary has acquired a bachelor's degree through a combination of education, specialized training and/or work experience in areas related to the specialty field of controller.

The record includes: (1) the Form I-129 filed January 30, 2006 and supporting documents; (2) the director's March 27, 2006 request for further evidence (RFE); (3) counsel for the petitioner's June 16, 2006 response to the director's RFE; (4) the director's August 18, 2006 denial decision; and (5) the Form I-290B and counsel's brief in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

The issue in this matter is whether the petitioner has established that the beneficiary is qualified to perform the duties of a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation. 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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

- (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.

In a December 13, 2005 letter appended to the petition, the petitioner stated:

In the position of Controller, [the beneficiary], will be responsible for directing the financial activities of [the] company and formulate, and implement plans and strategies to deal with economic, business, marketing and financial issues. He will prepare and direct the preparation of, reports, which summarize and forecast company business activity and financial position in areas of income, expenses, and earnings, based on past, present, and expected operations. He will establish, or recommend to management, major economic objectives and policies for the company. He will direct preparation of budgets and prepare reports required by regulatory agencies. He will advise management about property and liability insurance coverage needed.

The petitioner provided a June 13, 2002 evaluation of the beneficiary's previous work experience authored by [REDACTED] of the International Foundation of Science and Education. [REDACTED] referenced the beneficiary's prior employment positions as listed in an attached letter from the beneficiary's previous foreign employer and opined: the beneficiary's "professional skills over the last twelve years were strengthened by undertaking projects that progressively required greater skill and responsibility. He started his career as an Assistant Manager. He was then promoted to Marketing Manager and, later, to Business Manager." Dr. [REDACTED] concluded, without analysis, that the beneficiary's past work experience required the theoretical and practical application of specialized knowledge required by a business manager and that his work experience was gained while working with individuals who already possess university degrees, such as the beneficiary's mentor who is a graduate in business administration. [REDACTED] repeated the description of duties provided by the beneficiary's foreign employer and opined that the duties resulted in knowledge of a broad spectrum of areas pertaining to accounting, tax law, and business systems which are typically studied in undergraduate business programs offered by institutions of higher learning. [REDACTED] further concluded, based on the beneficiary's work experience, that the beneficiary had the equivalent of a bachelor's degree in business with a concentration in marketing.

The record also contains a May 7, 2002 letter from the beneficiary's previous foreign employer, Optica Cristal, which indicates the beneficiary worked for the company from March 1990 to August 2001. The executive writing on behalf of the beneficiary's previous foreign employer also indicated that the beneficiary as a marketing manager and business manager:

Examined and analyzed accounting records to, determine financial status of the company;  
reviewed [data] regarding material assets, net worth, liabilities, capital stock, surplus, income

and expenditures; prepared reports for management concerning scope of audit, financial conditions found and source application of funds, and handled all marketing decisions regarding product pricing, marketing media and publicity programs.

In a June 16, 2006 response to the director's RFE, counsel for the petitioner referenced a second evaluation prepared by Silny & Associates and dated June 8, 2006. The author of the June 8, 2006 evaluation, [REDACTED], assistant professor at the University of Kentucky, noted that his conclusions were reached "by examining the beneficiary's job history, focusing particular attention upon his responsibilities as indicated by job descriptions, as documented by employers." [REDACTED] does not provide copies of any of the documents he examined in reaching his conclusion. [REDACTED] also notes that the University of Kentucky offers internships for which credits are granted and indicates he is authorized to grant credits and grades for internships completed by University of Kentucky students. [REDACTED] opines that the beneficiary's positions while employed at Optica Cristal required a well-rounded understanding of a variety of fields of business such as accounting, finance, management, and marketing and that positions similar to those held by the beneficiary are commonly filled by an employee with a baccalaureate degree in the United States. Dr. [REDACTED] concludes that the beneficiary's training and employment experience in the field of marketing is equivalent to that required of marketing majors in the University of Kentucky's bachelor's of business administration degree program and that the beneficiary's 12 years of work experience meets the credit hours requirement for the U.S. degree Bachelor's of Business Administration with a major in marketing.

On August 18, 2006, the director denied the petition observing that the beneficiary had not completed any formal tertiary education and that the petitioner had indicated the beneficiary was qualified to perform the duties of a specialty occupation based solely on the beneficiary's work experience. The director determined that neither of the authors of the two evaluations provided: an actual assessment of the beneficiary's work history; analyzed the positions held, with respect to how the duties were performed or the knowledge gained; or analyzed how the work experience corresponded with coursework which one would actually complete at a accredited college or university in the United States. The director found that the one letter submitted by the beneficiary's prior foreign employer listed the time the beneficiary worked in various positions but did not indicate that the beneficiary engaged in any formal training or education while employed at its company. The director determined that the petitioner had not demonstrated that the beneficiary's prior work experience was carried out at the professional level in the occupations held by the beneficiary when employed by Optica Cristal. The director concluded that the petitioner had not established the beneficiary's eligibility to perform the duties of a specialty occupation.

On appeal, counsel for the petitioner asserts the petitioner complied with 8 C.F.R. § 214.2(h)(4)(iii)(C), which requires 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. Counsel notes that the first evaluation provided had been submitted with a prior H-1B petition on behalf of the beneficiary (for a different employer) and had been accepted by Citizenship and Immigration Services (CIS). Counsel asserts that CIS should give deference to the earlier submitted petition and recognize that the beneficiary has the equivalent of a bachelor's degree. Counsel also notes that [REDACTED], the author of the second evaluation submitted, is called upon to grant course credits and grades for internships completed by students. Counsel concludes that two independent and accredited institutions have evaluated the beneficiary's work experience as equivalent to a

bachelor's degree; CIS has previously recognized that the beneficiary has the equivalent of a bachelor's degree; and that CIS has failed to appropriately exercise its discretion.

Counsel's assertions and conclusions are not persuasive. The petitioner in this matter has not provided evidence that the beneficiary holds a United States baccalaureate or higher degree in any field, a foreign degree determined to be equivalent to a United States baccalaureate or higher degree, or that the State requires or that the beneficiary has an unrestricted license, registration, or certification to practice as a controller for a retail business. The petitioner has not established that the beneficiary is qualified to perform services in a specialty occupation pursuant to 8 C.F.R. §§ 214.2(h)(4)(iii)(C)(1) through (3).

Therefore to establish the beneficiary's qualifications to perform the duties of a specialty occupation, the petitioner must prove that the beneficiary's combined education, if any, training, and employment experience provide him with the equivalent of a baccalaureate or higher degree required by the specialty occupation. To determine eligibility under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), the AAO relies upon the five criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(D). A beneficiary who does not have a degree in the specific specialty may still qualify for H-1B status based on:

- (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;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (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 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 the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

Turning first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(D)(1), the petitioner has submitted two evaluations of the beneficiary's work experience. When attempting to establish that a beneficiary has the equivalent of a degree based on his or her combined education and employment experience under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), a petitioner may not rely on a credentials evaluation service to evaluate a beneficiary's

work experience. A credentials evaluation service may evaluate only a beneficiary's educational credentials. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). The AAO acknowledges ██████████ claim to have authority to grant college-level credit for training and/or experience presumably at the University of Kentucky. The record, however, does not establish his authority. Nor does the record contain evidence that the University of Kentucky has a program for granting such credit. ██████████ claim is not substantiated by independent documentary evidence, such as a letter from the dean or provost of the university. Further, the AAO notes that giving credit for the supervised internships described by ██████████ is not a program for granting credit based on experience and/or training under the regulation. 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)). Counsel does not claim nor does the record support that Dr. Nadal has authority to grant college-level credit for training and/or experience in a specialty. The record is deficient in this regard and does not establish that the beneficiary is eligible to perform the duties of a specialty occupation based on his work experience under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(D)(1).

The petitioner does not claim nor does the record contain evidence that the beneficiary is qualified to perform the services of a specialty occupation based on the requirements at 8 C.F.R. §§ 214.2(h)(4)(iii)(D)(2), (3), or (4).

Thus, the AAO must consider whether the beneficiary's work experience is sufficient to establish that he is qualified to perform the duties of a specialty occupation pursuant to the fifth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(D). In this matter it is not. When evaluating a beneficiary's qualifications under the fifth criterion, CIS considers three years of specialized training and/or work experience to be the equivalent of one year of college-level training. In addition to documenting that the length of the beneficiary's training and/or work experience is the equivalent of four years of college-level training, the petitioner must also establish that the beneficiary's training and/or work experience has included the theoretical and practical application of the specialized knowledge required by the specialty occupation, and that the experience was gained while working with peers, supervisors, or subordinates who have degrees or the equivalent in the specialty occupation. The petitioner must also document recognition of the beneficiary's expertise in the specialty, as evidenced by one of the following: recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation; membership in a recognized foreign or U.S. association or society in the specialty occupation; published material by or about the alien in professional publications, trade journals, books or major newspapers; licensure or registration to practice the specialty in a foreign country; or achievements which a recognized authority<sup>1</sup> has determined to be significant contributions to the field of the specialty occupation.

The only available information in the record to substantiate the beneficiary's work experience is the May 7, 2002 letter submitted by the beneficiary's foreign employer. The AAO does not find the information in this letter

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<sup>1</sup> *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 opinion, 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)(i)(C)(ii).

sufficient to establish that the beneficiary's work experience included the theoretical and practical application of the specialized knowledge required by the specialty occupation or that the experience was gained while working with peers, supervisors, or subordinates who have degrees or the equivalent in the specialty occupation. The record does not contain evidence substantiating that any of the beneficiary's peers, supervisors, or subordinates at Optica Cristal held degrees or specialized knowledge associated with a bachelor's degree in business administration with a focus on financial controls. Although the individual writing the employer's letter claimed to be a graduate in business administration, the record lacks evidence substantiating that information. In addition, there is nothing in the letter to further describe the beneficiary's interaction, if any, with this individual, nor the length of time the beneficiary worked with this individual. Most importantly, the brief description of duties the beneficiary performed for the foreign employer is insufficient to demonstrate that the beneficiary's work experience included the theoretical and practical application of the specialized knowledge required of an individual who through study has attained a bachelor's degree in business administration with a focus on marketing or in finance. Although the letter suggests that the beneficiary gained experience and greater responsibility as he was promoted from assistant manager to marketing manager and then to business manager, the letter does not describe the beneficiary's actual daily duties in detail. The letter fails to discuss how the beneficiary's work experience with his peers, supervisors, or subordinates comprised an atmosphere conducive to obtaining knowledge that consequentially progressed to the equivalent of a bachelor's degree or its equivalent in the field.

Moreover, the record does not contain evidence regarding the scope or complexity of the foreign employer sufficient to determine whether the beneficiary's duties of examining accounting records, reviewing data regarding material assets, net worth, etc., preparing reports, and handling marketing decisions included the theoretical and practical application of specialized knowledge required by a specialty occupation. The brief description of the beneficiary's duties for the foreign employer, without further detail including the organizational structure, the number of employees, the sales, and level of income, is insufficient to enable the AAO to conclude that the beneficiary gained progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in a specialty occupation. The record lacks evidence that demonstrates that the beneficiary has attained the equivalent of a bachelor's degree in education based on his work experience. The petitioner has not established the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). For this reason, the AAO determines that the petitioner has not established that the beneficiary is qualified to perform the duties of the specialty occupation.

The AAO also finds the evaluations in the record insufficient to establish that the beneficiary has the recognition of expertise in the field of business administration with a focus on either marketing or finance. While Dr. [REDACTED]'s resume establishes his credentials in the field, [REDACTED]'s evaluation does not. Thus, the record does not contain recognition of expertise by two recognized authorities as required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). Further, the regulation requires a recognized authority to establish how his or her conclusions were reached and the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(i)(C)(ii). The record is deficient in that neither evaluator explains how they reached their conclusion that the beneficiary's 12 years of work experience included the same or similar types of knowledge obtained through four years of university-level study in the field of business, finance, or marketing. Neither evaluator provides an analysis of the beneficiary's experience nor how the briefly described experience equates to particular courses of study at the university level. Concluding that the briefly described experience is relevant to accounting, tax law, business systems, finance, management, and marketing courses is not the same as

analyzing the work experience and showing how the work experience incorporates these diverse elements. The evaluators do not provide examples of how the beneficiary's length of time in a particular position contributes or is otherwise equal to college-level courses. Moreover, the record does not contain evidence that the writers interviewed the beneficiary, the beneficiary's foreign employer, researched the foreign employer's business, or otherwise investigated the beneficiary's foreign work experience, including the time the beneficiary spent performing various duties. The evaluators do not expound upon their expertise, if any, regarding foreign retail businesses and whether such businesses require advanced training, whether the described position was a full or part-time position, or whether the actual duties of the beneficiary required the theoretical and practical application of specialized knowledge equivalent to a U.S. bachelor's degree in education. The AAO does not accept the professors' repetition of the beneficiary's foreign employer's statement of the beneficiary's work experience as an analysis of the beneficiary's attainment of specialized knowledge in a specialty field. Where an opinion is in any way questionable, the AAO may discount it or give it less weight. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). The petitioner has not provided expert opinions that contain evidence substantiating any conclusions regarding the beneficiary's expertise in the specialty occupation. The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). For this additional reason, the petition will be denied.

The AAO acknowledges counsel's reference to the prior approval of the beneficiary in an H-1B classification for a different petitioner. However, if that record contained the same evidence as submitted with this petition that approval would be in violation of paragraph (h) of 8 C.F.R. § 214.2, and would constitute material and gross error on the part of the director. CIS 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).

The petitioner has not submitted argument or documentation on appeal sufficient to overcome the director's decision on this issue. The petitioner has not established that the beneficiary has the requisite qualifications to perform the duties of a specialty occupation. For this reason, the petition will not be approved.

Beyond the decision of the director, the AAO finds that the description of the duties of the proffered position does not establish that the proffered position is a controller position. The duties described are general and do not clarify what tasks the beneficiary would perform for the petitioner on a daily basis. In light of the beneficiary's lack of a degree or substantiated experience in business administration, finance, or marketing, and the generality of the described duties, the AAO questions whether the position described and the work the beneficiary would perform are the duties of a specialty occupation. The record does not establish that the actual duties associated with the proffered position fulfill any of the criteria to qualify as a specialty occupation. For this additional reason, the petition will be denied.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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. Accordingly, the AAO will not disturb the director's denial of the petition.

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