



U.S. Citizenship
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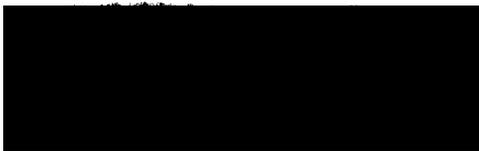
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FILE: SRC 04 072 50188 Office: TEXAS SERVICE CENTER Date: **607 03 2005**

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, Director
Administrative Appeals Office

DISCUSSION: The director 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 director denied the petition on March 4, 2004. Counsel filed a timely motion, which was dismissed on May 8, 2004. Counsel submitted Form I-290B (Notice of Appeal), without a brief or evidence, on June 11, 2004. Although counsel marked the box at section two of the Form I-290B to indicate that a brief and/or evidence would be sent within 30 days, the AAO has received neither. The AAO sent a follow-up letter to counsel's office requesting that the brief and/or additional evidence be sent within five days and has received no response. Thus, the AAO deems the record complete and ready for adjudication.

The petitioner, a company engaged in the distribution and maintenance of gate operating systems and access control products, seeks to employ the beneficiary as a manager. 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 on the basis that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation under the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Section 214(i)(1) of the Immigration and Nationality Act (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:

[A]n 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 proposed position.

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director’s request for evidence (RFE); (3) the petitioner’s RFE response and supporting documentation; (4) the director’s denial letter; (5) the petitioner’s motion to reconsider and supporting documentation; (6) the director’s dismissal of the motion to reconsider; and (7) the Form I-290B. The AAO reviewed the record in its entirety before issuing its decision.

In the petitioner’s letter of support, the duties of the proposed position were set forth as follows:

The position to be filled is manager of the new company. In the initial stages Mr. [REDACTED] will have two important duties: devising and implementing a marketing plan to expand the company’s business and providing technical assistance and advice to our customers in the purchase, design[,] and maintenance of these systems. For this reason, we need a person with both engineering and marketing background[s]. The person also needs to be bilingual in English and Spanish, as the Miami area is populated with many Spanish[-]speaking persons who we hope to gain as customers.

In the beginning we see the job consisting of both working on marketing and technical ends of the job. He will be expected to identify and approach prospects. When these prospects are identified he must be able to deal with them on a technical level, explaining and devising our gate operating systems and access control products. In addition, while we do not repair systems we are frequently called upon to trouble shoot the problems in such parts as the circuit board, loop detector, entry system[,] or any device installed that controls the entrance of a residence or condominium [sic]. Disassembling the product to be sent back to the manufacturer for repair is an expensive and difficult process. When we can avoid this situation through our technical advice we are providing an important service to our customers.

As time goes on, he will also be expected to attend trade shows and conduct training seminars on new products and the utilization of existing products.

The director denied the petition, finding that the petitioner had satisfied none of the four criteria set forth at § 214.2(h)(4)(iii)(A), and therefore had not established that the proposed position qualified for classification as a specialty occupation.

On appeal, the petitioner contends that the director erred in denying the petition, and that the proposed position is in fact a specialty occupation.

In determining whether a proposed 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. The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

The *Handbook* describes the responsibilities of advertising, marketing, promotions, public relations, and sales managers, specifically those of marketing managers, as follows:

The objective of any firm is to market and sell its products or services profitably. In small firms, the owner or chief executive officer might assume all advertising, promotions, marketing, sales, and public relations responsibilities. In large firms, which may offer numerous products and services nationally or even worldwide, an executive vice president directs overall advertising, promotions, marketing, sales, and public relations policies. . . .

Marketing managers develop the firm's detailed marketing strategy. With the help of subordinates, including *product development managers* and *market research managers*, they determine the demand for products and services offered by the firm and its competitors. In addition, they identify potential markets—for example, business firms, wholesalers, retailers, government, or the general public. Marketing managers develop pricing strategy with an eye towards maximizing the firm's share of the market and its profits while ensuring that the firm's customers are satisfied. In collaboration with sales, product development, and other managers, they monitor trends that indicate the need for new products and services and oversee product development. Marketing managers work with advertising and promotion managers to promote the firm's products and services and to attract potential users.

The *Handbook* describes the responsibilities of electrical and electronics installers and repairers as follows:

Businesses and other organizations depend on complex electronic equipment for a variety of functions. Industrial controls automatically monitor and direct production processes on the factory floor. Transmitters and antennae provide communication links for many organizations. Electric power companies use electronic equipment to operate and control generating plants, substations, and monitoring equipment. The Federal Government uses radar and missile control systems to provide for the national defense and to direct commercial air traffic. These complex pieces of electronic equipment are installed, maintained, and repaired by electrical and electronics installers and repairers.

Some industrial electronic equipment is self-monitoring and alerts repairers to malfunctions. When equipment breaks down, repairers first check for common causes of

trouble, such as loose connections or obviously defective components . . . Repairers use software programs and testing equipment to diagnose malfunctions. . . .

The duties of the proposed position appear to combine those of both marketing managers and electrical and electronics installers and repairers, as discussed in the *Handbook*. For example, the petitioner specifically states that one of two primary functions to be fulfilled by the beneficiary will be to devise and implement a marketing plan for the company, as would a marketing manager. The other primary function, similar to that of an electrical and electronics installers and repairers, will be to visit client sites to install and/or troubleshoot the company's products. If new parts are needed, the beneficiary will order them for the customer.¹

In that the duties of the proposed position mirror those of marketing managers and electrical and electronics installers and repairers, the AAO turns next to the *Handbook's* discussion of the educational qualifications required for entry into these fields. The *Handbook* states the following with regard to marketing managers:

A wide range of educational backgrounds is suitable for entry into advertising, marketing, promotions, public relations, and sales managerial jobs, but many employers prefer those with experience in related occupations plus a broad liberal arts background. A bachelor's degree in sociology, psychology, literature, journalism, or philosophy, among other subjects, is acceptable. However, requirements vary, depending upon the particular job.

For marketing, sales, and promotions management positions, some employers prefer a bachelor's or master's degree in business administration with an emphasis on marketing. Courses in business law, economics, accounting, finance, mathematics, and statistics are advantageous. . . .

Most advertising, marketing, promotions, public relations, and sales management positions are filled by promoting experienced staff or related professional personnel. For example, many managers are former sales representatives, purchasing agents, buyers, or product, advertising, promotions, or public relations specialists. In small firms, where the number of positions is limited, advancement to a management position usually comes slowly. In large firms, promotion may occur more quickly.

The *Handbook* states the following with regard to electrical and electronics installers and repairers:

Knowledge of electrical equipment and electronics is necessary for employment. Many applicants gain this knowledge through programs lasting 1 to 2 years at vocational schools or community colleges, although some less skilled repairers may have only a high school diploma. Entry-level repairers may work closely with more experienced technicians who provide technical guidance.

¹ The petitioner states that although the beneficiary will provide installation and troubleshooting services, he will not make any repairs.

Installers and repairers should have good eyesight and color perception in order to work with the intricate components used in electronic equipment. Field technicians work closely with customers and should have good communication skills and a neat appearance. Employers also may require that field technicians have a driver's license.

Experienced repairers with advanced training may become specialists or troubleshooters who help other repairers diagnose difficult problems. Workers with leadership ability may become supervisors of other repairers. Some experienced workers open their own repair shops.

The proposed position does not qualify for classification as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires a showing that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the field.² The *Handbook* indicates that most marketing manager positions are filled on the basis of experience (most positions "are filled by promoting experienced staff or related professional personnel"). Moreover, the fact that some employers "prefer" a degree or that individuals possessing degrees "should have the best job opportunities" does not rise to the "normally required" provision of the regulation. As such, marketing managers do not normally qualify as specialty occupations under the first criterion.

Nor do electrical and electronics installers and repairers qualify under the first criterion. The *Handbook* specifically states that vocational training, and in some cases a high school diploma, is sufficient for entry into the field.

As such, the proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Nor does the proposed position qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The first prong of this criterion requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations. The AAO has reviewed the information submitted by counsel in support of his assertion that the proposed position qualifies for classification as a specialty occupation under this prong, which consists of a list of the general managers of other companies, all of whom are claimed to possess degrees, and a statement from [REDACTED] the East Coast manager for a manufacturer of gate operators and accessories. Counsel, however, has failed to consider the specific requirements set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) for establishing a baccalaureate or higher degree as an industry norm. To meet the burden of proof imposed by the regulatory language, a petitioner must establish that its degree requirement exists in parallel positions among similar organizations.

The list of general managers purported to hold degrees does not satisfy the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). There is no evidence in the record to substantiate the claim that these individuals possess degrees. Simply 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)).

² The AAO notes that counsel does not assert that the proposed position qualifies for classification as a specialty occupation under the first criterion.

Also, there is no indication what types of degrees these individuals possess. As noted previously, 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 proposed position. Finally, there has been no demonstration that these individuals fill positions that are “parallel” to the position proposed here, or that the companies for which they work may be considered “similar” to the petitioner.

Counsel asserts that the petitioner “cannot obviously require its competitors to submit detailed information as to their general manager’s qualifications for submission here.” While the AAO has no reason to doubt the veracity of this statement, the petitioner could have submitted an industry survey or other such publication to establish the industry norm.

Nor does the letter from Mr. [REDACTED] satisfy the first prong of the second criterion, as there has been no attempt to demonstrate that his assertions pertain to a parallel position in a similar organization. For example, Mr. [REDACTED] specifically states that his company is the largest manufacturer of gate operators and accessories in the United States. There has been no showing that the petitioner manufactures such products – the information contained in the record states that the petitioner distributes and installs them, which is a separate undertaking. Moreover, there is no evidence that the petitioner, a newly-formed entity, is similar in size or scope of operations to the largest manufacturer of gate operators and accessories in the United States.

Therefore, the proposed position does not qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) requires the petitioner to prove that the duties of the proposed position are so complex or unique that only an individual with a degree can perform them. The nature of the duties of the proposed position as set forth in the petition does not support such a finding, as they are similar to those of marketing managers and electrical and electronics installers and repairers, as discussed in the *Handbook*, which do not require a degree. The record contains no documentation to support a finding that the proposed position is more complex or unique than such positions at other, similar organizations.

Therefore, the petitioner cannot establish that the proposed position qualifies as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor does the proposed position qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a showing that the petitioner normally requires a degree or its equivalent for the proposed position. To determine a petitioner’s ability to meet this criterion, 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.

On appeal, counsel contends that “[e]vidence is provided that both individuals who presently hold the position as ‘general manager’ in the parent company hold baccalaureate level technical degrees and, furthermore, that [the] person who held this position previously was also degreed.”

Copies of two of these employees’ resumes were submitted: the owner and a part-owner of the petitioner, [REDACTED] who was not in the position. However, copies of their diplomas were not. No evidence was submitted for the other three previous employees in a similar position: [REDACTED] and [REDACTED]

██████████ Again, simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici* at 165. No evidence to document these assertions has been submitted.

Nor does the job posting satisfy the third criterion. In order to establish eligibility under this criterion the petitioner must demonstrate that it normally hires individuals with degrees for this position. The issue to be proven here is not whether the petitioner desires its future employees to possess a degree, but whether it has in fact required such a degree in the past. This job posting does not prove that the petitioner has, in the past, imposed a degree requirement.

Accordingly, the proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) – that 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.

Counsel's response to the director's request for evidence regarding this fourth criterion consisted of a "typical technical call." On appeal, counsel contends that this particular aspect of the proposed position qualifies it as a specialty occupation under this criterion.

However, counsel's contention fails. To the extent that they are depicted in the record, the duties of the proposed position do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. The petitioner has not established that the position requires the knowledge of an electrical engineer. There is no information in the record to support a finding that the proposed position is more complex or unique than such positions in other, similar organizations. Therefore, the evidence does not establish that the proposed position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The proposed position does not qualify for classification as a specialty occupation under any of the four criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4), and the director was correct to deny the petition.

Finally, counsel asserts that the petition should be approved because "our experience is that you have in the past granted H-1B status to similar 'general manager' cases where we have represented similar petitioners and the facts of the case were appropriate. This record of proceeding does not, however, contain all of the supporting evidence submitted to the service center in those cases. In the absence of all of the corroborating evidence contained in those records of proceeding, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the positions offered in those cases were similar to the position proposed here.

Moreover, 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 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 prior cases were similar to the proposed position or were approved in error, no such determination may be made without review of the original records of proceeding from those cases in their entirety. If the nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, those approvals 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 petitions 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 petitioner has failed to establish that the position qualifies for classification as a specialty occupation. Accordingly, the AAO will 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.