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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: EAC-02-082-54296 Office: Vermont Service Center Date: JAN 24 2003

IN RE: Petitioner: [redacted]
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)

IN BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

INSTRUCTIONS:
This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a coin and jewelry shop with five employees and a stated gross annual income of $8 million. It seeks to employ the beneficiary as a special projects and public relations officer for a period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation.

On appeal, counsel submits a brief and additional documentation.

8 C.F.R. 214.2(h)(4)(ii) defines the term "specialty occupation" 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.

The director concluded that the petitioner had failed to submit sufficient evidence to demonstrate that a bachelor's degree is a standard requirement for employment in the proffered position. On appeal, counsel argues that the offered position can be considered a specialty occupation because it is professional in nature. Counsel asserts that the duties of the offered job are so complex and unique that it can be performed only by an individual with a baccalaureate or higher degree, and that an evaluation contained in the record supports this assertion. Counsel contends that the petitioner is best suited to determine the minimum education requirements needed to perform the duties of the offered job. Counsel cites several court decisions in support of the arguments put forth on appeal.

The Service does not rely solely on the title of a position in determining whether that position qualifies as a specialty occupation. The specific duties of the offered position combined with the nature of the petitioning entity's business operations are factors that the Service considers. In an attachment to the initial I-129 petition, the petitioner described the duties of the offered position as follows:

> ...assists in planning of projects/articles/advertising to promote the company's jewelry business; write

articles, agenda items and correspondence; general administrative support; design and produce materials and desktop publishing.

In response to a subsequent Service request for additional information relating to the proffered position, the petitioner provided the following revised description of the duties for the offered position:

I. Assist in the planning of projects/articles/advertising to promote the company's coins and jewelry business; design and produce materials and desktop publishing.

1.1 To submit concrete proposals for establishing multi-media networking to promote the business i.e. television; radio; prints and Internet services including the establishment of a Website for the coins and jewelry business promotions;

1.2 Prepares and submits a distribution scheme of brochure materials for the services provided by the coins and jewelry business to its existing buyers and updates Web inventory of available stocks;

1.3 Communicates through the internet with potential buyers local and overseas (Asian - Philippines, Hongkong [sic], China, Malaysia, Europe, etc.) deals with buyers mostly Asian and collectors at the store and during shows;

1.4 Writes press releases and articles of some of the significant accomplishments of the business;

1.5 Proposed and develop an appropriate database for the buyers for purposes of effective monitoring;

II. Administrative support

2.1 In charge of monitoring the implementation of documentation guidelines for evaluation and management services of buyers;

2.2 Writes letter, correspondence in response to buyer's queries or letters of general nature pertaining to the coins and jewelry business as

well as the nature and extent of quality of care evaluations done by the business;

2.3 Collection of data that may be used for research, education and future expansion of the coins and jewelry business;

2.4 Shall create, establish and monitor an effective and orderly system of billings and collections from buyers and insurance companies and appropriate agencies for the business services rendered.

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.

The petitioner has not met any of the above requirements to classify the offered position as a specialty occupation.

The proffered position appears to combine the duties of a public relations and promotions manager with those of a office and administrative support worker manager and an administrative assistant. A review of the Department of Labor's (DOL) Occupational Outlook Handbook (Handbook), 2002-2003 edition, at pages 26-29, finds no requirement of a baccalaureate or higher degree in a specific specialty for employment as a public relations manager or a promotions manager. Rather, most employers prefer a wide range of educational backgrounds or promote individuals from within companies. Additionally, certain personal qualities and participation in in-house training programs are often considered as important as a specific formal academic background.

The DOL's Handbook at page 418, does not list a requirement of a baccalaureate degree in a specific specialty for employment as an office and administrative support worker manager. Most businesses fill administrative and office support supervisory and managerial positions by promoting clerical or administrative support workers within their organizations. In addition, certain personal qualities such as strong teamwork and problem solving skills and a good working knowledge of the organization's computer system are often considered as important as a specific formal academic background.

A further review of the Handbook at pages 423-424, finds no requirement of a baccalaureate or higher degree in a specific specialty for employment as an administrative assistant. High school graduates with basic office skills may qualify for entry-level administrative assistant positions. Training ranges from high school vocational education programs to 1 and 2-year programs in office administration offered by business schools, vocational-technical institutes, and community colleges. Thus, the petitioner has not shown that a bachelor's degree in a specific specialty or its equivalent is required for the position being offered to the beneficiary.

The petitioner has not provided any evidence that it has, in the past, required the services of individuals with baccalaureate or higher degrees in a specific specialty for the offered position. Counsel argues that the petitioner's level of business activity had recently expanded so as to require the employment of the beneficiary in a specialty occupation. However, counsel's reasoning is problematic when viewed in light of the statutory definition of specialty occupation. The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. As with employment agencies as petitioners, the Service 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 or 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 bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if the Service was limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have bachelor's degrees. See id. at 388.

In this case, the proffered position of special projects and public relations officer does not meet the statutory definition of specialty occupation. The position does not require the theoretical and practical application of a body of highly specialized knowledge. Therefore, even though counsel argues that the petitioner requires a bachelor's degree in a specific field of study for employment in the offered job, such a requirement is the petitioner's preference rather than an indication that the position is a specialty occupation requiring a bachelor's degree in a specific specialty.

Counsel's argument that the petitioner should be allowed to determine the minimum education requirements needed to fill the proffered position in light of its own business and employment needs is not persuasive. While counsel asserts that the holding reached in Unico American Corp. v. Watson, CV No. 896958 (C.D. Cal. Mar. 19, 1991), dictated such an outcome in this particular case, the proffered position at issue in the cited decision was that of a computer programmer, which can be readily distinguished from the position of a special projects and public relations officer in this case. Counsel has not demonstrated that the cited decision is relevant to the facts and issues of this proceeding.

Counsel asserts that the offered position is a specialty occupation because it is professional in nature. In support of this assertion, counsel cites the holdings reached in Matter of Essex Cryogenics, Inc., 14 I. & N. Dec. 196 (Comm. 1972), and Matter of General Atomic Co., 17 I. & N. Dec. 532 (Comm. 1980), as well as 8 U.S.C. 1101(a)(32). However, this proceeding is not concerned with membership in the professions, but rather whether the job is a specialty occupation. The term "specialty occupation" is specifically defined in section 214(i) of the Act. That statutory language effectively supersedes the cited decisions.

Counsel argues that the degree requirement is common to the industry in parallel positions among similar organizations. In an attempt to provide evidence of an industry standard, the petitioner has submitted an evaluation of the proffered position signed by [redacted] In his letter [redacted] finds that the offered job "...should be filled by a person with a bachelor[']s degree in any related field...." However, [redacted] conclusion is based on the duties of the position as described by the petitioner and does not identify a degree in a specific specialty pertinent to the related field. While [redacted] claims that he holds a masters degree in computer engineering, the record contains no evidence to corroborate that he holds the claimed degree. Furthermore, [redacted] fails to explain how such a degree provides him with the expertise and knowledge to evaluate positions that are not within the computer engineering field. In addition, the record does not contain any evidence that Mr. Putta possesses the ability to give expert testimony regarding

the question of whether the proffered position qualifies as a specialty occupation. That determination is the province of the Service as set forth within the Immigration and Nationality Act. Moreover, one evaluation of the proffered position cannot be considered as evidence of an industry standard. For these reasons, the Service is not inclined to accept the conclusions of [redacted] relating to the issue of whether the offered position is a specialty occupation. Therefore, the petitioner has failed to demonstrate that businesses similar to the petitioner in their type of operations, number of employees, and amount of gross annual income require the services of individuals in parallel positions.

Counsel's contention that the duties of the offered job are so unique and complex that the performance of such duties in the business setting customarily requires an individual with a minimum of a baccalaureate degree is not persuasive. As noted above, the Handbook does not provide any indication that a baccalaureate degree in a specific specialty is required for employment as a public relations manager, promotions manager, office and administrative support worker manager, or an administrative assistant. The record does not contain any independent evidence which would tend to support counsel's contention. Consequently, the petitioner has failed to establish that the nature of the beneficiary's proposed 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 in a specific specialty.

With respect to counsel's objection to the denial of this petition in view of the approval of similar petitions in the past, this Service is not required to approve applications or petitions where eligibility has not been demonstrated. The record of proceeding, as presently constituted, does not contain a copy of the approved visa petitions and their supporting documents. It is, therefore, not possible to determine definitively whether the visa petitions in question were approved in error or whether the facts and conditions have changed since their approval. Determinations of eligibility are based on the totality of evidence available to this Service at this time. The Associate Commissioner, through the Administrative Appeals Office, is not bound to follow the contradictory decision of a service center. Louisiana Philharmonic Orchestra v INS, 2000 WL 282785 (E.D.La. 2000), aff'd, 248 F. 3d 1139 (5th Cir. 2001), cert. denied, 122 S. Ct.51 (U.S. 2001).

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

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 decision of the director will not be disturbed.

ORDER: The appeal is dismissed.