

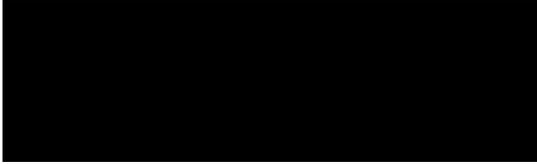
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U.S. Citizenship  
and Immigration  
Services

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FILE: EAC 05 195 52251 Office: VERMONT SERVICE CENTER Date: **JUL 31 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.

for *Michael F. Kelly*  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is engaged in the development and delivery of information technology, employs 22 personnel, and earned an estimated \$3.7 million gross annual income for 2004. It seeks to employ the beneficiary as a director of product marketing and management. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant 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 determining that the position was not a specialty occupation and that the beneficiary had abandoned his request for a change of nonimmigrant status by traveling outside the United States while the request for a change of status was pending.

The record of proceeding before the AAO contains: (1) the Form I-129 with supporting documentation filed July 1, 2005; (2) the director's July 26, 2005 request for further evidence (RFE); (3) counsel for the petitioner's October 19, 2005 response to the director's RFE; (4) the director's November 18, 2005 denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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.

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 (5<sup>th</sup> 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 regarding the nature of the proffered position includes: the petitioner's June 1, 2005 description of duties; the petitioner's August 29, 2005 description of the overall functions and responsibilities of the proffered position; the petitioner's December 3, 2005 description of the role of the proffered position submitted on appeal; and an October 18, 2005 position evaluation authored by J.P. Singh, professor of computer science at Princeton University. As the descriptions are in the record, the detailed descriptions will not be repeated here.

The director in this matter determined that the description of the proffered position corresponded most closely with the Department of Labor's *Occupational Outlook Handbook (Handbook)* discussion on marketing managers. The director noted the *Handbook's* discussion of the education to perform the duties of a marketing manager did not indicate a baccalaureate degree in a specific specialty was required; although the *Handbook* recognized that employers may prefer to hire individuals with a baccalaureate degree and in technical industries a bachelor's degree in engineering or science combined with a master's degree in business is preferred. The director also noted the several job announcements submitted but determined that the job postings failed to demonstrate that the degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations. The director also found that the petitioner had not established that it normally required a degree in a specific specialty for the position as the petitioner had not previously employed anyone in the position.

Upon review of the evidence in the record relating to the proffered position, the AAO finds that the proffered position is that of a marketing manager for a technical industry and also contains elements of the occupation of a sales engineer. The AAO agrees that the *Handbook* does not present a definitive statement regarding educational requirements for marketing managers in technical industries and notes only that a bachelor's degree in engineering usually is required to become a sales engineer. Regarding the advertisements submitted as evidence of the petitioner's industry's requirements, the AAO observes that the petitioner has not presented evidence that it is similar in size, number of employees, or level of income to the businesses advertising for the various positions. Likewise, the petitioner has not explained how the proffered position is parallel to any of the advertised positions.

However, when considering the totality of evidence, including counsel's brief and the petitioner's information on appeal, the AAO finds that the petitioner has presented sufficient evidence to establish 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 computer science and electrical engineering and, therefore, has established the proffered position as a specialty occupation under the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). In this matter, the petitioner has provided sufficient documentary evidence that the duties of the proffered position contain elements that require the performance of a combination of varying occupations directly related to computer science and including electrical engineering, making the proffered position specialized. As the petitioner explained on appeal, the position is an interdisciplinary role combining research and development, marketing, and sales which focuses on product line life-cycle development and management. The petitioner's previously submitted detailed descriptions accompanied by the petitioner's explanations on appeal are sufficient to overcome the director's decision. The petitioner has established the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4). Accordingly, the AAO withdraws the director's determination to the contrary.

The AAO finds that the beneficiary is qualified to perform the duties of the specialty occupation as the record contains evidence of the beneficiary's bachelor's of science degree in computer and electrical engineering at a United States university, as well as evidence of the beneficiary's master's of science degree in electrical engineering at a United States university.

As always, 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 met that burden. The proffered position is a specialty occupation and the beneficiary is qualified to perform the duties of the specialty occupation. However, as provided in 8 C.F.R. § 248.3(g), the denial of an application to change nonimmigrant status may not be appealed. Thus, the AAO does not enter a decision on the director's denial of the beneficiary's application to change nonimmigrant status.

**ORDER:** The appeal is sustained. The petition is approved.