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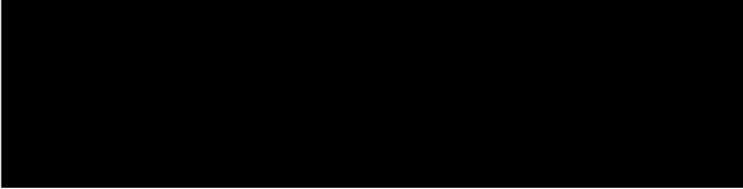
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: SRC 06 089 52485 Office: TEXAS 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 T. Kelly
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The service center 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 petitioner is a prepaid phone card wholesaler and seeks to employ the beneficiary as a marketing and sales manager. 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).

The director denied the petition because the position did not qualify as a specialty occupation, and because the beneficiary was not qualified to perform the duties of a specialty occupation. On appeal, counsel submits a brief asserting that the proffered position is a specialty occupation and the beneficiary is qualified to perform the duties of a specialty occupation.

The first issue to be discussed in this proceeding is whether the proffered position qualifies as 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)(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:

[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 are 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.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B with supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a marketing and sales manager. Evidence of the beneficiary's duties includes the Form I-129 petition with attachment and the petitioner's response to the director's request for evidence. According to this evidence the beneficiary would:

- Develop, organize and implement a cost-effective and integrated marketing and sales program;
- Analyze research and data to perform marketing tasks and identify strategies;
- Identify and establish marketing territories;
- Prepare budgets and submit estimates for program costs as part of campaign plan development;
- Plan and prepare advertising and promotional material to increase sales of products or services, working with customers, company executives, sales departments and advertising agencies;
- Assist with annual budget development;
- Inspect layouts and advertising copy and edit scripts, audio and video tapes, and other promotional material for adherence to specifications;
- Coordinate activities of departments, such as sales, graphic arts, media, finance, and research;
- Prepare and negotiate advertising and sales contracts;

- Identify and develop contacts for promotional campaigns and industry programs that meet identified buyer targets such as retailers, distributors, or consumers;
- Gather and organize information to plan advertising campaigns;
- Confer with department heads and/or staff to discuss topics such as contracts, selection of advertising media, or product to be advertised;
- Analyze customer preferences to determine focus of sales efforts;
- Confer and/or consult with department heads to plan advertising services and to secure information on product and customer specifications;
- Review marketing reports to insure that all leads have been reached and attended;
- Confer with clients to provide marketing or technical advice;
- Develop tactics and timelines to ensure effective completion of programs with targeted goals;
- Identify long-term solutions to handling customer complaints regarding sales and service;
- Direct and coordinate activities involving sales of international calling cards, and new product lines that will be released the coming year;
- Determine price and discount rates;
- Review operational records and reports to project sales and determine profitability;
- Direct, coordinate, and review activities in sales;
- Advise distributors on policies and operating procedures to ensure functional effectiveness of business;
- Prepare budgets and approve budget expenditures;
- Represent the company at trade association meetings to promote products;
- Train, motivate, counsel and evaluate promoters;
- Implement motivational and incentive plans to keep productivity high and turnover low; and
- Assign individual and team marketing and sales responsibilities.

The petitioner requires a minimum of a bachelor's degree in marketing, business administration or industrial engineering for entry into the proffered position.

The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook (Handbook)* for information about the duties and educational requirements of particular occupations. The duties of the proffered position are essentially those of marketing and sales managers and are discussed in the *Handbook* section entitled advertising, marketing, promotions, public relations, and sales managers. The *Handbook* notes that a wide range of educational backgrounds is suitable for entry into advertising, marketing, promotions, public relations, and sales manager positions, but that many employers prefer related experience plus a broad liberal arts background. Bachelor's degrees in sociology, psychology, literature, journalism, philosophy, or other subjects are suitable. Requirements will vary, however, depending on the duties of a particular position. For example, some employers prefer a bachelor's or master's degree in business administration with an emphasis in marketing, for marketing, sales, and promotion management positions. In highly technical industries such as computer and electronics manufacturing a degree in engineering or science combined with a business degree may be preferred. In public relations management positions some employers prefer a bachelor's or master's degree in public relations or journalism. The *Handbook* notes that most advertising, marketing, promotions, public relations, and sales management positions are filled by promoting experienced staff or related professional or technical personnel. Many managers are former sales representatives, purchasing agents, or promotions specialists. A baccalaureate or higher degree in a specific specialty or its equivalent is not, therefore, the minimum requirement for entry into the position. A degree in a wide range of disciplines will suffice. The petitioner has failed to establish the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner asserts that a degree requirement, in a specific specialty, is common to the industry in parallel positions among similar organizations. In support of this assertion the petitioner submitted copies of several job advertisements for marketing and sales managers. The advertisements submitted, however, do not establish the petitioner's assertion. The advertisements submitted required degrees in marketing, finance, engineering, or business administration. Two of the advertisements did not require a bachelor's degree in a specific specialty. One preferred, but did not require, a degree in management. The second stated that a college degree was required, but did not indicate that the degree need be in any specific specialty. The advertisements are consistent with the statements in the *Handbook* about the educational requirements for the position that degrees in any number of educational disciplines will suffice.

The petitioner also refers to the Department of Labor's *O*Net* to establish a degree requirement in a specific specialty for the position. The *O*Net's* education and training code for the position is JobZone 4, which indicates that most positions within this code require a bachelor's degree, but some do not. Neither the *DOT's* SVP rating nor a Job Zone category indicate that a particular occupation requires the attainment of a baccalaureate or higher degree, or its equivalent, in a specific specialty as a minimum for entry into the occupation. An SVP rating and Job Zone category are meant to indicate only the total number of years of vocational preparation required for a particular position. Neither classification describes how those years are to be divided among training, formal education, and experience, nor specifies the particular type of degree, if any, that a position would require. The petitioner has failed to established the referenced regulatory criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner asserts that it normally requires a degree in a specific specialty for entry into the offered position and notes that CIS has on two prior occasions granted H-1B status in similar positions at the petitioner's request. This reference will not sustain the petitioner's burden of establishing H-1B qualification in the petition now before the AAO. This record of proceeding does not contain the entire record of proceedings in the petitions referred to by counsel. Accordingly, no comparison of the positions can be made. 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, the AAO is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). It warrants noting that Congress intended this visa classification for aliens that are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge. Congress specifically stated that such an occupation would require, as a *minimum* qualification, a baccalaureate or higher degree in the specialty. CIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specialty occupation as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created that visa category. In the present matter, the petitioner has offered the beneficiary a position as a marketing and sales manager. For the reasons discussed above, the proffered position does not require attainment of a baccalaureate or higher degree in a specific specialty as a minimum for entry into the occupation, and approval of a petition for another beneficiary based on identical facts would constitute material error and a violation of 8 C.F.R. § 214.2 paragraph (h). The petitioner has failed to establish the regulatory criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the record does not establish that the duties to be performed by the beneficiary are so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. Nor does the record establish that the duties are so complex or unique that they can be performed only by an individual with a degree in a specific specialty. The duties appear to be routine in the industry for marketing and sales management positions in the petitioner's work environment; and the record lacks evidence that the proffered position exceeds in specialization and complexity those marketing and sales management positions that the *Handbook* indicates are regularly performed by individuals with a wide range of education in a number of different disciplines. The record does not establish that the duties to be performed require the beneficiary to perform tasks that are more complex, specialized or unique than those normally performed by marketing and sales management personnel working without at least a baccalaureate level education in a specific specialty. As described by the petitioner, they appear to those tasks which are generally performed by similar personnel in the industry, and are included within those duties that are generally described for the position in the *Handbook*. The petitioner has not established that the performance of the position's duties requires a precise and specific course of study that relates directly and closely to the position in question. The petitioner has failed to establish the referenced criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(2) or (4).

The final issue to be considered is whether the beneficiary is qualified to perform the duties of the proffered position. It has been determined that the offered position does not qualify as a specialty occupation, thus, there would be no regulatory requirement that the petitioner possess any specific level of education in order to qualify to perform the duties of that position. Suffice it to say that the petitioner deems the beneficiary qualified to perform the duties of the position based upon his past education, training, and experience. That

determination is one over which the petitioner has sole authority and discretion as the position does not qualify for H-1B status and is not subject to regulation by CIS.

The petitioner has failed to establish that the offered position meets any of the criteria listed at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the AAO shall 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 and the appeal shall accordingly be dismissed.

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