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**U.S. Citizenship
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Services**

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FILE: WAC 03 239 55818 Office: CALIFORNIA SERVICE CENTER Date:

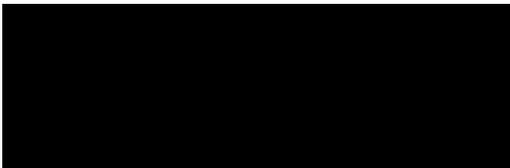
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IN RE: Petitioner:
Beneficiary:



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 of the 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 importer and wholesaler of farm and fish products. It seeks to employ the beneficiary as a marketing specialist. 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 because the proffered position is not a specialty occupation. On appeal, counsel submits a brief and additional evidence.

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.

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 proffered position.

The record of proceeding before the AAO contains: (1) 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) Form I-290B and 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 specialist. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail gathering and analyzing statistical data and information about product distribution, market expansion, and marketing trends; developing a marketing plan and strategy; conducting competitive analysis and positioning of the company regarding price, promotion, and product management; formulating collection strategies and solutions to sales problems; providing counseling to clients; and attending seminars and training. The petitioner stated that a candidate for the proffered position must possess a bachelor's degree in agriculture or a related field and have five years of experience.

The director determined that the proffered position was not a specialty occupation. According to the director, as described in the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*), the beneficiary's duties are performed by advertising, marketing, promotions, public relations, and sales managers and bookkeepers. The director stated that the DOL reports that employers prefer, but do not require, a bachelor's degree in a specific specialty for these managerial positions, and that a person can enter a bookkeeper job in wholesale trade without education beyond high school. The director found that the stated level of responsibility did not indicate complexity or authority beyond what is normally encountered in the occupational field or that the job offered could not be performed by an experienced person whose educational training falls short of a baccalaureate degree. The director stated that the petitioner's job posting did not indicate that it normally requires applicants for the position to possess a baccalaureate or higher degree in the field.

On appeal, counsel states that the director did not read correctly the information in the *Handbook*. Counsel claims that the DOL communicated that education is integral in the marketing field, and that some employers require more than a bachelor's degree. The petitioner, counsel contends, prefers and requires an individual to have a bachelor degree for the proffered position. Counsel states that the petitioner's posting notice plainly stated that the proffered position required a bachelor's degree in agriculture or a related field, and the petitioner's job description submitted in response to the request for evidence also relayed this requirement.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO first considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the particular position; a specific degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors often considered by CIS when determining these criteria include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the

industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

In determining whether a 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 *Handbook* for its information about the duties and educational requirements of particular occupations.

On appeal, counsel states that the director misread the information in the *Handbook* because the DOL reported that education is integral in the marketing field, and that some employers require more than a bachelor's degree. Counsel's statement is not persuasive. A careful review of the *Handbook* discloses that the proffered position's duties are performed by marketing and sales managers. The *Handbook* reports that:

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.

For marketing and sales management positions, the *Handbook* states that some employers *prefer* a bachelor's or master's degree in business administration with an emphasis in marketing.

To qualify a position as a specialty occupation, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) indicates that a petitioner must establish that a baccalaureate or higher degree or its equivalent in a specific specialty is normally the minimum requirement for entry into the particular position. That only *some* employers *prefer*, but do not require, a specific baccalaureate degree is insufficient to establish that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position, marketing specialist.

There is no evidence in the record that would establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations.

No evidence is in the record that would show the proffered position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Again, the *Handbook* shows that the proffered position is performed by sales and marketing managers, jobs that do not require a baccalaureate degree in a specific specialty.

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position. Counsel contends that the petitioner prefers and requires an individual to have a bachelor degree for the proffered position. This may be the petitioner's requirement; nevertheless, the petitioner must satisfy one of the four criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) for the position to qualify as a specialty occupation. Furthermore, 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. 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 (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 baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act.¹ To interpret the regulations any other way would lead to absurd results: if CIS were 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 baccalaureate or higher degrees. *See id.* at 388.

The AAO notes that, contrary to the director's statement, the petitioner's job posting did communicate its requirement that a candidate for the proffered position must possess a bachelor's degree in agriculture or a related field. Nonetheless, under the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) the petitioner is required to show a past practice of requiring a specific baccalaureate degree for the proffered position.

The evidentiary record fails to satisfy the regulation 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 the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The *Handbook* shows that the proffered position is performed by sales and marketing managers, jobs that do not require a baccalaureate degree in a specific specialty.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. 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.

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

¹ The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *See id.* at 387.