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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

D1

[redacted]

FILE: WAC 04 032 53483 Office: CALIFORNIA SERVICE CENTER Date: MAY 17 2005

IN RE: Petitioner:
Beneficiary: [redacted]

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:

[redacted]

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 a retirement care facility for the elderly that seeks to employ the beneficiary as a marketing 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 because the proposed position is not a specialty occupation. On appeal, counsel submits a brief and additional evidence.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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 manager. 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 planning and administering marketing and sales programs; soliciting local communities and senior centers and organizing seminars; assigning sales jobs and designating sales territories; setting up sales quotas, marketing target, and training programs for sales representatives; analyzing competitors and customer demographic characteristics to determine pricing and select the customer group; planning the advertising program; consulting with seniors to understand their needs and ensure quality service; and preparing sales, market share reports, and the promotional budgets. The petitioner's February 11, 2004 letter elaborated on the proposed duties, and indicates that it accepts "a candidate with a degree in [m]arketing or related field of study."

The director found the proposed position did not qualify as a specialty occupation. The Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*), the director stated, reveals that the proposed position's duties are performed by advertising, marketing, promotions, public relations, and sales managers; that a wide range of educational backgrounds are suitable for entry into these occupations; and that although baccalaureate-level of training is preferred, it is not a normal, industry-wide minimum requirement for entry into the occupation. The director stated that the marketing manager position shown in the petitioner's organizational chart is occupied by a person holding a bachelor's degree. However, the director found that no evidence establishes whether the person actually possesses a bachelor's degree or whether the petitioner presently employs the person. The director concluded that the petitioner did not have a past practice of hiring persons with a baccalaureate degree for the proposed position. The director stated that no evidence supports the petitioner's assertion that the degree requirement is common to the industry. The director also found the beneficiary's stated level of responsibility did not indicate complexity or authority that is beyond what is normally encountered in the occupational field, and that the evidence did not show that the job offered could not be performed by an experienced person whose educational level fell short of a baccalaureate degree.

On appeal, counsel asserts that the proposed position requires a bachelor's degree, and that the *Dictionary of Occupational Titles (DOT),* the *Handbook,* and job postings support his assertion. Counsel states that due to the complexity of the job and the petitioner's industry, a bachelor's degree is required for a marketing manager position.

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.

Counsel states that the proposed position is a specialty occupation based on its SVP rating in the *DOT.* The *DOT* is not a persuasive source of information regarding whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the

occupation. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience, and it does not specify the particular type of degree, if any, that a position would require.

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 is the normal minimum requirement for entry into the particular position; a 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. 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.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

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.

The director correctly concluded that the duties of the proposed position are performed by advertising, marketing, promotions, and sales managers, as these occupations are described in the *Handbook*. With respect to the educational requirements of these occupations, the *Handbook* explains:

> 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.

The *Handbook* reports that 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. For advertising management positions, it states "some employers prefer a bachelor's degree in advertising or journalism."

As discussed earlier in this decision, a "specialty occupation" is defined in the Act as an occupation that *requires* theoretical and practical application of a body of highly specialized knowledge, and the 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 *Handbook* relays that some employers *prefer* a bachelor's degree in a specific specialty for advertising, marketing, promotions, and sales managers. The terms "prefer" and

"require" are not synonymous; they do not express a similar meaning. In the *American Heritage Dictionary of the English Language* the term "prefer" means to select in preference to another or others; value more highly; or like better. The term "require" means to have use for as a necessity or need. In light of the definition of the terms, the proffered position fails to qualify as a specialty occupation as defined in the Act because employers "prefer," but do not "require" a specific baccalaureate degree for a marketing manager. The petitioner, therefore, fails to satisfy the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*) - that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the particular position.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*) states that a specific degree requirement must be common to the industry in parallel positions among similar organizations. Of the submitted job postings, only Network Associates, Inc. requires a baccalaureate degree in a technical or marketing field. Furthermore, the employers are either dissimilar in nature to the petitioner, a retirement care facility, or they are not described. JSTARR Advertising provides advertising services; IMG, Inc. is not described; Network Associates and Altera Corporation are in the computer industry; and D&B provides business information solutions. Thus, the postings fail to establish that a specific degree requirement must be common to the industry in parallel positions among similar organizations.

No evidence in the record establishes that the proffered position is so complex or unique that it can be performed only by an individual with a degree. The *Handbook* reveals that the proffered position is performed by advertising, marketing, promotions, and sales managers, which are occupations that do not require a specific baccalaureate degree.

The petitioner's organizational chart reflects that an employee occupies a position entitled marketing director, and that the employee holds a bachelor's degree. However, the petitioner fails to indicate the specialty of the employee's degree. Furthermore, no evidence shows that the proposed position is similar to the marketing director position. For these reasons, no evidence establishes 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.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish 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. As discussed in this decision, the *Handbook* discloses that the duties of the proposed position resemble those of advertising, marketing, promotions, and sales managers, which are occupations that do not require a specific baccalaureate degree. No evidence establishes that the proposed duties would exceed these occupations.

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.