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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536

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File: SRC-00-181-51231 Office: Texas Service Center

Date: DEC 21 2001

IN RE: Petitioner: [Redacted]
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)

Public Copy

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which 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 which 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 which 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 manufactures and solicits software for IBM mainframes or compatibles. It has 40 employees and a gross annual income of \$4,000,000. It seeks to employ the beneficiary as an executive vice president of sales and marketing 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.

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 denied the petition because the petitioner had not demonstrated that a baccalaureate or higher degree is the normal requirement for the proffered position or the industry in general. On appeal, counsel states, in part, that the Department of Labor's (DOL) Occupational Outlook Handbook (Handbook), 2000-2001 edition, finds that a bachelor's degree in engineering or science combined with a master's degree in business administration is preferred for marketing managerial positions in highly technical industries such as computer and electronics manufacturing. Counsel also submits an expert opinion in support of his claim.

Counsel's statement on appeal is not persuasive. The Service does not use a title, by itself, when determining whether a particular job 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 the initial I-129 petition, the petitioner described the duties of the offered position as follows:

Manage group of telemarketing sales representatives and market software product. Design and oversee marketing efforts and advertisements for software product. Travel

to customer sites and non-customer sites for sales presentations.

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.

First, the Service does not agree with counsel's argument that the proffered position would normally require a bachelor's degree in business administration or a related field. The proffered position appears to combine the duties of a general manager or executive with those of a marketing manager. A review of the DOL's Handbook, 2000-2001 edition, at pages 50-51 finds no requirement of a baccalaureate or higher degree in a specialized area for employment as a general manager or executive. Degrees in business and in liberal arts fields appear equally welcome. In addition, certain personal qualities and participation in in-house training programs are often considered as important as a specific formal academic background.

A review of the Handbook at pages 25-26 also finds no requirement of a baccalaureate degree in a specialized area for employment as a marketing manager. A wide range of educational backgrounds are considered suitable for entry into marketing managerial positions. Some employers prefer degrees in business administration but bachelor's degrees in various liberal arts fields are also acceptable. Here again, certain personal qualities and participation in in-house training programs are often considered as significant as the beneficiary's specific educational background. It is additionally noted that although counsel quotes from the Handbook indicating that a bachelor's degree in engineering or

science combined with a master's degree in business administration is preferred for marketing managerial positions in highly technical industries such as computer and electronics manufacturing, the petitioner has not demonstrated that it manufactures computers or that the proffered position requires a bachelor's degree in engineering or science combined with a master's degree in business administration. Thus, the petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary.

Second, although the petitioner has been in operation since 1985, it has shown that only one other individual who occupied the proffered position held a baccalaureate or higher degree in a specialized area such as business administration. Third, the petitioner did not present any documentary evidence 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. Finally, the petitioner did not demonstrate 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 an undated expert opinion, an academic expert states as follows:

As the chief sales and marketing officer of SoftTouch Systems, Inc., it is arguable that the incumbent's strategic, procedural, functional and management information knowledge and skills are **usually** associated with the education and training that occurs during the pursuit of a Bachelor of Science or higher business degree. Most educators and certainly most business dean schools would take that position. However, we are also convinced that such knowledge and skills can be attained, and are frequently attained, through sales and marketing and/or executive experiences, thus the question posed above is difficult to answer. In our opinion, however, it is fair to say that much of the knowledge and skills required to perform the duties of a chief sales and marketing officer is **often** associated with the attainment of a bachelor or higher degree in business.

The above expert opinion does not demonstrate that the usual requirement for the proffered position industry wide is a baccalaureate or higher business-related degree. It is also noted that in an undated position description from the petitioner's CEO, one of the prerequisites for the proffered position is stated as follows: A 120-hour bachelor degree, preferably in business administration-marketing from an accredited University or the equivalent in training and experience. Again, the prerequisite indicates that although a bachelor's degree or equivalent is

required, the field of business administration-marketing is a preference rather than a requirement.

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.

ORDER: The appeal is dismissed.