

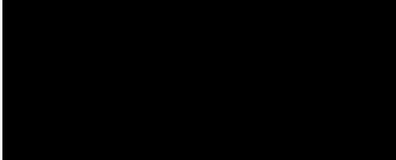


U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



PUBLIC COPY

File: EAC-99-144-50710 Office: Vermont Service Center

Date: FEB 13 2001

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)

IN BEHALF OF PETITIONER:



identification data deleted to
prevent clearly unwarranted
invasion of personal privacy

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, Acting 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 is a tour operator and wholesaler to travel agencies with 18 employees and \$4 million gross annual income. It seeks to employ the beneficiary as a marketing manager for the Middle East Department 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 argues that the proffered position is a specialty occupation and the beneficiary is qualified to perform the duties of a specialty occupation.

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), provides in part for nonimmigrant classification to qualified 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 a "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and 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 section 214(i)(2) of the Act, 8 U.S.C. 1184(i)(2), to qualify as an alien coming to perform services in a specialty occupation the beneficiary must hold full state licensure to practice in the occupation, if such licensure is required to practice in the occupation. In addition, the beneficiary must have completed the degree required for the occupation, or have experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

1. A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,
2. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay, and
3. Evidence that the alien qualifies to perform services in the specialty occupation.

The petitioner has provided a certified labor condition application and a statement that it will comply with the terms of the labor condition application.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

1. Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
2. Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
3. Hold an unrestricted State license, registration, or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
4. Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The beneficiary's foreign education has been found by a credentials evaluation service to be equivalent to a baccalaureate degree in travel and tourism management conferred by a United States institution. This evaluation is based upon the beneficiary's baccalaureate degree in tourism and hotel management conferred by a university in Turkey. Accordingly, it is concluded that the petitioner has shown that the beneficiary qualifies to perform the duties of the proffered position.

The term "specialty occupation" is 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.

The duties of the proffered position are described in pertinent part as follows:

1. **Prepare and implement a successful marketing plan:** Create an effective marketing strategy for the company; Accumulate all relevant data; Analyze the competition; Create, name and price products; Implement the positioning, promotion, and distribution of all products.
2. **Direct Advertising Campaign Strategies:** Choose the media for each assignment; Coordinate the working relationships between client, agency, and media companies; Campaign planning and research, including target market, product, and competition; Campaign concept and strategy, including creative style and media; Measure all results for success of campaigns.
3. **Ongoing Market Analysis:** Determine customer needs; Prepare worldwide market analysis; International yield forecasting and planning for developing campaigns; Evaluate and select promotional partners, vendors and suppliers; Perform marketing impact and analysis of products; Product positioning for export; Assess overseas trends and competitive postures.
4. **Product Development:** Develop and evaluate new product ideas and implement if feasible; Conduct

marketing research to identify the market for new products; Introduce new products or launch existing products into new markets; Design and implement international marketing strategies.

5. **Represent Company at Trade and Marketing Shows:** Attend association meetings to promote product and develop company's image.

6. **Work Closely with Other Departments:** Prepare monthly sales reports showing actual sales volume and potential sales; Coordinate sales information with accounting for budgeting; Liaison with operations to insure client satisfaction.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. The petitioner has not shown that it has, in the past, required the services of individuals with baccalaureate or higher degrees in a specialized area for the proffered position. Counsel has submitted a letter from the president and general manager of another tour business indicating that its marketing manager position requires a baccalaureate degree in a related field, and two job advertisements for travel industry positions requiring baccalaureate degrees. Such documentation, however, is insufficient evidence of an industry standard.

Counsel has also provided three letters from individuals involved in the travel industry. All state that the usual requirement for positions such as the proffered position is a baccalaureate degree in a tourism-related field. The writers, however, have not provided evidence in support of their assertions. In addition, none of the writers have indicated the number or percentage of tour industry managers who hold such degrees.

It is also noted that in a letter dated October 14, 1999, counsel stated that all of the petitioner's 18 employees have bachelor's degrees in a field related to the tourism industry. The record, however, contains no evidence, such as a list of all of the employees' names and proof of their educational backgrounds, in support of such claim.

In these proceedings, the duties of the position are dispositive and not the job title. The proffered position appears to combine the duties of a marketing manager with those of a travel agent. The Department of Labor's Occupational Outlook Handbook (Handbook), 2000-2001 edition, at pages 25-26 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. In addition, certain personal qualities and participation in in-house training programs are often considered as significant as the beneficiary's specific educational background.

The Handbook at pages 283-284 also finds no requirement of a baccalaureate degree in a specialized area for employment as a travel agent. The minimum requirement is a high school diploma or its equivalent for entry into travel agent positions. As technology and computerization are having a profound effect on the work of travel agents, some form of specialized training, such as that offered in many vocational schools and adult public education programs, is becoming increasingly important. Here again, certain personal qualities and participation in in-house training programs are often considered as significant as the beneficiary's specific educational background. In view of the foregoing, it is concluded that the petitioner has not demonstrated that the proffered position is a specialty occupation within the meaning of regulations.

With respect to counsel's objection to denial of this petition in view of the previous approval of a similar petition, this Service is not required to approve applications or petitions where eligibility has not been demonstrated. Although the record of proceeding contains a copy of the approved visa petition, its supporting documents have not been submitted. It is, therefore, not possible to determine definitively whether it was approved in error or whether the facts and conditions have changed since its approval. Determinations of eligibility are based on the totality of evidence available to this Service at this time.

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. Accordingly, the decision of the director will not be disturbed.

ORDER: The appeal is dismissed.