



PUBLIC COPY

U.S. Department of Justice

Immigration and Naturalization Service

D2

Identifying data deleted to prevent clearly demonstrated invasion of personal privacy

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

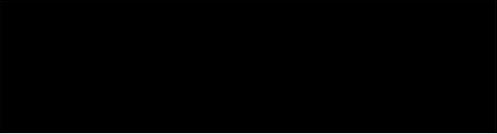


File: LIN 01 257 50164 Office: NEBRASKA SERVICE CENTER Date:

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)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

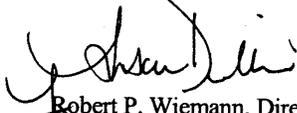
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

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 that 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 that 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, Nebraska Service Center, and the matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is described as a packaging services company. The company, established in 1987, has ten employees and a gross annual income of \$300,000. It seeks to temporarily employ the beneficiary as a Marketing Manager for a period of three years. The director determined that the petitioner had not established that the position offered to the beneficiary was a specialty occupation.

On appeal, counsel asserts that the position offered to the beneficiary is 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.

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 field 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 issue in this proceeding is whether the position proffered to the beneficiary is a specialty occupation.

In the initial petition filing, the petitioner stated that the proffered position involved the following duties:

Responsible for securing packaging distributors in major US and international markets,

Monitor their activity to ensure that they represent the brand name correctly through their distribution efforts in specified markets,

Assist with their marketing activities-both trade and consumer,

Work with [REDACTED] in [the petitioner's] efforts to sell the packaging brand to their expanding customer base,

Support Tolbert's sales and marketing teams and participate in national trade shows,

Head up the sales and marketing team at Tolbert, providing services to global customers in keeping with the guidelines established by general manager, Ms. Emma Tolbert, and

Responsible as liaison between Tolbert and its larger clients in respect to packaging styling, design and advertising.

In a letter to the prospective beneficiary submitted with the petition, the petitioner stated the position title of the beneficiary as Marketing Manager, with an annual salary of \$31,500. The petition also included evidence of coursework done by the beneficiary for an incomplete bachelor's degree in social work in the 1980's, a diploma for a Bachelor of Science degree in Management Studies (Special) with second class honors dated 1999 from the University of the West Indies, Jamaica. In 1989, the beneficiary also received a diploma in Management Studies

following the completion of a one year program conducted by the Jamaican Institute of Management. The petition also documented courses taken in banking and computer project management, with extensive work experience in the banking profession in increasingly more responsible positions. Finally, the petition also contained an equivalency evaluation of the beneficiary's educational background. The evaluator, Foundation for International Services, found that the beneficiary had the equivalent of a bachelor of business administration degree from an accredited college or university in the United States.

On November 4, 2001, the director asked for additional information to establish that the position of Marketing Manager qualified as a specialty occupation. Specifically the director requested evidence to establish that the position of Marketing Manager met one of the four criteria used to qualify the position in question as a specialty occupation.

In response, the petitioner compared the position in question to the classification of Manager, Sales (any industry) 1163.167-18 contained in the Department of Labor (DOL) Dictionary of Occupational Titles (DOT). Counsel stated that the DOT used this classification to examine the position of marketing or sales manager. This classification states the following duties:

Manages sales activities of establishment: Directs staffing, training, and performance evaluations to develop and control sales program. Coordinates sales distribution by establishing sales territories, quotas, and goals and advises dealers, distributors, and clients concerning sales and advertising techniques. Assigns sales territory to sales personnel. Analyzes sales statistics to formulate policy and to assist dealers in promoting sales. Reviews market analyses to determine customer needs, volume potential, price schedules, and discount rates, and develops sales campaigns to accommodate goals of company. Directs product simplification and standardization to eliminate unprofitable items from sales line. Represent Company at trade association meetings to promote products. Coordinates liaison between sales department and other sales-related units. Analyzes and controls expenditures of division to conform to budgetary requirements. Assists other departments within establishment to prepare manual and technical publications. Prepares periodic sales report showing sales volume and potential sales. May direct sales for manufacturer, retail store, wholesale house, jobber, or other establishment. May direct product research and development. May recommend or approve budget, expenditures, and appropriations for research and development work.

The petitioner pointed out that this position was given a Specific Vocational Preparation (SVP) of 8. The petitioner interpreted this rating as meaning that the position requires at least the minimum of a baccalaureate degree. The petitioner submitted the survey results (without attachments) on the position of Marketing Manager compiled by a company, HR Analytical Services. The company identified their public domain information sources as including, among others, Department of Labor Occupational Information Network (O*NET), the Dictionary of Occupational Titles (DOT), the Classified Index of Industries and Occupations, the 2000-2001 Occupational Outlook Handbook (Handbook), the Standard Occupation Classification System, and the Occupational Outlook Quarterly.

With regard to the third criterion identified in the regulations, namely, that the employer normally requires a degree or its equivalent for the position, counsel explained that the proposed position was the first such position for the petitioner. With regard to the fourth criterion, counsel asserted that the job definition listed in the DOT indicated the complexity of the position.

On January 26, 2002, the director denied the petition stating that the petitioner had failed to establish any of the four criteria listed in the regulations. Furthermore the director questioned the use of the DOT ratings, citing to page xiii of the DOT which states "[i]n using the DOT, it should be noted that the U.S. Employment Service has no responsibility for . . . setting jurisdictional matters in relation to different occupation." [sic] The Service then referred to the Handbook, 2000-2001 version, and found that the duties of the proffered position appeared to be common to the Handbook classification of "Advertising, Marketing, and Public Relations Manager," on page 25 as well as the classification of "Manufacturers' and Wholesale Representative" on page 269. In looking at the Advertising, Marketing and Public Relation Manager classification, the Service stated that the Handbook found no requirement for a baccalaureate or higher degree in a specialized area for employment as a marketing manager. The Service cited the following from this classification:

A wide range of educational backgrounds are suitable for entry into marketing, advertising, and public relations managerial jobs, but many employers prefer a broad liberal arts background. Additionally, certain personal qualifies [sic] and participation in in-house training programs are often considered as important as specific formal academic training. Most advertising, marketing, and public relation management positions are filled by promoting experienced staff. Or related professional or technical personnel (Emphasis in original).

In looking at the classification of Manufacturers' and Wholesale Sales Representative, the Service quoted the following Handbook excerpt:

The background needed for sales jobs varies by product line and market. As the number of college graduates has increased and the job requirements have become more technical and analytical, most firms have placed a greater emphasis on a strong educational background. Nevertheless many employers still hire individuals with previous sales experience who do not have a college degree. In fact, for some consumer products, sales ability, personality, and familiarity with brands are as important as a degree. On the other hand, firms selling industrial products often require a degree in science or engineering in addition to some sales experience. In general, companies are looking for the best and brightest individuals who display the personality and desire necessary to sell. . . (Emphasis in original).

The Service also noted that the Handbook did not find any requirement of a baccalaureate or higher degree in a specialized area for employment as a manufacturers' and wholesale sales representative.

On appeal, counsel explains the history of the establishment of the position of marketing manager, stating that the petitioner had earned top honors in 1999 in an award given to historically underutilized businesses that have improved their business standards by utilizing new and innovative ideas. In particular, the petitioner was praised for its ability to service and supply its customers located in multiple locations within and outside the continental United States. The petitioner, in seeking to further improve its effectiveness of its operation, needed a competent marketing professional to locate, evaluate and understand its market.

Counsel states that the petitioner had met three of the four requirements necessary to have the manager position qualified as a specialty occupation. First, counsel asserts that it agrees with the Service's finding that the packaging industry may hire certain lower or entry-level positions. With regard to the industry standard criteria, counsel submits a sampling of advertisements recently placed on the Internet for marketing managers for the Chicago area. Six such advertisements were placed on the record. Four of the six were for positions requiring a non-specific bachelor's degree, with experience. An additional position specified the need for a bachelor's degree in marketing or business administration, with experience, while a sixth advertisement required a degree in marketing, with experience.

With regard to the third criterion, namely, the employer requiring a degree, counsel asserts that the petitioner is setting the norm with the first marketing manager that it will hire. A highly skilled position is required precisely because of the smallness of the company. Counsel also asserts that the Service arbitrarily reduces the position in the petition to a simple sales position. Counsel points out that the marketing position has been found eligible as a specialty occupation in the past, and cites to previous Administrative Appeals Office (AAO) decisions. One AAO decision found a marketing position with market research, analysis and promotion to be a specialty occupation, while the other, involving the program coordinator for an adoption agency, was also found to be a specialty occupation.

In conclusion, counsel points out that the offered position is not the same as the position described in the Service's denial letter, since the petitioner's position is designed to specifically carry out high-level marketing studies, and reaches within and outside of the continental United States. Counsel finally asserts that the Service should not rely simply on standardized government classification systems, such as the Handbook, and cites to a California District Court decision to this effect.

Upon review of the record, both counsel's assertion with regard to not relying simply on the Handbook in examining job duties, and the Service's comments on why reference to the DOT and SVP rating levels is not sufficient to establish an occupation as a specialty occupation appear to be well-founded.

The DOT is an authoritative source of information on standardized occupational information and definitions. Its special notice on page xiii contains a clear disclaimer that its data should not be considered a judicial or legislative standard for wages, hours, or other contractual or bargaining elements. The U.S. Employment Service also has no responsibility for establishing appropriate wage levels for workers, or settling jurisdictional matters in relation to different occupations. It should be noted that the Service's reference to "not setting jurisdictional matters" contained in its denial is using the U.S. Employment Service's disclaimer inappropriately. Nevertheless, the DOT training and experience rating system is not directly related to whether a position is a specialty occupation. Likewise, the purpose of the Handbook is described on page v as describing changes in workplace practices, working conditions, training and educational requirements, earnings, and job prospects in a wide range of occupations.

In examining the sales representative classification, the 2000-2001 Handbook stated that "[a]lthough employers place an emphasis on a strong educational background, many individuals with previous sales experience still enter the occupation without a college

degree." The 2002-2003 Handbook edition eliminates this text and on page 368 substitutes the following statement: "A bachelor's degree increasingly is required; nevertheless, some individuals with previous sales experience enter the occupation without a college degree." From the revised wording, it appears that the trend is for more employers to require persons seeking this type of employment to have a degree. This ability to document trends is perhaps the best use of the Handbook.

Upon review of the record, the position contained in the petition appears more analogous to Advertising, Marketing and Public Relations Managers as described in the Handbook on page 26. While it does contain elements of sales, the petitioner's job duties for the position focus more on customer service, assisting the general manager, and heading up the combined sales and marketing teams. In addition, the beneficiary will not be self-employed, and the position as described does not appear to support much travel, both items described in the Sales Representatives job as significant points.

To date, the evidence provided is unpersuasive that the proffered position of marketing manager in this petition is a specialty occupation. With regard to the first criterion for qualifying the position as a specialty occupation, the petitioner concedes that the industry may hire certain lower or entry-level positions. In addition, the Advertising, Marketing, Promotions, Public Relations, and Sales Managers classification in the 2002-2003 Handbook basically establishes on page 28 that a wide range of educational backgrounds are suitable for entry, but that many employers prefer those with experience in related occupations plus a broad liberal arts background. (Emphasis added.) The Handbook also adds that for marketing, sales, and promotion management positions, some employers prefer a bachelor's or master's degree in business administration with an emphasis on marketing. This wording suggests that while some employers may prefer a specific degree for marketing positions, it is not necessarily the normal minimum requirement for entry. Additionally, the survey submitted by the petitioner appears to support this finding, with its three prong analysis of needed job qualifications for a marketing manager position. This letter states:

[a] survey of qualifications for current vacancies in occupational posts categorized as Market Managers and Sales Managers reveals a common criterion of a required post-secondary degree in business or marketing, an unspecified post-secondary degree determined to be a baccalaureate or a higher degree plus professional experience, or long-term professional experience. Findings of this survey reflect the practical application of the guidelines provided by the Federal Government and serve as further evidence that the

position of a Marketing Manager requires a person holding a post-secondary degree and is a specialty occupation. (Emphasis added.)

In other words, the possession of a bachelor degree in business or marketing was not the minimum qualification necessary or required to secure a job as a marketing manager. An unspecified degree determined to be a baccalaureate, a higher degree plus professional experience, or long-term experience at a professional level could also qualify a person for a job in this field. To the extent that the requirement for a degree is not established sufficiently on the record, the petitioner did not meet the first criterion.

With regard to the second criterion that requires that parallel positions in the industry require a degree, the Internet vacancy advertisements provided by the petitioner were insufficient to document that the packaging industry as a whole requires a degree in business administration or marketing to obtain a job. First, the advertisements that were submitted were from a variety of firms, all of which were not similar to the petitioner or in the same industry. Second, the advertisement for the foodservice disposables packaging firm, the only firm that appeared similar to the petitioner, required a 4 year degree, marketing experience in the foodservice disposable industry, sales experience in the packaging industry, and a stable work history. No specific degree in business administration or marketing was required. The advertisements taken as a whole appear to document that a degree, with experience, was required for all the jobs posted. To the extent this evidence did not support the requirement of a bachelor's degree in business administration or marketing throughout the packaging industry, this evidence was not deemed sufficient to establish the second criterion.

The fact that the petitioner will require a degree in any future job postings for the marketing manager position does not carry sufficient weight to meet the third criterion. The fact that the petitioner requires a degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, does not establish eligibility. See Matter of Michael Hertz Associates, 19 I&N 558 (BIA 1988).

In conclusion, the petitioner has not established any of the four criteria listed in 8 C.F.R. 214.2(h)(4)(iii)(A) to qualify the proffered position as a specialty occupation.

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 appeal will be dismissed.

ORDER: The appeal is dismissed.