



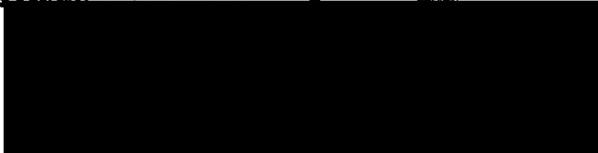
DA

U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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FILE: LIN 02 055 51818

OFFICE: NEBRASKA SERVICE CENTER

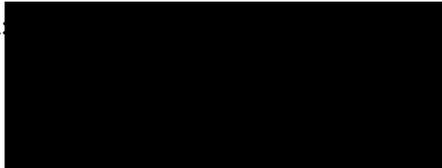
DATE: DEC 18 2002

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 USC 110(a)(15)(H)(i)(b)

IN BEHALF OF PETITIONER



PUBLIC COPY

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 Director, Nebraska Service Center, denied the nonimmigrant visa petition and the matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a software consulting firm with three employees and a gross annual income of \$150,000. It seeks to employ the beneficiary as its Business Manager for a period of three years.

The director denied the petition because he found that the proffered position did not meet the requirements of a specialty occupation. On appeal, counsel submits a brief in which he asserts that the proffered position is, in fact, 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 the classification of qualified nonimmigrant 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 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) further 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.

In the initial petition, the petitioner's CEO stated that the beneficiary's proposed duties are "contract negotiation and review, draft(ing) and clos(ing) all international business deals, (and) manag(ing) all international business transactions." Counsel summarized the applicant's present occupation and work experience as follows: "Holds Masters degree in Business Law, and experience

in the area."

In a letter which accompanied the application, the CEO stated that the beneficiary has "some experience in the field" but did not further describe the applicant's experience. In that letter, the CEO further stated that a bachelor's degree in business, economics, or law is a requirement of the position, as the company has never hired anyone for the position without such a degree.

The petitioner also submitted job postings for Business Managers from the internet. Those postings explicitly require degrees in business administration or a related specialty.

On December 12, 2001, the director of the Nebraska Service Center, requested that the petitioner provide additional evidence to demonstrate that the proffered position requires a college degree. That request noted that the proffered position appears to be a generalist position, which does not necessitate a baccalaureate degree in a specific specialty. In response, the petitioner submitted more job postings for business managers from the internet.

On December 31, 2001, the director denied the petition, finding that the petitioner had not established any of the relevant criteria stated above in 8 C.F.R. 214.2(h)(4)(iii)(a) and, therefore, had not established that the proffered position is not a specialty occupation.

On appeal, counsel states that the requirement of 8 C.F.R. 214.2(h)(4)(iii)(a) has been satisfied, that is; that the petitioner has demonstrated that a baccalaureate or higher degree is common to the industry in parallel positions among similar organizations. Referring to the job postings submitted in response to the request for additional information, counsel notes that the director observed that the job postings were for positions comparable to the proffered position, yet he found that the proffered position was not similar because of the petitioner's size. Counsel states that the decision was based was on the size of the petitioner's company, which is contrary to the holding in Young China Daily v. Chapell, 742 F.Supp. 552 (N.D. Cal. 1989).

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.

As was stated above, counsel maintains that the director denied the petition based on the size of the petitioning firm. Implicit in the decision of denial, however, is a finding that the job postings provided were not parallel positions in similar organizations in the petitioner's industry. In stating that the positions were "comparable," the director appears to have meant only that, like the proffered position, they are ostensibly managerial.

In fact, the preliminary inquiry in this matter is whether, based on the described duties, the proffered position is a Business Manager position, or some other type of position. The duties of the position are to negotiate, draft, review, and close transactions for the sale of the petitioner's services. Those duties are entirely consistent with those of a Sales Representative. This is manifestly a Sales Representative position, notwithstanding that the job title is Business Manager, and shall be evaluated as such.

Counsel's contention that the proffered position is a specialty occupation is unconvincing. In evaluating whether the proffered position is a specialty occupation, each of the four criteria listed at 8 C.F.R. 214.2(h)(4)(iii)(A) will be considered separately below.

I. A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. 8 C.F.R. 214.2(h)(4)(iii)(A)(1).

The Service often looks to the U.S. Department of Labor's (DOL) Occupational Outlook Handbook (Handbook) when determining whether a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into a particular position. Although the Handbook does not contain a section pertinent to software company sales representatives, the position is comparable to that of Sales Representatives, Wholesale and Manufacturing.

In the 2002 - 2003 edition of the Handbook at page 369, the DOL states the following about the training and educational

requirements for Sales Representatives for Wholesale and Marketing firms.

The background needed for sales jobs varies by product line and market. Most firms require a strong educational background and increasingly prefer or require a bachelor's degree as the job requirements have become more technical and analytical.

Although that passage indicates that many firms now prefer or require that Sales Representatives have a bachelor's degree, it implies that the balance of firms have no such requirement nor even such a preference. This indicates that a bachelor's degree or the equivalent is not a requirement for entry into the position. More important, however, no degree in a specific specialty is a minimum requirement for entry into the proffered position. If the proffered position is more technical than other Sales Representative positions, the burden was on the petitioner to demonstrate that salient difference.

II. 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. 8 C.F.R. 214.2(h)(4)(iii)(A)(2).

Factors often considered by the Service when determining the industry standard include: whether the DOL's 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." Shanti, Inc. v. Reno, 36 F.Supp.2d 1151, 1165 (D. Minn. 1999) (quoting Hird/Blaker Corp. v. Slattery, 764 F.Supp.2d 872, 1102 (S.D.N.Y. 1991)).

The DOL's conclusions pertinent to a degree requirement for a Sales Representative position were discussed in the previous section, and shall not be repeated here. Neither counsel nor the petitioner presented any evidence that any association of Sales Representatives has instituted a degree requirement for membership.

Although the petitioner submitted job postings for Business Manager positions, the record contains no indication that the duties of those positions are similar to those of the proffered position. As such, the petitioner has not demonstrated that those positions are parallel to the proffered position.

Nothing in the description of the proffered position indicates that the petitioner's business is so much more complex than routine Sales Representative positions that it would require a

baccalaureate degree in a specialized field of study.

III. The employer normally requires a degree or its equivalent for the position. 8 C.F.R. 214.2(h)(4)(iii)(A)(3).

As was noted above, in a letter accompanying the petition, the CEO stated that a bachelor's degree in business, economics, or law is a requirement of the position, as the company has never hired anyone for the position without such a degree. The record contains no evidence, however, that the petitioner has ever filled this position before. The position appears to be newly created. Thus, the petitioner cannot establish that it normally requires a degree in a specific specialty.

IV. The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. 8 C.F.R. 214.2(h)(4)(iii)(A)4).

As described, the duties of the position, which are negotiating, drafting, reviewing, and closing transactions for the sale of the petitioner's services, do not appear so specialized and complex that they can only be performed by an individual who has attained a baccalaureate or higher degree in a specific specialty.

Based upon the evidence in the record, the petitioner has not established that the proffered position is a specialty occupation. The critical element is not the title of the position, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's degree in the specific specialty as a minimum for entry in the occupation as required by the Act. The Service must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. Cf. Defensor v. Meissner, 201 F3d 384 (5th Cir. 2000). In this case, the petitioner has not shown that the practice of the proffered position requires the attainment of a bachelor's degree in a specific specialty.

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.