



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



File: WAC-01-056-50987 Office: California Service Center

Date: DEC 27 2002

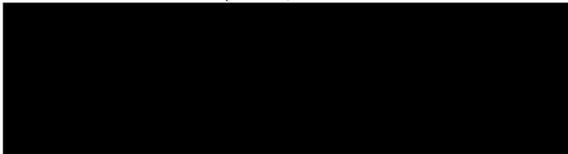
IN RE: Petitioner:
Beneficiary:



PUBLIC COPY

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:



**identifying 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, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a provider of advance-messaging systems to users over the internet. It has eight employees and a projected gross annual income of \$900,000. The petitioner seeks to employ the beneficiary as its president for a period of three years. The director denied the petition because the petitioner had not shown that the proffered position is a specialty occupation. The director further determined that the petitioner and the beneficiary do not share an employer-employee relationship.

On appeal, counsel submits a brief and documentation.

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 noted that the beneficiary of this petition is actually the president and owner of the petitioning company and, therefore, the petitioner does not meet the definition of "United States employer" set forth at 8 C.F.R. 214.2(h)(4)(ii).

On appeal, counsel argues that the petitioner, as a corporation, is recognized as a legal entity created under the authority of the laws of California and distinct from the individuals who comprise it, the shareholders. Counsel further asserts that the beneficiary is not the owner of the petitioning company, but rather a minority shareholder owning only 10% of the total number of shares.

8 C.F.R. 214.2(h)(4)(ii) defines the term "United States employer" as follows:

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

In this case, the evidence of record shows that the petitioning entity, Mail2World, Inc., is registered as a corporation in the State of California. A corporation is a separate and distinct legal entity from its owners or stockholders, able to employ them and petition on their behalf. Matter of M, 8 I & N Dec. 24 (B.I.A. 1958; A.G. 1958); Matter of Aphrodite Investments Limited, 17 I & N Dec. 530 (Comm. 1980); and Matter of Tessel, 17 I & N Dec. 631 (Act. Assoc. Comm. 1980). The beneficiary's ownership of shares in the petitioning company does not preclude the petitioner from being able to file this nonimmigrant petition in the beneficiary's behalf. Indeed, if the beneficiary were the sole owner of the corporation, that fact would not preclude the petitioner from filing an H-1B petition on behalf of the beneficiary. In view of the foregoing, this portion of the director's objection has been overcome.

The director also determined that the proffered position is not a specialty occupation. On appeal, counsel argues that the specific duties of the position are 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 a specific specialty.

Counsel's statements on appeal are not persuasive. The Service does not rely solely on the title of a position in determining whether that position 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 a separate letter which accompanied the initial I-129 petition, the petitioner described the duties of the beneficiary in the offered position as follows:

- (a) directing the day-to-day operations and all business, administrative and financial activities including exercising discretionary authority in decision-making with regard to business operations;
- (b) establishing corporate goals and policies;

- (c) overseeing market development including advertising and procurement in order to effectuate company directives;
- (d) overseeing delivery of technical services to Mail2World's clients;
- (e) developing and implementing standard operating procedures and other documentation required for ongoing use of system within client environment;
- (f) overseeing training and assisting client personnel in providing customer technical assistance;
- (g) directing project status meetings with team members to ensure project schedules are achieved; and
- (h) formulating business plans and processes into technical solutions for company's clients.

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.

The Service does not agree with counsel's argument that the proffered position of president requires a minimum of a bachelor's degree in a specific specialty. The proffered position parallels that of a top executive as that job is described by the Department of Labor (DOL) in its Occupational Outlook Handbook (Handbook),

2002-2003 edition. The Handbook describes the general duties of a top executive as follows:

All organizations have specific goals and objectives that they strive to meet. Top executives devise strategies and formulate policies to ensure that these objectives are met. Although they have a wide range of titles -- such as chief executive officer, board chair, president, vice president, school superintendent, county administrator, and tax commissioner -- all formulate policies and direct the operations of businesses and corporations, nonprofit institutions, governments, and other organizations.

A review of the Handbook at pages 87-88 finds no requirement of a baccalaureate or higher degree in a specific specialty for employment as a top 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.

Counsel contends that the Handbook supports a finding that the proffered position is a specialty occupation. In support of this contention, counsel cites the Handbook, 2000-2001 edition, as follows:

Since many general manager and top executive positions are filled by promoting experienced lower level managers when an opening occurs, many are promoted from within the organization. Some companies prefer that their top executives have specialized backgrounds and hire individuals who are managers in other organizations.

The fact that a company may hire individuals who are managers in other organizations, however, does not demonstrate that these managers are required to have a baccalaureate degree in a specific specialty. In this case, it is noted that the beneficiary's "specialized background" experience consists of part-time and summer work for family-owned companies while the beneficiary was attending college in the United States and during his summer vacations in Saudi Arabia.

Counsel asserts that the position of company president has a specific vocational preparation (SVP) code of 8 in the DOL's Dictionary of Occupational Titles (DOT). Counsel asserts that an SVP level of 8 reflects a requirement of at least a baccalaureate degree in a specific specialty for employment in the position of company president. However, a reference in the DOT, standing alone, is not enough to establish that an occupation is a specialty occupation. The DOT classification system and its categorization of an occupation as "professional and kindred" are not directly

related to membership in a profession or occupation as defined in immigration law. In the DOT listing of occupations, any given subject area within the professions contains nonprofessional work, as well as work within the professions.

The latest edition of the DOT does not give information about the educational and other requirements for the different occupations. This type of information is currently furnished by the Department of Labor in the various editions of the Handbook. The latter publication is given considerable weight (certainly much more than the DOT) in determining whether an occupation is within the professions. This is because it provides specific and detailed information regarding the educational and other requirements for occupations. Thus, counsel has not shown that a bachelor's degree in a specific specialty is a minimum requirement for entry into the occupation.

In an attempt to show that the requirement of a baccalaureate degree in a specific specialty is standard to the industry in parallel positions among similar organizations, counsel submits a letter from [REDACTED] the president of an internet communications company. [REDACTED] states that it is customary in the internet communications industry to hire individuals who have at least a bachelor's degree for the position of president. [REDACTED] has not, however, provided any documentary evidence to corroborate his assertion. Furthermore, one letter is insufficient evidence of an industry standard. Therefore, the petitioner has not shown that the degree requirement is standard to the industry in parallel positions among similar organizations.

The petitioner has failed to submit any evidence to show that it required a baccalaureate degree in a specific specialty as part of the hiring process.

Counsel's assertion that the nature of the 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 is not persuasive. As discussed above, the duties of this position do not appear to be any more complex or specialized than those normally expected of a company president or top executive. The DOL, which is an authoritative source for educational requirements for certain occupations, does not indicate that a bachelor's degree in a specialized area is the normal minimum requirement for employment as a president or top executive. Consequently, the petitioner has failed to establish 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 a specific specialty.

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.