



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: SRC-01-063-51898

Office: Texas Service Center

Date:

JAN 29 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 U.S.C. 1101(a)(15)(H)(i)(b)

Identification data deleted to
prevent clearly unwarranted
invasion of personal privacy.

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 is a telemarketing and distribution business which specializes in closed-circuit transmission of South and Central American soccer matches to clients in the U.S., in addition to marketing and distributing vitamin products. It has 12 employees and a gross annual income of \$3.5 million. It seeks to employ the beneficiary as an operations manager for a period of two 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 duties described by the petitioner did not appear to be so complex as to require a baccalaureate or higher degree. The director further found that the beneficiary's educational background did not appear to be related to the proffered position. On appeal, counsel states, in part, that the proffered position is similar to that of an industrial engineer, a specialty occupation. Counsel further states that the beneficiary holds a degree in industrial engineering and is therefore qualified to perform the duties of the specialty occupation.

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:

...supervise the Company's daily operations in an effort to increase sales and revenue and to increase overall operational efficiency.

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 industrial engineering or a related field. In its Occupational Outlook Handbook (Handbook), 2000-2001 edition, at page 91, the Department of Labor (DOL) describes the job of an industrial engineer as follows:

Industrial engineers determine the most effective ways for an organization to use the basic factors of production--people, machines, materials, information, and energy--to make a product or provide a service. They are the bridge between management goals and operational performance. They are more concerned with increasing productivity through the management of people, methods of business organization, and technology than are engineers in other specialties, who generally work more with products or processes.

To solve organizational, production, and related problems most efficiently, industrial engineers carefully study the product and its requirements, use mathematical methods such as operations research to meet those requirements, and design manufacturing and information

systems. They develop management control systems to aid in financial planning and cost analysis, design production planning and control systems to coordinate activities and control product quality, and design or improve systems for the physical distribution of goods and services. Industrial engineers determine which plant location has the best combination of raw materials availability, transportation, and costs. They also develop wage and salary administration systems and job evaluation programs.

The record reflects that the petitioner, which specializes in closed-circuit transmission of South and Central American soccer matches to clients in the U.S., in addition to marketing and distributing vitamin products, employs approximately 12 persons and has a gross annual income of \$3.5 million. The business in which the beneficiary is to be employed does not require the services of an industrial engineer who studies products and their requirements, uses mathematical methods such as operations research to meet those requirements, and designs manufacturing and information systems. Furthermore, there is no evidence that the position offered includes the development of management control systems to aid in financial planning and cost analysis, the design of production planning and control systems to coordinate activities and control product quality, and the design or improvement of systems for the physical distribution of goods and services, or that the position requires an individual with a knowledge of sophisticated engineering techniques normally associated with the duties of an industrial engineer.

The duties that the petitioner endeavors to have the beneficiary perform are the daily supervision duties including marketing duties, which are similar to the duties that a general manager or top executive and a marketing manager would execute in a small business establishment. In contrast to the description of an industrial engineer, at page 50 of the Handbook, the DOL describes the positions of a general manager and top executive as follows:

Although they have a wide range of titles--such as chief executive officer, president, executive vice president...--all formulate policies and direct the operations of businesses and corporations, nonprofit institutions, and other organizations.

In smaller organizations, such as independent retail stores or small manufacturers, a partner, owner, or general manager is often also responsible for purchasing, hiring, training, quality control, and day-to-day supervisory duties.

Also, at page 25 of the Handbook, the DOL describes the position of a marketing manager as follows:

Marketing managers develop the firm's detailed marketing strategy...they identify potential markets--for example, business firms, wholesalers, retailers, government, or the general public. Marketing managers develop pricing strategy with an eye towards maximizing the firm's share of the market and its profits while ensuring that the firm's customers are satisfied.

The types of duties the petitioner ascribes to the beneficiary fall within the scope of a general manager or top executive position and a marketing manager position rather than an industrial engineer position. For example, the petitioner states that the beneficiary will "supervise the Company's daily operations..." Daily supervisory duties are not duties normally associated with an industrial engineer. 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, 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 such as industrial engineering, for the offered position. 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.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. The job fits the description of a general manager or executive and 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.

Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

Beyond the decision of the director, the petitioner's labor condition application was certified on December 18, 2000, a date subsequent to December 14, 2000, the filing date of the visa petition. Regulations at 8 C.F.R. 214.2(h)(4)(i)(B)(1) provide that before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application. As this matter will be dismissed on the grounds discussed, this issue need not be examined further.

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.