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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: EAC-00-170-52346 Office: Vermont Service Center

Date: JUL 05 2002

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:



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 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 the manufacturer and distributor of computerized motion controllers and personal computer based alternating current motor controllers. It has nine employees and a stated gross annual income of \$750,000. It seeks to employ the beneficiary as a director of international marketing for a period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation.

On appeal, the petitioner's most current counsel submits a brief and additional 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.

To qualify the offered position as a specialty occupation, the petitioner must establish that:

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.

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

The director concluded that the petitioner had failed to demonstrate that the proffered position could be successfully performed only by an individual who possessed a baccalaureate or higher degree in a specific and specialized area. On appeal, the petitioner's current counsel submits a new amended list of "specialized marketing duties" for the offered position, and argues that such position can be considered professional based on the complexity of its duties alone. Counsel contends that the petitioner is best suited to determine the minimum education requirements needed to perform the duties of the proffered position. Counsel cites several federal district court decisions in support of the arguments put forth on appeal.

Counsel also requests oral argument. Oral argument, however, is limited to cases where cause is shown. It must be shown that a case involves facts or issues of law which cannot be adequately addressed in writing. In this case, no cause for oral argument is shown. Consequently, counsel's request for oral argument is denied.

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 letter which accompanied the initial I-129 petition, the petitioner's president described the beneficiary's duties in the offered position as follows:

[The beneficiary]... is the key person heading our marketing effort in Japan. She is the Head of our International Marketing Department solely responsible for sales in Japan, Taiwan, China and Europe.

In response to a Service request for additional information regarding the offered position, the petitioner's former counsel described the duties of the position as follows:

Planning and administering marketing and sales policies and programs to promote the company's line of computerized motion controller and pc-based ac motor controller.

Directing staffing, training, and performance evaluations to develop and control marketing and sales programs.

Coordinating marketing channels and sales distribution channels by establishing territories, quotas, and goals.

Reviewing market analyses to determine customer needs, volume, potential, price schedules and discount rates.

Representing [the petitioner] at trade association meetings to promote company's line of computerized motion controller and pc-based ac motor controller.

Analyzing and controlling expenditures of division to conform to budgetary requirements.

Preparing marketing and sales report showing sales volume and potential sales.

On appeal, the petitioner's current counsel provides a revised description of twelve "specialized marketing duties" for the proffered position. This revised description appears to paraphrase the description of some of the duties contained in the Department of Labor's (DOL) Occupational Outlook Handbook, (Handbook), 2002-2003 edition, for the position of market research analyst. The position, however, does not appear to be primarily that of a market research analyst, especially when viewed in light of the two prior descriptions of the duties of the offered job cited above.

The Handbook specifically notes "[m]arket research analysts are concerned with the potential sales of a product or service. They analyze statistical data on past sales to predict future sales." While the duties described above appear to involve some sales analysis, the duties of the proffered position appear to be the duties of either a marketing manager or a market research manager.

According to the DOL's Handbook:

Marketing managers develop the firm's detailed marketing strategy. With the help of subordinates, including *product development managers* and *market research managers*, they determine the demand for products and services offered by the firm and its competitors. In addition, they identify potential markets.... 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. In collaboration with sales, product development, and other managers, they monitor trends that indicate the need for new products and services and oversee product development.

The most recent revision of the beneficiary's proposed job duties, which include "...develop a marketing strategy, based on her knowledge and established company policy, nature of the market, and cost and markup factors" and "advise company on export documentation procedures and certified commercial documents that are required by foreign companies," parallel the job responsibilities of a marketing manager or market research manager. Information at page 28 of the Handbook does not indicate that

study. Rather, most employers prefer a wide-range of educational backgrounds or promote individuals from within companies. Additionally, certain personal qualities and participation in in-house training programs are often considered as important as a specific formal academic background. Thus, the petitioner has not shown that a bachelor's degree or its equivalent in a specific area is required for the position being offered to the beneficiary.

The petitioner has not provided any evidence that it has, in the past, required the services of individuals with baccalaureate or higher degrees in a specialized area for the offered position.

The record contains no evidence to demonstrate 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. Counsel's argument that the petitioner should be allowed to determine the minimum education requirements needed to fill the proffered position in light of its own business and employment needs is not persuasive. While counsel asserts that the holding reached in Unico American Corp. v. Watson, CV No. 896958 (C.D. Cal. Mar. 19, 1991), dictated such an outcome in this particular case, counsel has failed to provide a copy of this unpublished district court decision. Furthermore, the proffered position at issue in the cited decision was that of a computer programmer, which can be readily distinguished from the position of a marketing manager in this case. Counsel has not demonstrated that the cited decision is relevant to the facts and issues of this proceeding.

Counsel argues that the proffered position can be considered professional based on the complexity of its duties alone. Counsel cites the holding reached in American Biotech, Inc. v. INS, F. Supp. (E.D. Tenn. March 27, 1989), in support of this argument. Counsel further argues that the petitioner's size and the scope of its business activities should not be determinative factors in considering whether the duties of the offered job are professional in nature. In support of this assertion, counsel cites the holding reached in Young China Daily v. Chappell, 742 F. Supp. 522 (N.D. Cal. 1989). However, these decisions dealt with membership in the professions, not membership in a specialty occupation. While these terms are similar, they are not synonymous. The term "specialty occupation" is specifically defined in section 214(i) of the Act. That statutory language effectively supersedes the cited decisions.

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.

Counsel implies that the petitioner needs to employ an individual possessing knowledge of the Japanese language and culture in the offered position to diminish business risk, prevent cultural misunderstandings, and maintain respectable negotiating status. The

proffered position, however, is that of a marketing manager and not that of a Japanese linguist and cultural expert. Furthermore, the petitioner has failed to establish that the beneficiary's duties are of such complexity that a baccalaureate degree in a specific specialty, as distinguished from familiarity with Japanese language and culture or a less extensive education, is necessary for entry into the job offered.

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

**ORDER:** The appeal is dismissed.