

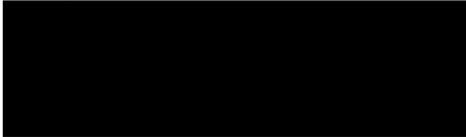


DA

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: LIN-01-074-54746 Office: Nebraska Service Center

Date: JUL 08 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)

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. Wiermann, 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 imports and exports pharmaceutical products, and medical and surgical equipment. It has two employees and a gross annual income of \$119,838. It seeks to employ the beneficiary as a manager for a period of three 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 degree. On appeal, counsel states, in part, that the proffered position should be considered a specialty occupation based on the complexity of the duties alone. Counsel further argues that the job advertisements that were previously submitted demonstrate that the proffered position requires a baccalaureate degree.

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:

- * responsible for fully describing product for its pharmaceutical, surgical and medical use to clients as well as translating products to the dictionary description for Middle East clients,

- * responsible for analyzing customer's needs

- * responsible for analyzing sales and financial data, implementing promotional strategies, managing inventory and ordering products,
- * Interview and make hiring decisions,
- * conducts orientation of new personnel,
- * disciplines and suspends personnel if needed,
- * responsible for assigning work and directing the work flow assigned to personnel,
- * establishes performance standards and periodically conducts appraisal interviews with subordinates,
- * Monitors key activities and outcomes and obtain solutions to problems and improve services and operations in a cost effective manner.
- * Will identify[,] recommend and develop new product concepts and existing product modifications to generate incremental sales

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 general medicine and surgery or a related field. The proffered

position appears to combine the duties of an office and administrative support worker manager with those of a sales and marketing manager. A review of the Department of Labor's Occupational Outlook Handbook (Handbook), 2002-2003 edition, finds no requirement of a baccalaureate or higher degree in a specialized area for employment as an office and administrative support worker manager. Most businesses fill administrative and office support supervisory and managerial positions by promoting clerical or administrative support workers within their organizations. In addition, certain personal qualities such as strong teamwork and problem solving skills and a good working knowledge of the organization's computer system are often considered as important as a specific formal academic background.

A review of the Handbook also finds no requirement of a baccalaureate or higher degree in a specialized area for employment in sales and marketing managerial jobs. A wide range of educational backgrounds are suitable, but many employers prefer those with experience in related occupations plus a broad liberal arts background. In addition, 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 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 general medicine and surgery, for the offered position. Third, although the record contains numerous job advertisements, 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.

Counsel cites unpublished AAU decisions, which have no precedential effect in this proceeding. See 8 C.F.R. 103.3(c). It is also noted that counsel has not provided sufficient details to persuasively demonstrate that the proposed duties of the instant petition compares are as complex as the duties which the beneficiaries mentioned in the cited decisions were required to perform.

Counsel also cites various court decisions but provides no discussion as to how such cited decisions compare with the instant petition. Counsel additionally asserts that the proposed position is considered a specialty occupation in view of the court ruling in Hong Kong T.V. Video Program, Inc. v. Ilchert (Hong Kong), 685 F.

Supp. 712 (N.D. Cal. 1988), which found a company president position professional based on the complexity of its duties alone even though a degree is not required. Hong Kong is inapplicable here because it dealt narrowly with a company president with both extensive experience and significant authority over individuals.

In the court case, the beneficiary was the president of the largest Asian-language video distribution company in the United States, which under the beneficiary's guidance had achieved a gross annual income of approximately \$10 million within seven years of the company's founding. In addition, he had direct oversight of over 70 employees and over 700 sublicensees, and his salary was \$140,000 per year. He was a corporate executive who made decisions at the senior management level of an extensive business operation. He was responsible for corporate strategy, budgeting, financial planning, marketing and promotional strategy, transportation and distribution of goods, product and inventory control, contractual negotiation and determination, and legal involvement with "pirate" firms involved in illegally duplicating and selling the company's products.

Unlike here, the beneficiary supervised managers who, in turn, had supervisors and assistants reporting to them. The supervisors and assistants, in turn, had employees such as foremen, blue-collar workers, secretaries, receptionists, clerks, and sales assistants reporting to them. The beneficiary is not a company president. Additionally, the beneficiary's duties do not appear to be as varied and complex as those of the beneficiary in Hong Kong.

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.