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U.S. Department of Justice

Immigration and Naturalization Service

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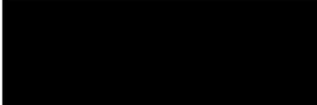


OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: EAC-01-115-50812 Office: Vermont Service Center

Date: OCT 10 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 that 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 that 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 that 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 business providing services in marketing, advertising, public relations, and events management with one employee and a stated gross annual income of \$171,037. It seeks to employ the beneficiary as a marketing manager for a period of one year. The director determined the petitioner had not established that the proffered position is a specialty occupation.

On appeal, 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.

The director denied the petition because the petitioner had not demonstrated that baccalaureate level training or higher in a specialized area was a normal requirement for entry into the proffered position. On appeal, counsel argues that the proffered position is a specialty occupation because it requires at least a bachelor's degree as reflected in the Department of Labor's Occupational Outlook Handbook (Handbook). Counsel asserts that the offered position is a specialty occupation because it is professional in nature. Counsel contends that the duties of the offered job are so unique and complex that the performance of such duties customarily requires an individual with a minimum of a baccalaureate degree in a related field.

Counsel's statements on appeal are not persuasive. The Service does not use either the characterization of a position as a profession or the title of a position to determine 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:

Planning, organizing, and executing company's marketing, advertising and public relations policies. Communication with newspapers, radio, television and public organization[s].

In a letter that accompanied the I-129 petition, the petitioner provided the following description of the duties of the beneficiary in the offered job:

[The beneficiary] will be responsible for planning, organizing, and executing our Company's marketing, advertising and public relations policies. She will confer with our president to discuss, analyze and outline new policies and to implement existing policies in view of our client needs. She will also be responsible for conferring with officials of newspapers, radio, television, advertising agencies and community organization[s]. In addition, she will direct research activities for planning and execution of works for our clients in view of their business interests and needs.

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 proffered position appears to combine the duties of a marketing manager with those of a public relations manager and an advertising manager. A review of the DOL's Handbook, 2002-2003 edition, at pages 26-29, finds no requirement of a baccalaureate or higher degree in a specialized area for employment as a marketing, public relations, or advertising manager. 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 in a specific area or its equivalent is required for the position being offered to the beneficiary.

Counsel argues that the petitioner had not previously required the services of an individual in the proffered position because it was a relatively new business experiencing rapid growth with all prior marketing activities having been performed by its president. Counsel asserts that the petitioner's level of business activity had expanded so as to require the employment of the beneficiary in a specialty occupation. However, counsel's reasoning is problematic when viewed in light of the statutory definition of specialty occupation. The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. As with employment agencies as petitioners, 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 F.3d 384 (5th Cir. 2000).

The critical element is not the title of the position or an employer's self-imposed standards, 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 the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if the Service was limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have bachelor's degrees. See id. at 388.

In this case, the proffered position of marketing manager does not meet the statutory definition of specialty occupation. The position does not require the theoretical and practical application of a body of highly specialized knowledge. Therefore, even though the petitioner has indicated that it requires a bachelor's degree in business administration, marketing, finance or a related discipline for employment in the offered job, such a requirement is a preference of the petitioner rather than an indication that the position is a specialty occupation requiring a bachelor's degree in a specific specialty.

Counsel asserts that the offered position is a specialty occupation because it is professional in nature. However, the criteria in

these proceedings is not concerned with membership in the professions, but rather 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, and such statutory language effectively supersedes any prior categories of occupations under the law.

Counsel argues that the degree requirement is common to the industry in parallel positions among similar organizations. In an attempt to provide evidence of an industry standard, counsel submits a letter signed by Lisa Skriloff, president of Multicultural Marketing Resources, Inc., in New York City, New York. In her letter, Ms. Skriloff stated that the job duties associated with the position of a marketing manager are of a professional nature and only an individual holding at least a minimum of a baccalaureate degree and/or qualified work experience in this field would be qualified for the position. However, a single letter is insufficient evidence of an industry standard. In addition, Ms. Skriloff has failed to provide any independent evidence that would tend to support her opinion.

Counsel also submits several pages of job advertisements from the Corp.Colorkinetics.Com and Marketing.Com Internet sites for five different marketing manager positions being offered by various private companies on October 24, 2001. However, one of the advertisements reflects that the particular position requires only a bachelor's degree without specifying a specific field of study, and another advertisement lists a bachelor's degree in engineering as an acceptable degree for employment. While the remaining three advertisements list a bachelor's degree in marketing, business, finance, or a related field, three advertisements cannot be accepted as sufficient evidence of an industry standard. Therefore, it cannot be concluded that the evidence demonstrates 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 contention that the duties of the offered job are so unique and complex that the performance of such duties customarily requires an individual with a minimum of a baccalaureate degree in a related field is not persuasive. As noted above, the Handbook does not provide any indication that a baccalaureate degree in a specialized area is required for employment as a marketing, public relations, or advertising manager. The record does not contain any independent evidence which would tend to support counsel's contention. 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.