



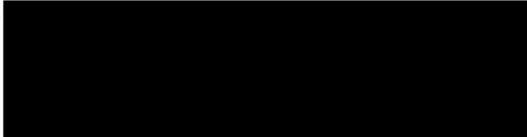
DA

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: EAC-01-102-53557 Office: Vermont Service Center

Date: OCT 10 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 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 wireless communications services with three employees and a stated gross annual income of \$400,000. It seeks to employ the beneficiary as a marketing administration supervisor 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 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 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, counsel argues that the offered position can be considered professional in nature based upon the complexity of its duties. Counsel contends that the petitioner is best suited to determine the minimum education requirements needed to perform the duties of the offered job. Counsel cites several court decisions in support of the arguments put forth on appeal.

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:

...Supervise general marketing direction of the company both locally and internationally considering the competitiveness of the communications industry. She will be directly involved in advertising and promotions. In addition, she will coordinate with customer

representatives to evaluate and promote possibilities for improved and expanded marketing. She will also be involved in Market Research to determine prospective clients/target market, product diversification, etc. She will manage sales aids for promotional programs as well as handle written and visual materials e.g. updates for the Company's web-site, Board meetings, conferences and issue symposiums, and specialized progress reports. She will also maintain the company budget with the President. Also, [the beneficiary] will prepare correspondence, reports and mailings to its members as well as progress reports on issues and general updates on marketing activities in the computer industry. [The beneficiary] will oversee the development and maintenance of membership mailing list and to serve as primary liaison for public relations, negotiations and promotions of the company.

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 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, a promotions 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, promotions, 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.

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. Counsel argues that the petitioner's level of business activity had recently 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 administration supervisor 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 or a related field for employment in the offered job, such a requirement is the petitioner's preference rather than an indication that the position is a specialty occupation requiring a bachelor's degree in a specific area of study.

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 administrative supervisor in this case. Counsel has not demonstrated that the cited decision is relevant to the facts and issues of this proceeding.

Counsel asserts that the offered position is a specialty occupation because it is professional in nature. In support of this assertion, counsel cites the holdings reached in Matter of Essex Cryogenics, Inc., 14 I. & N. Dec. 196 (Comm. 1972), and Matter of General Atomic Co., 17 I. & N. Dec. 532 (Comm. 1980), as well as 8 U.S.C. 1101(a)(32). However, the criteria in these proceedings is not concerned with membership in the professions, but rather membership in a specialty occupation. The decisions and cited section of law were concerned 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 and 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, the petitioner has submitted an evaluation of the proffered position signed by Harold Berkman, Ph.D., Professor of Management and Marketing and AMS Distinguished Professor of Business at the University of Miami, Florida. In his letter, Professor Berkman finds that the offered job "...would be typically filled by a person with a minimum of a BBA [Bachelor of Business Administration] or its equivalent,..." Professor Berkman continues, "[w]ithout question the position is of a professional nature and it corresponds to the industry standards for a marketing administration supervisor." However, Professor Berkman bases his conclusions on the duties of the position as described by the petitioner. Although Professor Berkman may be qualified to evaluate the academic credentials of the beneficiary and determine if a particular position is of a professional nature, he has not provided any credentials setting forth his ability to give expert testimony regarding the question of whether the proffered position qualifies as a specialty occupation. That determination is the province of the Service as set forth within the Immigration and Nationality Act. Moreover, one evaluation of the proffered position cannot be considered as evidence of an industry standard. For these reasons, the Service is not inclined to accept the conclusions of Professor Berkman relating to the

issue of whether the offered position is a specialty occupation. Therefore, the petitioner has failed 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.

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's contention that the duties of the offered job are so unique and complex that the performance of such duties in the business setting customarily requires an individual with a minimum of a baccalaureate degree in a business 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, promotions, 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. Accordingly, the decision of the director will not be disturbed.

ORDER: The appeal is dismissed.