



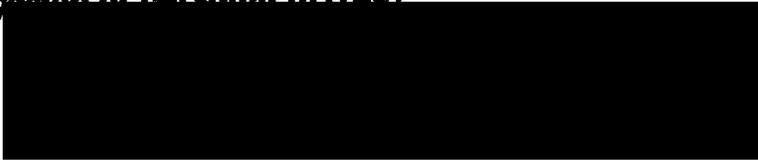
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U.S. Department of Justice

Immigration and Naturalization Service

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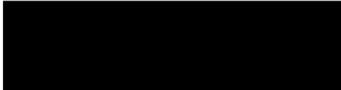
OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536



File: WAC-00-034-53813 Office: California Service Center

Date: OCT 22 2002

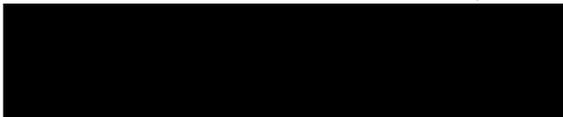
IN RE: Petitioner:  
Beneficiary:



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)

PUBLIC COPY

IN BEHALF OF PETITIONER:



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

Oct 22 2002 - 0512/101

**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 that manages the online commercial business transactions of its corporate clients. It has eighteen employees and an estimated gross annual income of \$1.2 million. It seeks to employ the beneficiary as an international marketing and sales 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 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 proffered position is a specialty occupation because it requires at least a bachelor's degree in business administration, marketing, or a related field. Counsel contends that the offered job is a specialty occupation because it requires a combination of education and specialized experience. Counsel asserts that the offered position can be considered professional in nature based upon the complexity of its duties. Counsel cites the education requirements for marketing and sales managers listed in the Department of Labor's (DOL) Occupational Outlook Handbook, (Handbook), as well as 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:

Management of all International Territories.

- \* Lead and manage[.]
- \* Develop International territory to a business model that generates \$10,000,000 in it's [sic] first year...with a 50% growth curve into year 2[.]
- \* Interface with customers regarding TNS services and products. Interface with scheduling from other departments.
- \* Provide related information to clients.
- \* Research International territory for Distribution Service/needs[.]
- \* Provide thorough reporting.
- \* Provide Daily exporting of customer reports when required[.]
- \* Increase sales via effective customer service skills.
- \* Develop self within the organization.
- \* Maintain profitability.
- \* Follow policy and procedures of the company.
- \* Continue to learn about competition and our industry in general.
- \* Require employees to understand all TNS requirements[.]
- \* International Sales and Marketing Budget[.]

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.

Counsel's argument that the proffered position is a specialty occupation because it requires at least a bachelor's degree in business administration, marketing, or a related field is not persuasive. The proffered position appears to combine the duties of a marketing manager with those of a sales manager. A review of the DOL's Handbook, 2002-2003 edition, at page 28, finds no requirement of a baccalaureate or higher degree in a specialized area for employment as either a marketing manager or a sales manager. Rather, most employers prefer a wide range of educational backgrounds or promote individuals from within companies. While some employers may prefer degrees in business administration with emphasis in marketing, most employers prefer individuals with experience in related occupations plus a broad liberal arts background with a bachelor's degree in areas as diverse as sociology, psychology, literature, journalism, and philosophy being amongst the acceptable areas of study. 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's citation of Tapis International v. INS, 94 F. Supp. 2d 172 (D. Mass. 2000), which found that the Service improperly ignored the provision of the regulations which allowed for a bachelor's degree or "its equivalent," is noted. However, the court in Tapis was examining a position where a specific degree was not available in that field. Clearly, in this case, specific degrees and courses of study directly and reasonably related to the marketing and sales duties of the proffered position are readily available at a variety of institutions including senior colleges and universities, as well as junior and community colleges. Furthermore, as discussed previously, bachelor's degrees in a wide variety of academic disciplines are acceptable for employment in either a marketing manager or a sales manager position.

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 indicates 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 international marketing and sales 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 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 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 six advertisements from the Society of Human Resource Management job bank and the Monster.Com internet site for positions being offered by various private companies. However, one of the advertisements reflects that the particular position being offered is that a director of business development for a private hospital, a position not even remotely related to the position being offered by the petitioner. While the remaining five advertisements are for positions that appear to parallel those of a sales manager, three require only a bachelor's degree without specifying a specific field of study, and the other two list a requirement for a bachelor's degree in marketing, management, business, or a related field. Two 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 asserts that the offered position can be considered professional in nature based upon the complexity of its duties. In support of this assertion, counsel cites the holdings reached in Matter of Michael Hertz Associates, 19 I. & N. Dec. 558 (Comm. 1988), Hong Kong T.V. Video Program, Inc. v. Ilchert, 685 F. Supp. 712 (N.D. Cal. 1988), Globenet, Inc. v. Attorney General, 1989 WL 132041 (D.D.C., 1989), and American Biotech, Inc. v. INS, CIV-2-88-262 (E.D. Tenn. March 27, 1989), as well as several decisions issued by the Administrative Appeals Unit (AAU). However, the unpublished AAU decisions cited by counsel have no precedential effect in this proceeding. See 8 C.F.R. 103.3(c). Moreover, all of the remaining court decisions 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. 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.