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Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536

FILE: WAC-02-072-51882 OFFICE: CALIFORNIA SERVICE CENTER

DATE:

IN RE: Petitioner:
Beneficiary:

DEC 03 2003

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:

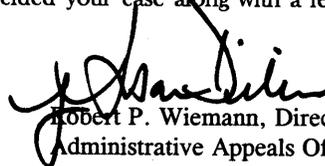
INSTRUCTIONS:

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 Citizenship and Immigration Services (CIS) 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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the California Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a tour service company that employs seven persons and has a gross annual income of \$129,060. It seeks to employ the beneficiary as a sporting events manager. The director denied the petition because the petitioner failed to establish that the offered position qualified as a specialty occupation.

On appeal, counsel submits a brief and previously submitted evidence. Counsel states, in part, that the petitioner has established that the offered position qualifies as a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

The issue to be discussed in this proceeding is whether the position offered to the beneficiary qualifies as a specialty occupation.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

[A]n 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.

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 letter accompanying the I-129 petition described the beneficiary's duties as follows:

Research: [The beneficiary] will be responsible for conducting research on several aspects of sporting events. He must determine, through his research, what sporting events, activities, and games will optimize pleasure, satisfaction, and physical fitness, depending on the targeted group of individuals. He will be responsible for producing reports that reflect current trends of tourists' interests. . . . [The beneficiary's] research must also include current information regarding the use of tools, supplies, equipment, instructional advice, and methods of training novices in game play. He must also maintain current knowledge of new sports, equipment, techniques, players, and team statuses.

Sports Package Development: [The beneficiary] will be responsible for the development and implementation of sports packages based on his research, personal experiences with clientele, and suggestions made by our [m]arketing [d]irector. He will use discretion in promoting certain sporting activities based on the target clientele, the amount of generated revenue, the abilities and desires of the target clientele, and budgetary limitations. [The beneficiary] will compile lists of activities and compile the list into marketable packages, grouped by location, interest, season, cost, and physical fitness level. He will determine age ranges, physical fitness levels, and ability levels for each activity . . . and develop

sports packages for our clients. [The beneficiary] will also be solely responsible for training tour guides involved in the sporting events.

Instruction: [The beneficiary] will be solely responsible for instructing our clientele on the correct methods of equipment use, as well as how to execute some of the physical activities such as rock climbing, skiing, water skiing, etc. He will be responsible for monitoring clientele in their execution of such activities. . . .

Conducting Events: [The beneficiary] will also be solely responsible for all aspects of major sporting events packages. He will develop, control, instruct, encourage, and equip sporting events. . . . He will direct all activities of employees involved with major sporting events . . . [he] will be responsible for their appropriate preparation, training, and performance during the event.

Develop, Coordinate, and Administer Sports Betting: [H]e must also use the information gained through dedicated research to assist clientele on how, who, when, and what to wager, according to his knowledge of current trends in professional teams' performances, collegiate teams' performances, and the specific sport clientele wish to place a wager. He will also be responsible for explaining rules, regulations, and scoring methods to the clientele.

The letter further stated that candidates must be knowledgeable in the field of sports management and hold a bachelor's degree in sports management, sports medicine, sports science, physiology, kinesiology, or a related degree. The letter added that the petitioner prefers that the candidate have one year of experience in either sports management or sporting events coordination.

On December 28, 2001, the director requested additional evidence: (1) a detailed description of the work done to be done; (2) evidence that the offered position qualified as a specialty occupation; (3) copies of the petitioner's present and past job announcements and classified advertisements that would show that the petitioner requires candidates to have a bachelor's degree or higher or its equivalent; and (4) a properly completed Form I-20A-B/I-201D and a letter from the school stating that the beneficiary is currently attending the school.

In response, counsel submitted a letter, dated March 15, 2002; it stated that the purpose of the beneficiary's duties is to market the company, and counsel elaborated on the duties as follows:

- Develop and execute the implementation of marketing strategies and programs to increase client interest in sports packages and [increase] income;
- Supervise the development and implementation of sporting events marketing plans which [sic] will attract more tourists;
- Collaborate with the president and marketing director to integrate improved sports marketing strategies and programs;
- Supervise the development and production of appropriate advertising and promotional materials in accordance with prescribed budgetary and quality standards;
- Consult and collaborate with the president and marketing director concerning sporting packages[,] advertising promotional programs, and marketing strategies[,] which require time out of the office and significant research;
- Assess and evaluate the management of all sporting events marketing objectives and identify potential problems and opportunities to implement cost-effective programs according to marketing goals;
- Evaluate other sporting packages, paraphernalia, and equipment marketing programs against established performance objectives to market a target audience;
- Evaluate the success of marketing programs that have been implemented and recommend adjustments and changes to achieve desired results;
- Review and evaluate competitive firms and their marketing programs and strategies;
- Develop and recommend programs which [sic] will respond to current competitive action.

Counsel stated that about 25 percent of the beneficiary's time would be spent on the following duties:

- Developing and executing the implementation of sporting package sales techniques, strategies[,] and programs to increase revenue;
- Supervise [sic] the development and implementation of [the] marketing plan which will attract more consumers to the sporting events, betting, and packages;
- Collaborate [sic] with [the] marketing director and tour guides to integrate improved selling strategies and programs;
- Analyzing the methods of advertising and approaches of selling materials in accordance with observed purchasing habits of tourists;
- [P]lanning, forecasting, resource allocation, facilities layout, inventory control[,] and distribution systems of sports packages;
- Surveying Japanese tourists to evaluate the satisfaction of

- sporting events, packages, and sports betting;
- Analyzing competitors['] specialty packages, financial reports, and other data to determine reasonableness of our sporting packages;
 - Reviews [sic] price proposals and develops itineraries within budgetary limitations and scope of other travel agencies;
 - Formulates [sic] and coordinates package proposals; monitors reservation schedules and preferences, and ensures completeness and accuracy; prepares marketing reports, and other documents for review by [the] president;
 - Investigates [sic] tourists' attitudes, preferences, and traveling problems; investigates potential markets and recommends those most desirable; keeps abreast of changes affecting the catering market changes in the U.S. and Japanese market[s];
 - Compiles [sic] information from periodicals, catalogs, [the] Internet[,] and other sources to keep informed on marketing trends and tourist industry;
 - Evaluates [sic] findings and makes recommendations to management regarding marketing strategies of sports packages[.]

Last, the letter said that the beneficiary would spend about 50 percent of his time on: (1) developing, evaluating, and marketing sports packages; (2) directing, instructing, training, and supervising all persons involved in executing sporting events and teaching sporting activities; and (3) organizing and overseeing the betting tours.

Counsel's letter explained that the 2000-2001 edition of the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*), at pages 26 and 149, shows that: (1) the offered position is similar to sporting events marketing directors and market research analysts; (2) marketing director positions require a bachelor's degree in business administration with a marketing emphasis; and (3) market research analysts enter the field with economics degrees. The letter stated that the beneficiary would market sporting events and research sports and sporting events. The letter also explained that the petitioner's marketing director holds an H-1B classification, and that the marketing director would work alongside the beneficiary. Finally, the letter stated that the beneficiary's betting duties resemble those of a specialty occupation: a card room supervisor.

With respect to position announcements, the letter stated that the petitioner submitted two internal memorandums, issued April and November 2001, and one advertisement from the *Las Vegas Review Journal*.

Finally, the letter explained the beneficiary's student status.

On April 8, 2002, the director denied the petition, finding that the offered position did not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A). According to the director, the *Handbook*, 2002-2003 edition, disclosed that the beneficiary's duties corresponded to those of advertising, marketing, promotions, public relations, and sales management positions. The *Handbook* stated that employers usually promote experienced staff or related professional or technical personnel for advertising, marketing, promotions, public relations, and sales management positions or they prefer candidates with bachelor's or master's degrees; thus, the director determined that a bachelor's degree is not a minimum or industry-wide requirement for entry into the occupation. With respect to the submitted job announcements, the director stated that they were not from companies in the same industry; therefore, they could not establish an industry-wide practice of requiring a bachelor's degree for sporting events manager positions. Last, the director stated that the beneficiary's duties and level of responsibility were not complex and his authority did not exceed the norm.

On appeal, counsel avers that the offered position qualifies as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A).

Counsel asserts that the petitioner satisfies the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), namely, that it requires a baccalaureate or higher degree, or its equivalent, as a minimum for entry into the occupation. For example, counsel claims that the SVP codes of sports instructors, market research analysts, sales managers, and casino managers in the Department of Labor's *Dictionary of Occupational Titles (DOT)*, indicate that the positions are specialty occupations, and because the beneficiary's duties are an amalgam of their duties, the offered position would also qualify as a specialty occupation.

Counsel's reliance on the DOT is misplaced. The DOT is not a persuasive source of information regarding whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation. The Department of Labor has replaced the DOT with the *Occupational Information Network (O*Net)*. Both the DOT and O*Net provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. The *Handbook* provides a more comprehensive description of the nature of a particular occupation and the education, training and experience normally required to enter into an occupation and advance within that occupation. For this reason, Citizenship and Immigration Services (CIS) is not persuaded by a claim that the proffered position is a specialty occupation simply because the Department of Labor has assigned it a specific SVP rating in the DOT.

Another of counsel's assertions is that the beneficiary's duties are similar to those performed by marketing research analysts. According to the *Handbook*, at page 240, market, or marketing, research analysts are concerned with the potential sales of a product or service. For example, they analyze statistical data on past sales to predict future sales; gather data on competitors and analyze prices, sales, and methods of marketing and distribution; devise methods and procedures for obtaining the data they need; and design telephone, personal, or mail interview surveys to assess consumer preferences.

The *Handbook* reports that most economists and market or market research analysts are employed with economic and marketing research firms, management consulting firms, banks, securities and commodities brokers, and computer and data processing companies. A wide range of government agencies provided the remaining jobs, primarily for economists. The *Handbook* clearly illustrates the incongruity for a market or marketing research analyst to be employed with a small tour service company; thus, it is unlikely that the beneficiary's duties parallel those performed by market or marketing research analysts.

Counsel accurately describes the beneficiary's duties as similar to those performed by marketing and sales managers. However, in addition, the beneficiary's duties are also comparable to those of advertising and promotions managers. According to the 2002-2003 edition of the *Handbook*, at pages 26-27, advertising, marketing, promotions, and sales managers coordinate market research, marketing strategy, sales, advertising, promotion, pricing, and product development. The *Handbook* states the following regarding their duties:

[Promotion managers] direct promotion programs combining advertising with purchase incentives to increase sales. In an effort to establish closer contact with purchasers - dealers, distributors, or consumers—promotion programs may involve direct mail, telemarketing, television or radio advertising, catalogs, exhibits, inserts in newspapers, Internet advertisements or Web sites. . . .

Marketing managers develop the firm's detailed marketing strategy. With the help of subordinates . . . they determine the demand for products and services offered by the firm and its competitors. In addition, they identify potential markets. . . . [They] 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. Marketing managers work with advertising and promotion managers to promote the firm's products and services and to attract potential users.

Sales managers direct the firm's sales program. They assign sales territories, set goals, and establish training programs for the sales representatives. Managers advise the sales representatives on ways to improve their sales performance. They analyze sales statistics gathered by their staffs to determine sales potential and inventory requirements and monitor the preferences of customers. Such information is vital to develop products and maximize profits.

On page 28, the *Handbook* reports that employers find a wide range of educational backgrounds suitable for entry into advertising, marketing, promotions, and sales managerial jobs, and that many employers prefer individuals with experience in related occupations plus a broad liberal arts background. For example, among other subjects, employers accept a bachelor's degree in sociology, psychology, literature, journalism, or philosophy. The director's denial letter had discussed the hiring and advancement practices for marketing, sales, and promotion manager positions.

With respect to the training, advancement, and other qualifications for the marketing, sales and promotion positions, counsel states that the director misinterprets the term "prefer" and understates advancement requirements. First, counsel claims that precedent Administrative Appeals Office (AAO) decisions are ignored by limiting the term "prefer" to generic marketing, sales, and promotion manager positions. Next, counsel claims that the term "prefer" means that the bachelor's degree is an alternative industry requirement, substituted by "three years of specialized training and/or work experience for each year of college level training the alien lacks to demonstrate the equivalency to a bachelor's degree." Finally, counsel claims that, although employers may promote experienced staff or related professional or technical personnel to fill manager and sales positions, these employees may hold a bachelor's degree or its equivalency.

Counsel's statements are not persuasive. The *Handbook*, unquestionably, shows that employers have not established a bachelor's degree or higher or its equivalent as an industry-wide minimum for entry or advancement into marketing, sales and promotion manager positions. When the *Handbook* states that some employers "prefer" a bachelor's or master's degree in business administration, the term "prefer" indicates that a subset of employers favor this qualification. Counsel clearly misinterprets and takes out of context the term "prefer" when he claims that it provides an alternative industry requirement that substitutes a candidate's training and work experience for formal college

education. The Department of Labor doesn't define the term "prefer" in this manner. In addition, employers reveal that there is no uniform entry qualification when they promote internally for marketing, sales, and promotion manager positions.

Based on the *Handbook*, and the evidence in the record, the petitioner has not satisfied the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), showing that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the occupation.

Next, counsel maintains that the petitioner met the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), specifically, that the degree requirement is common to the industry in parallel positions among similar organizations, or that its position is so complex or unique that it can be performed only by an individual with a degree. Counsel avers that, although the petitioner's marketing strategy makes it difficult to find identical positions in the industry, the degree requirement is common industry-wide in parallel positions among similar organizations. Counsel's assertion is groundless: the record contains no evidence to substantiate this assertion. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Similarly, the record contains no evidence to show that the offered position is so complex or unique that it can be performed only by a person with a degree.

The third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the employer establish that it normally requires a degree or its equivalent for the position. Counsel attests that the petitioner's in-house job posting and classified advertisement prove that it normally requires a bachelor's degree for the offered position. Counsel states that the adjudicator's comment, that the companies in the advertisements are not in the same industry as the petitioner, is irrelevant because the petitioner submitted the advertisements to demonstrate that it normally requires a bachelor's degree for entry into the occupation.

The in-house postings and advertisement are insufficient to establish the third criterion, namely, that the employer normally requires a degree or its equivalent for the position. The petitioner's creation of a position with a bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. CIS 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 baccalaureate or higher degree in the specific specialty as the

minimum for entry into the occupation as required by the Act.¹ To interpret the regulations any other way would lead to absurd results: if CIS were 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 baccalaureate or higher degrees. See *id.* at 388.

As previously discussed, the beneficiary's duties are performed by marketing, sales, promotions, and advertising manager positions. These positions do not require the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in a specific specialty as the minimum for entry into the positions.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner demonstrate that 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. Counsel states that the petitioner has satisfied this criterion: the beneficiary's duties require specialized theory, knowledge, and skills relating to sports gaming, requiring a bachelor's degree in sports management or a related field. In the first place, counsel's statement is not convincing because the record contains no evidence to support his statement. Moreover, the *Handbook* reports that the duties of marketing, sales, promotions, and advertising manager positions do not require a bachelor's degree.

Another of counsel's assertions is that the instant petition should be approved because the petitioner had filed a similar petition for a marketing director position and the California Service Center approved it on December 20, 2001. To support this statement, counsel submits a copy of the approval notice. This record of proceeding does not contain all of the supporting evidence submitted to the California Service Center in the prior case. In the absence of all of the corroborating evidence contained in the prior proceeding, the document submitted by counsel is not sufficient to enable the AAO to determine whether the petition was parallel to the offered position. Furthermore, each nonimmigrant petition is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). In making a determination of statutory

¹ The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." See *id.* at 387.

eligibility, CIS is limited to the information contained in the record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii).

In conclusion, the petitioner has failed to establish any of the criteria under 8 C.F.R. § 214.2(h)(4)(iii)(A).

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. The petition is denied.