

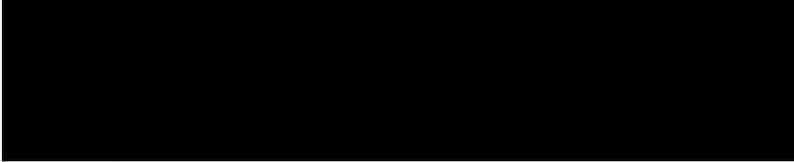
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U.S. Department of Homeland Security
Citizenship and Immigration Services

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



File: WAC 02 189 50129 Office: CALIFORNIA SERVICE CENTER

Date: **DEC 24 2003**

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)

ON BEHALF OF PETITIONER:



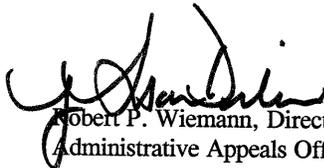
INSTRUCTIONS:

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, California Service Center, denied the nonimmigrant petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a distributor of car audio products and electronics. It has twenty-nine employees and a gross annual income of \$30,000,000. It seeks to temporarily employ the beneficiary as a marketing manager for a period of three years. The director determined that the petitioner had not established that the proffered position was a specialty occupation and that the petitioner had not submitted a Labor Condition Application for the appropriate occupational category.

Section 214(i)(1) of the Immigration and Nationality Act (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 field 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 first issue in this proceeding is whether the petitioner has established that the proffered position is a specialty occupation. In the original petition received by the California Service Center on May 17, 2002, the petitioner explained that it distributed a wide variety of electronic components throughout North America, Asia, Europe, South American and Australia. It described the duties of the proffered position as follows:

[W]ith clients located through a wide variety of venues, we wish to emphasize that, nevertheless, we are in an extremely competitive market and therefore if all our marketing, pricing, demographic[,] and competitive analysis information is not current, our operations could be seriously impacted. Therefore in our attempt to expand our activities as well as maintaining [sic] our current client base, we will require the services of a part-time [m]arketing [m]anager who will be able to provide us with consistent marketing information on an ongoing and consistent basis.

The primary focus of the reports to be submitted by the [m]arketing [m]anager will primarily relate as to how our distribution could lead to enhanced sales of our electronic-related products. Therefore, competitive analysis, pricing strategies, demographic-related surveying, promotional techniques, marketing trends and other related aspects will be of the utmost importance in our ability to continue and sustain our current growth levels. Moreover from this company's standpoint, the services of a [m]arketing [m]anager will be all the more incumbent [sic] because of the extensive marketing, pricing, demographic and competitive analysis studies directly applicable to the sale of our electronic products which will differ markedly depending upon the particular type of merchandise being marketed as well as to the region where it will be targeted.

The petitioner then stated:

[U]pon [the beneficiary's] hiring, we will be seeking to employ other bachelor-degreed [m]arket [a]nalyst [t]rainees who will be placed under [the beneficiary's] immediate charge in carrying-out the above-mentioned duties. In so doing, these people, with primarily a business and/or a marketing related background, will initially examine and analyze statistical data in our

industry in order to better[]forecast future marketing trends as well as such aspects as pricing strategies, demographic surveying, promotional techniques, and competitive analysis. [Once] these preliminary reports have been properly reviewed by [the beneficiary], she will then oversee the submission of comprehensive flow charts, diagrams, future trend reports, past sales and pricing analyses, statistical and probability amalgams and other relation information that will provide us with a complete overview of our business, as it applies to enhanced marketing opportunities available to us.

The petitioner then added that the beneficiary and her subordinates would orient their research efforts to expand clientele in the area of commercial, residential and government-sectors. The petitioner also stated that the beneficiary would be attending meetings with clients to better understand their needs and requirements prior to buying the petitioner's products. In addition the petitioner submitted a certified Labor Condition Application for H-1B Nonimmigrants Form ETA 9035E for a job position listed as accountant.

Counsel referred to the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* and its description of the classification of marketing managers. Counsel also submitted two previous AAO decisions on job categories described by counsel as relevant to the instant petition. Counsel also submitted a document identified as an occupation report for marketing, advertising, and public relations managers, taken from a CareerInfonet Internet website. Further counsel submitted several job vacancy announcements for marketing managers taken off a website identified as Careerbuilder. Finally counsel submitted a letter from Soledad Aguilar, President, Topnotch International Services. In this letter, Ms. Aguilar stated that employers required a marketing manager to have a degree and that a wide array of backgrounds are appropriate such as business administration, marketing, economics, management, commerce, liberal arts, psychology, sociology, and philosophy.

On September 23, 2002, the director asked for further information with regard to whether the proffered position was a specialty occupation. In particular, the director requested a detailed statement on the beneficiary's proposed duties and responsibilities and the percentage of time that the beneficiary would spend performing the specific duties each day. The director also requested copies of the petitioner's present and past job announcements for the proffered position. Finally the director noted that the petitioner had submitted an LCA for the occupation of accountant, and requested that the petitioner submit the LCA for the marketing manager position requested on the I-129 petition.

On June 10, 2002, the petitioner responded by reiterating the duties outlined in the initial petition. The petitioner also

stated that it found the beneficiary's studies in psychology to be relevant to the duties of the proffered position and pointed out the beneficiary's coursework in psychology, economics, business statistics, marketing, research, and management. The petitioner also submitted its job posting for the position. This posting stated: "Must have [b]achelor's [d]egree in [b]usiness [a]dministration, [e]conomics, [m]arketing, [s]ocial sciences or related fields and prior work experience as a [m]arketing [m]anager." The petitioner also submitted a certified LCA, dated May 24, 2002, for the position of marketing manager.

On June 24, 2002, the director denied the petition. The director stated that the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* states that for marketing manager positions, some employers prefer a bachelor's or master's degree in business administration with an emphasis on marketing, and it also noted that most positions are filled by promoting experienced staff or related professional or technical personnel. The director determined that the petitioner has not established any of the criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Pursuant to 8 C.F.R. 214.2 (h)(4)(i)(B)(1), the petitioner had to obtain a certified ETA Form 9035 in the marketing manager position prior to filing the I-129. Based on the petitioner's submission of the second LCA document on May 24, 2002, the petitioner had not met the regulatory guidance for the submission of the LCA.

On appeal, counsel refers to the numerous types of documentation submitted previously with regard to whether the proffered position was a specialty occupation. Counsel states that these sources of information establish that a baccalaureate degree is required for entry into the marketing manager position. With regard to the late LCA, counsel submits an affidavit, dated July 18, 2002, that states the attorney was not available in the office to check the petitioner's LCA at the time it was filed due to his son's immediate medical needs. Counsel states that the error on the LCA should be excused as an "extraordinary circumstances beyond the control of the applicant" when a second LCA is properly filed and approved even though it was filed subsequent to the filing of the H-1B petition.

Upon review of the record, the petitioner has not articulated a sufficient basis for classifying the proffered position as a specialty occupation. In evaluating whether the proffered position is a specialty occupation, each of the four criteria listed at 8 C.F.R. § 214.2(h)(4)(iii)(A) will be considered separately below.

I. A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position - 8 C.F.R. § 214.2 (h) (4) (iii) (A) (1)

Citizenship and Immigration Services (CIS) often looks to the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* when determining whether a baccalaureate or higher

degree or its equivalent is normally the minimum requirement for entry into a particular position. Both counsel and the director accurately represented the text of the *Handbook's* description of marketing managers. This text clearly establishes that a degree is required for the position of marketing manager, and that a range of academic areas is suitable for entry into the position. This however is not the regulatory standard to be met in this adjudication. The critical element is not the title of the position or an employer's self-imposed standards of a degree in a range of academic areas, 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.¹

As stated previously, the statute establishes that the petitioner must show that the proffered position requires a baccalaureate degree or higher, or the equivalent, in a specific specialty. To interpret the criteria in 8 C.F.R. 214.2(h) (4)(iii) (A) as solely requiring a bachelor's degree is an incorrect interpretation. The *Handbook* description of marketing manager does not establish that the position requires a baccalaureate degree in a specific specialty. Therefore the petitioner has not established the first criterion of 8 C.F.R. § 214.2(h) (4) (iii) (A).

II. 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 - 8 C.F.R. § 214.1(h) (4) (iii) (A) (2)

Factors often considered by Citizenship and Immigration Services (CIS) when determining the industry standard include: whether the *Handbook* reports that the industry requires a degree, whether the industry's professional association has made a degree a minimum entry requirement, and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *Shanti, Inc. v. Reno*, 36 F.Supp.2d 1151, 1165 (D.Min. 1999) (quoting *Hird/Blaker Corp. v. Slattery*, 764 F.Supp. 872, 1102 (S.D.N.Y. 1991)).

The *Handbook's* conclusions about a degree requirement for a marketing manager position were discussed in the previous section, and shall not be repeated here. In the instant petition, to establish the industry standard, the petitioner submitted numerous vacancy announcements for marketing manager positions from the

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 *Defensor v. Meissner* 201 F.3d 388 (5th Cir. 2000).

Careerbuilder website. Upon review of these announcements, only eight announcements identified specific baccalaureate degrees, and all eight referred a degree in marketing or a related field. The other announcements simply noted that a four-year degree was required. The petitioner also submitted a letter from the president of Topnotch International Services; however, this letter is not probative that parallel positions in similar firms require a baccalaureate degree in a specific specialty. Rather the letter writer identified a range of possible baccalaureate degrees that could be considered acceptable for the proffered position. Without more persuasive testimony, the petitioner has not established the second criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

III. The employer normally requires a degree or its equivalent for the position - 8 C.F.R. § 214.2(h)(4)(iii)(A)(3)

There is no evidence on the record with regard to any previous or current employees hired by the petitioner to perform the duties of the proffered position. Without more persuasive evidence, the petitioner has not established this criterion.

IV. 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 - 8 C.F.R. § 214.2(h)(4)(iii)(A)(4)

To date the petitioner has placed no information on the record with regard to the specialized and complex nature of the proffered position. Both in the original petition and the petitioner's response to the director's request for further evidence, the petitioner repeated the same job duties, rather than providing any more in-depth details that would clarify the actual duties of the position. The record is devoid of any information on any ongoing marketing initiatives that could provide further information on the specialized nature of the proffered position. Although the petitioner appears to have sales and marketing operations throughout many parts of the world, the record is devoid of how the petitioner's present national or international business operations would add to the specialized or unique nature of the duties of the proffered position. Without more persuasive evidence as to the specialized or complex nature of the marketing manager position, the petitioner has not met the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner has failed to establish that any of the four criteria 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 appeal

will be dismissed.

ORDER: The appeal is dismissed.