

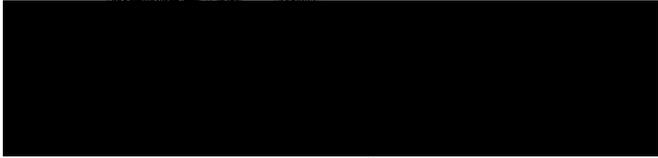
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U.S. Department of Homeland Security
Citizenship and Immigration Services

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



FILE: WAC 02 106 50107

OFFICE: CALIFORNIA SERVICE CENTER

DATE:

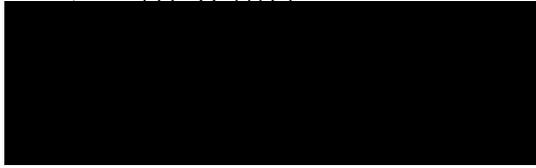
DEC 24 2003

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)

IN BEHALF OF PETITIONER:



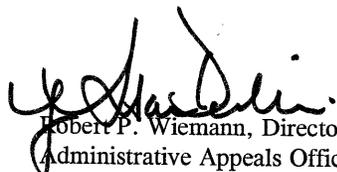
INSTRUCTIONS:

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 in the tour, travel, and events management business. It employs six persons and has a gross annual income of \$1,500,000. It seeks to employ the beneficiary as a marketing support specialist. The director denied the petition because he determined that the position was not a specialty occupation.

On appeal, counsel submits a letter and other evidence. Counsel states, in part, that the proffered position is a specialty occupation, because it meets all the criteria listed at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 proffered position 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:

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.

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.

In the original petition, the petitioner stated that the proffered position would involve the planning, directing, and coordination of the marketing of the petitioner's services. The beneficiary would research market factors, plan advertising activities, represent the petitioner at meetings, and maintain a marketing database, among other related activities.

On March 20, 2002, the director requested further evidence that the proffered position qualified as a specialty occupation. In response to the director's concerns, counsel submitted a letter from the petitioner indicating the percentage of time to be spent on the various job duties, as well as several Internet job postings and a letter from an industry competitor. The director found the record insufficient to conclude that the proffered position was a specialty occupation, so he denied the petition on June 15, 2002.

On appeal, counsel submits a statement, information about the petitioner, the newspaper job listing and internal vacancy notice for the proffered position, information that a competitor's marketing manager has a bachelor's degree in criminal science, a statement from another competitor, an academic evaluation stating that the beneficiary holds the equivalent of a U.S. bachelor of science degree in business administration, information from a business college and a

university regarding career opportunities for graduates, and several job listings from other companies. Counsel asserts that this evidence demonstrates that the proffered position can only be performed by an individual with a bachelor's degree in business administration or a related field.

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, as required by 8 C.F.R. § 214.2 (h) (4) (iii) (A) (1). Regarding the educational and other training requirements of the proffered position, the 2002-2003 edition of the Department of Labor's *Occupational Outlook Handbook (Handbook)* on page 28 discusses the training and other qualifications requirements for marketing managers. The *Handbook* states the following:

A wide variety of educational backgrounds are suitable for entry into advertising, marketing, promotions, public relations, and sales managerial jobs, but many employers prefer those with experience in related occupations plus a broad liberal arts background. A bachelor's degree in sociology, psychology, literature, journalism, or philosophy, among other subjects, is acceptable. However, requirements vary, depending upon the particular job.

The *Handbook* mentions that some employers of marketing and sales managers prefer individuals with a bachelor's or master's degree in business administration with an emphasis on marketing. A preference on the part of some employers, however, does not mean that a degree in business is a minimum entry requirement for the field of marketing.

In order to qualify as a specialty occupation, pursuant to 8 C.F.R. § 214.2(h)(4)(ii), the position must require a bachelor's degree, or its equivalent, *in a specific specialty*. The evidence on record and the *Handbook* do not indicate that a bachelor's degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position.

Regarding the establishment of the criterion found at 8 C.F.R. § 214.1(h)(4)(iii)(A)(2), factors often considered by 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 support manager were discussed in the previous section, and shall not be repeated here. In the instant petition, to establish the industry standard, the petitioner submitted job postings and evidence from competitors. The job postings are not demonstrated to be from companies similar to the petitioner's, nor is there evidence that the positions are parallel to the proffered position. The competitors' information is not probative, either. One competitor employs a marketing manager with a bachelor's degree in a field unrelated to business administration, and the other competitor's statement is vague, generic, and of little use.

In addition, the petitioner submitted no documentation that any professional marketing association has made a bachelor's degree a requirement for entry into the field, nor has it submitted letters or affidavits from firms or individuals in the industry which attest that such firms "routinely employ and recruit only degreed individuals." Accordingly the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations.

In the alternative, the petitioner may show that the proffered position is so complex or unique that it can be performed only by an individual with a degree. In the instant petition, the petitioner has submitted no documentation that the position of a marketing support specialist would involve duties seen as either unique or complex that only an individual with a degree in a specific specialty could perform them.

With respect to the criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), the petitioner has submitted no information with regard to other employees with similar duties and their academic credentials. In fact, the record contains no information that the petitioner has hired individuals in the proffered position previously. The AAO notes that the newspaper job announcement provided names the proffered position as "sales representative" and does not mention any degree requirement. The Internet listing for the proffered position notes that a bachelor's degree is required but does not specify any particular field of study. The petitioner's internal vacancy announcement notes the requirement for a bachelor's degree in

business administration, marketing, or a related field, or a combination of a degree and experience.

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. 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 attainment of a baccalaureate or higher degree in a 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 non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

To date the petitioner has placed no information on the record with regard to the specialized and complex nature of the proffered position. The job description in the original petition contains work duties that are similar to any marketing support position. Without more persuasive evidence as to the specialized or complex nature of the proffered 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 evidence on record does not demonstrate that the proffered position is a specialty occupation. The burden of proof in

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.

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.