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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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File: WAC-99-094-52105 Office: California Service Center

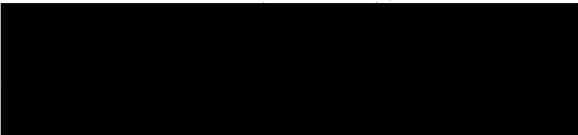
Date: JAN 13 2003

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:



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. A subsequent appeal was dismissed by the Associate Commissioner for Examinations. The matter is now before the Associate Commissioner on a motion to reopen and reconsider. The motion will be granted and the previous decisions of the director and the Associate Commissioner will be affirmed.

The petitioner is a firm that imports and sells Chinese antiques and antique reproduction furniture. It has three employees and a stated gross annual income of \$750,000. It seeks to employ the beneficiary as a marketing manager for a period of three years. The director determined the petitioner had not established that the beneficiary is qualified to perform services in a specialty occupation.

On appeal, counsel argued that the proffered position is a specialty occupation and the beneficiary is qualified to perform the duties of a specialty occupation.

The Associate Commissioner dismissed the appeal reasoning that the petitioner failed to submit a certified labor condition application, failed to establish that the beneficiary is qualified to perform services in a specialty occupation, and failed to demonstrate that the proffered position is a specialty occupation.

On motion, counsel argues that the Service erred in dismissing the appeal because the proffered position is a specialty occupation and the beneficiary is qualified to perform services in a specialty occupation. Counsel also submits a photocopy of the petitioner's certified labor condition application and asserts that any delay in obtaining this document had not been caused by him or the petitioner.

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 in part for nonimmigrant classification to qualified aliens who are coming temporarily to the United States to perform services in a specialty occupation. Section 214(i)(1) of the Act, 8 U.S.C. 1184(i)(1), defines a "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and 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.

Pursuant to section 214(i)(2) of the Act, 8 U.S.C. 1184(i)(2), to qualify as an alien coming to perform services in a specialty occupation the beneficiary must hold full state licensure to practice in the occupation, if such licensure is required to practice in the occupation. In addition, the beneficiary must have completed the degree required for the occupation, or have

experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

1. A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,
2. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay,
3. Evidence that the alien qualifies to perform services in the specialty occupation as described in paragraph (h)(4)(iii)(A) of this section...

Counsel's statements regarding delays in obtaining the certified labor condition application from the Department of Labor (DOL) are acknowledged, as is the fact that the petitioner has provided a copy of this document on motion. Nevertheless, that application was certified on March 16, 1999, a date subsequent to February 8, 1999, the filing date of the visa petition. Regulations at 8 C.F.R. 214.2(h)(4)(i)(B)(1) provide that before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application. Since this has not occurred, it is concluded that the petition may not be approved.

The term "specialty occupation" is 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 to fully perform the occupation in such 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 duties of the proffered position are described in pertinent part as follows:

Develop and administer firm's sales program. Determine the demand for products offered by the firm and its competitors and identify potential customers. Develop pricing strategy. Monitor interior design trends and apply knowledge of furniture design trends, competitors' products, production costs, capability of production facilities, and characteristics of company's market to work with suppliers and manufacturers to develop new products. Interface with media representatives to develop effective advertising plan.

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 these proceedings, the duties of the position are dispositive and not the job title. The proffered position appears to combine the duties of a general manager or executive with those of a marketing manager. The Department of Labor's Occupational Outlook Handbook (Handbook), 2002-2003 edition, at pages 86-89, finds no requirement of a baccalaureate or higher degree in a specific specialty for employment in a top executive position such as a general manager. Degrees in business and in liberal arts fields appear equally welcome. In addition, certain personal qualities and participation in in-house training programs are often considered as important as a specific formal academic background.

The Handbook at pages 26-29, also finds no requirement of a baccalaureate degree in a specialized area for employment as a marketing manager. A wide range of educational backgrounds are considered suitable for entry into marketing managerial positions. Some employers prefer degrees in business administration but

bachelor's degrees in various liberal arts fields are also acceptable. Here again, certain personal qualities and participation in company training programs are often considered as significant as the beneficiary's specific educational background. Most marketing, advertising, and public relations management positions are filled by promoting experienced staff or related professional or technical personnel, such as sales representatives, purchasing agents, buyers, product or brand specialists, advertising specialists, promotion specialists, and public relations specialists. Thus, it is concluded that the petitioner has not demonstrated that a baccalaureate degree in a specific specialty is required for employment in the offered position.

The petitioner has not shown that it has, in the past, required the services of individuals with baccalaureate or higher degrees in a specific specialty for the proffered position. In addition, the petitioner has not shown that the degree requirement is common to the industry in parallel positions among similar organizations.

As noted above, an analysis of the specific duties of the offered position in conjunction with the petitioner's business operations demonstrates that the proffered position combines the duties of a general manager or executive with those of a marketing manager. The Handbook does not provide any indication that a baccalaureate degree in a specific specialty is required for employment as either a general manager or marketing manager. 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. In view of the foregoing, it is concluded that the petitioner has not demonstrated that the offered job is a specialty occupation within the meaning of the regulations.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

1. Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
2. Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

3. Hold an unrestricted State license, registration, or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
4. Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The beneficiary does not hold a baccalaureate degree in any field of study. Two different evaluators have determined that the beneficiary's foreign education is equivalent to graduation from a United States vocational school. The record indicates that the beneficiary also had approximately fifteen years of employment in marketing related positions at the time of the filing of the present petition. The evaluators found the combination of the beneficiary's foreign education and work experience equivalent to a bachelor's degree in marketing as awarded at an institution of higher learning in the United States. Accordingly, the beneficiary is considered to be qualified to perform services in the offered position.

While the petitioner has overcome one of reasons cited for denial of the petition, the petition may not be approved because the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations. Additionally, the petition cannot be approved as the record does not contain a labor condition application that was certified prior to the filing date of the petition.

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 previous decision dated September 11, 2000, by the Associate Commissioner dismissing the appeal is affirmed.