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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: EAC-00-236-50160 Office: Vermont Service Center

Date: JAN 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:

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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center. A subsequent appeal was dismissed by the Associate Commissioner for Examinations. The matter is now before the Associate Commissioner for Examinations on motion to reopen and reconsider. The motion will be granted. The previous decision of the Associate Commissioner will be affirmed.

The petitioner is a motor vehicle sales corporation with 64 employees and a gross annual income of \$1,668,587. It seeks to employ the beneficiary as a translator 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 asserted that the duties of the proffered position involved much more than simple English-Spanish translation. Counsel stated that the duties of the position involved the negotiation of sales contracts with businesses in Spanish-speaking countries and maintenance of the company's Spanish-language website, as well as translation of technical specifications in the vernacular of the particular country with which the company is conducting business.

The Associate Commissioner dismissed the appeal reasoning that the petitioner had not shown that the duties of the position are so specialized or complex as to require a baccalaureate degree in a specific specialty.

On motion, counsel states that the proffered position qualifies as a specialty occupation based on the complexity of the duties and the high volume of sales involved. Counsel states that another company employee in a similar position has a bachelor's degree from George Mason University.

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 Service does not use a title, by itself, when determining whether a particular job 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 the initial I-129 petition, the petitioner described the duties of the offered position as follows:

Objective: to sell used school buses via auction to buyers, who are basically from out of the country, including but not limited to: Venezuela, Guatemala, Puerto Rico, Belize, Mexico, Honduras, Peru.

Translates documents, advertising, web page from one language to another;

Reads and rewrites above material from one language to another;

Auctioneer makes announcements via microphone to customers and [the beneficiary] translates and repeats announcements in other language to customers.

In response to a Service request for additional evidence, the petitioner provided the following, amended description of the job's duties:

Some of the related duties include, but are not limited to: initiating and receiving phone calls from non-[E]nglish speaking customers. Contacting Hispanic Publications around the world and creating and translating our advertising into Hispanic [sic] for these publications. Creating, maintaining and revising our Web Page in Hispanic [sic]. Updating our computer data base with foreign customers. Soliciting new foreign auction business and maintaining contact with existing foreign business. Working with Computer Programmer to translate and facilitate the acceptance of Hispanic Business data. Works closely with the auctioneers & Hispanic buyers translating information and descriptions of each bus and it's [sic] unique equipment. Also translates how to bid on buses at auction and convey auction terms & policies.

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 petitioner has not met any of the above requirements to classify the offered position as a specialty occupation.

First, the Service does not agree with counsel's argument that the proffered position of translator would normally require a bachelor's degree in a specific specialty. The proffered position appears to combine the duties of a marketing or promotions manager with those of a translator. A review of the Department of Labor's Occupational Outlook Handbook (Handbook), 2002-2003 edition, at pages 26-29, finds no requirement of a baccalaureate or higher degree in a specific specialty for employment as a marketing or promotions manager. Rather, most employers prefer a wide range of educational backgrounds or promote individuals from within companies. Additionally, certain personal qualities and participation in in-house training programs are often considered as important as a specific formal academic background.

Similarly, a review of the Handbook at page 596 finds no requirement of a baccalaureate degree in a specific specialty for employment as a translator. The most significant source of training for employment as a translator is long-term on-the-job training. The petitioner has not submitted sufficient evidence to show that the beneficiary's duties as a translator are of such complexity that a baccalaureate degree in Spanish is required for the successful completion of such duties. While the beneficiary may very well be fluent in Spanish, he does not possess a formal degree in this language and his familiarity with it derives from the fact that he is a native speaker. Thus, the petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary.

Counsel's argument that the petitioner should be allowed to determine the minimum education requirements needed to fill the proffered position in light of its own business and employment needs is not persuasive. While counsel asserts that the holding reached in Unico American Corp. v. Watson, CV No. 896958 (C.D. Cal. Mar. 19, 1991), dictated such an outcome in this particular case, the position at issue in the cited decision was that of a computer programmer, a position that can be readily distinguished from the proffered position of translator/marketing manager in this case.

Counsel has not demonstrated that the cited decision is relevant to the facts and issues of this proceeding.

The petitioner states that another employee with essentially the same duties as those of this position has a bachelor's degree in psychology and anthropology. It is noted that bachelors degrees in psychology and anthropology are not relevant to the duties of this position. The record does not contain any evidence to show that the petitioner requires a baccalaureate degree in a specific and related specialty for the position being offered to the beneficiary.

Furthermore, the petitioner did not present any documentary evidence 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 with a baccalaureate degree in a specific specialty in parallel positions.

Finally, counsel contends that the proffered position can be considered professional based on the complexity of the duties alone. Counsel cites the holding reached in American Biotech, Inc. v. INS, F. Supp. (E.D. Tenn. March 27, 1989), in support of this argument. That decision, however, dealt 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.

On motion, counsel asserts that the petitioner maintains a high-volume business that has experienced significant growth since the beneficiary began performing the duties of the proffered position. In support of his assertion, counsel submits copies of various company documents reflecting the petitioner's business activity such as consignment agreements, sold vehicle reports, and purchased vehicle reports. Neither the growth in volume of the petitioner's business nor the manner in which the beneficiary has performed his duties supports a finding that the proffered position qualifies as a specialty occupation. The duties of this petition do not appear to be any more specialized or complex than those normally required of a marketing manager or a translator. As noted above, the Handbook does not provide any indication that a baccalaureate degree in a specific specialty is required for employment in the proffered position. The record does not contain sufficient evidence to support counsel's assertion. 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.

ORDER: The previous decision of the Associate Commissioner dated February 20, 2002 is affirmed.