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

PUBLIC COPY

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: EAC 01 131 52217 Office: VERMONT SERVICE CENTER Date: **MAR 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)

ON BEHALF OF PETITIONER:

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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 Bureau of Citizenship and Immigration Services (Bureau) 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 nonimmigrant visa petition was denied by the Director, Vermont Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Massachusetts software contracting services and exporting commodity marketing company that has six employees and an unspecified gross annual income. It seeks to temporarily employ the beneficiary as a sales manager/sales representative for a period of three years. The director determined that the petitioner had not established that the proffered position was a specialty occupation.

On appeal, counsel asserts that the position of sales representative is a specialty occupation based on the uniqueness and complexity of duties of the proffered position.

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 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 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 issue in this proceeding is whether the petitioner has established that the position offered to the beneficiary is a specialty occupation. In the original petition received by the Vermont Service Center on March 21, 2001, the petitioner described the position as sales manager, international trade, and explained the duties of the proffered position as follows:

1. To oversee company's software contracting services
2. To market-research exporting goods to Korean end-customers
3. To arrange international trade sales transaction to Korea
4. To contact and arrange for the after-services towards the Korean purchasers of computer related soft/hardware
5. To provide Korean market consulting for the U.S. exporters
6. To import items from Korea and conduct sale activities in the U.S.
7. To supervise overall sales activities of sales assistant in the company

The petitioner also submitted an educational equivalency document from The Knowledge Company, in Fairfax, Virginia, that indicated the beneficiary's bachelor of arts degree with a major in English language and literature was the equivalent of a bachelor's degree from an accredited university in the United States. In addition, letters from previous employers and work colleagues with regard to the beneficiary's work experience were placed on the record. The petitioner also submitted an excerpt from the Department of Labor's (DOL) *Dictionary of Occupational Titles (DOT)* with regard to sales managers, any industry.

On May 14, 2001, 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 more evidence with regard to whether the petitioner and other companies within the petitioner's industry require a bachelor degree in a specific field of study for entry into the proffered position. Finally, the director requested more evidence with regard to other persons employed in similar positions by the

petitioner. Evidence requested included the number of individuals employed in similar positions in the past two years, with the degrees that they hold, as well as pay stubs or Form W-2s as proof that the petitioner employed these workers.

In response, the petitioner submitted another description of the beneficiary's duties and explained that the beneficiary would perform all tasks every day. According to the petitioner, the percentage of time spent on duties can vary on a daily basis. Therefore the petitioner provided no percentage breakdown for the duties. The duties were outlined as follows:

1. Daily communication with manufacturers (suppliers) in China and Korea.
2. In-depth market research for buyers' demand, especially discount stores and department store market places.
3. Sample presentation for buyers.
4. Handling shipping schedule from overseas cargo and customs clearance.
5. Management distribution networks.
6. Negotiation between suppliers and buyers regards to the sophisticated and complex subject.

The petitioner also submitted an excerpt from the DOL *Occupational Outlook Handbook (Handbook)* on manufacturers and wholesale sales representatives, as well as evidence on the petitioner's six employees, including resumes for four employees and tax and salary records for all six employees. The petitioner described these employees as "hardware service and sales personnel." The petitioner stated that:

It is the company's hiring practice that a baccalaureate degree is a minimum requirement for the proposed job position. In fact, all of the six (6) full-time employees in the company hold a four year college degree or above. In terms of industry standard, the firms selling consumer products may not need a degree, however in this petitioning company selling computer products and equipment, a baccalaureate degree is a minimum requirement to perform complex job duties requiring the knowledge of more technical and analytical aspects of the state-of-art sales items.

On January 22, 2002, the director denied the petition. The director noted that the petitioner's other employees did not hold positions similar to the proffered position, and that the excerpt from the DOL *Handbook* had not established that a bachelor's degree was a standard minimum requirement for the sales manager/sales representative position.

On appeal, counsel asserts that the job duties outlined by the petitioner explain the uniqueness and complexity of duties to be performed in the proffered position and that the position requires a person with a college education. Counsel resubmits the DOL

Handbook excerpt on manufacturers and sales representatives, and the information on the petitioner's present employees. In addition, the following statement is contained in the appeal:

Please be advised that [the beneficiary]'s additional specialty occupation are as follows:

1. Because of his personal relationship with manufacturer and distributor in Korea, China and USA [,] Bethel Info Inc. itself will have a priority to make deal with them. They are willing to cooperate with and also depend upon [the beneficiary's] help. The company [sic] list[ed] are Arthurtec Co., Ltd., GlobalSportec Co.,Ltd. Parfums Marketing Co. in Korea and Beijing Xinmaoshen Trade Co., Ltd. in China. Therefore, we believe that [the beneficiary] is suitable for import/export business promotion for our company.

Upon review of the record, the petitioner has not presented a persuasive argument 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 CFR 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)

The Immigration and Naturalization Service, now the Bureau of Citizenship and Immigration Services (Bureau) 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.

In the instant petition, the petitioner submitted two possible job titles for the proffered position, office manager, international trade, and manufacturers' and wholesale sales representative. Based on the duties of the proffered position submitted by the petitioner on appeal with regard to business with Korea and China, the more analogous *Handbook* classification appears to be sales representative, wholesale and manufacturing. With regard to training and experience for sales representatives, the *Handbook* on page 368 states:

The background needed for sales jobs varies by product line and market. Most firms require a strong educational background and increasingly prefer or require a bachelor's degree as the job requirements have become more technical and analytical. Nevertheless, some individuals with previous sales experience enter the occupation without a college degree. . . .On the other hand, firms selling complex,

technical products may require a technical degree in addition to some sales experience.

With regard to training and other qualifications for sales managers, the *Handbook* on page 28 states the following:

A wide range 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. . . . For marketing, sales and promotion management positions, some employers prefer a bachelor's or master's degree in business administration with an emphasis on marketing.

While the *Handbook* indicates an increasing requirement for individuals with college degrees for sales representatives, the *Handbook* does not indicate that a bachelor's degree in a specific specialty is required for entry into the position of sales representative. (Emphasis added.) With regard to sales managers, the *Handbook* also does not indicate any requirement for a bachelor's degree in any specific specialty.

It should be noted that a basic distinction can be made between the reasoning underlying the director's decision that the proffered position is not a specialty occupation and the petitioner's assertions that the position is a specialty occupation because the petitioner requires a university degree. 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 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. (Emphasis added.) 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. Without more persuasive evidence, the petitioner has not met 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

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

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 CFR § 214.1(h)(4)(iii)(A)(2)

A. Degree Requirement is Common to the Industry

Factors often considered by the Bureau when determining the industry standard include: whether the Department of Labor's (DOL) *Occupation Outlook Handbook* (*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 sales representative/sales 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 no documentation on parallel positions among similar organizations. In addition, the petitioner submitted no documentation that any professional association has made a bachelor's degree a requirement for entry into the sales representative 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 software contracting/export commodity industry in parallel positions among similar organizations.

B. Complexity and Uniqueness of the Proffered Position

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 U.S. sales representative to Chinese or Korean businesses would involve duties seen as either so unique or complex that only an individual with a degree in a specific specialty could perform them.

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

With regard to the instant petition, the petitioner submitted information on six employees. The petitioner identified one employee as president and the remaining five employees as software engineers. In addition, the four resumes submitted for four of the six employees indicate that all four have technical degrees in such areas as computer science, and engineering. In comparison, the beneficiary has a degree in English. The degrees of the petitioner's present employees do not establish that the

petitioner normally requires a degree in a specific specialty for the proffered position which appears to be a new sales position. To date the petitioner has not provided sufficient evidence to establish the third criterion of 8 C.F.R. § 214.2 (h) (4) (iii) (A).

IV. The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree - 8 CFR § 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 sales position with Bethel Info, Inc. In addition, there is no breakdown as to what percentage of time would be spent in specific duties to further describe the complexity of the position. The record contains a description of job duties entailing liaison with foreign businesses in China and Korea, consulting with Korean and U.S. customers, and arranging for sales. This description contains work duties that are similar to any sales representative or sales manager position. Without more persuasive evidence as to the specialized or complex nature of the sales representative/manager position, the petitioner has not met the fourth criterion of 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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.