

D2

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: WAC-01-275-50454 Office: California Service Center Date: MAR 18 2003

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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)

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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 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 and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an exporter of aircraft parts with ten employees and a stated gross annual income of \$5 million. 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 proffered position is a specialty occupation.

On appeal, counsel submits a brief.

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.

The term "specialty occupation" is defined at 8 C.F.R. § 214.2(h)(4)(ii), as follows:

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 director concluded that the petitioner had failed to demonstrate that the proffered position could be successfully performed only by an individual who possessed a baccalaureate or higher degree. On appeal, counsel argues that the proffered

position is a specialty occupation because it requires at least a bachelor's degree in marketing, management, or a related field. Counsel asserts that the education requirements for marketing managers listed in the Department of Labor's (DOL) *Occupational Outlook Handbook*, (*Handbook*), support the arguments put forth on appeal.

The Bureau does not rely solely on the title of a position in determining whether that position 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 Bureau considers. In a separate letter that accompanied the initial I-129 petition, the duties of the beneficiary in the offered position were described as follows:

As Marketing Manager, [the beneficiary] will develop the firm's detailed marketing strategy. He will determine the demand for the company's various products as well as the demand for products offered by its competitors. He will then develop a pricing strategy for the company's products designed to maximize the firm's share of the market and maximize profits while ensuring that the company's customers are satisfied[.]

In addition, [the beneficiary] will try to identify potential new markets for the company's products and, in collaboration with sales, product group managers, he will monitor trends that may indicate the need for new products and oversee product development. He will also work with advertising and promotion personnel to promote the company's products and services and to attract potential customers.

Finally, [the beneficiary] will write proposals and reports as required to effectively communicate his plans and strategies to the Executive Manager.

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.

Counsel's argument that the proffered position is a specialty occupation because it requires at least a bachelor's degree in business administration with an emphasis in marketing is not persuasive. The proffered position is that of a marketing manager. A review of the DOL's *Handbook*, 2002-2003 edition, at page 28, finds no requirement of a baccalaureate or higher degree in a specific specialty for employment as a marketing manager. Rather, most employers prefer a wide range of educational backgrounds or promote individuals from within companies. While some employers may prefer degrees in business administration with emphasis in marketing, most employers prefer individuals with experience in related occupations plus a broad liberal arts background with a bachelor's degree in areas as diverse as sociology, psychology, literature, journalism, and philosophy being amongst the acceptable areas of study. Additionally, certain personal qualities and participation in in-house training programs are often considered as important as a specific formal academic background. Thus, the petitioner has not shown that a bachelor's degree in a specific specialty or its equivalent is required for the position being offered to the beneficiary.

The petitioner has cited several decisions issued by the AAO, in support of the argument that the position of marketing manager is a specialty occupation. However, the unpublished AAO decisions cited by the petitioner have no precedential effect in this proceeding. See 8 C.F.R. § 103.3(c).

The petitioner's citation of *Tapis International v. INS*, 94 F. Supp. 2d 172 (D. Mass. 2000), which found that the Service (now the Bureau) improperly ignored the provision of the regulations which allowed for a bachelor's degree or "its equivalent," is also noted. However, the court in *Tapis* was examining a position where a specific degree was not available in that field. Clearly, in this case, specific degrees and courses of study directly and reasonably related to the marketing duties of the proffered position are readily available at a variety of institutions including senior colleges and universities, as well as junior and community colleges. Furthermore, as noted above, bachelor's degrees in a wide variety of academic disciplines are acceptable for employment in a marketing manager position.

Counsel contends that the statements of the petitioner regarding the degree it requires an individual to possess for employment in the offered job should be accepted as evidence. While the record contains the resumes of four individuals whom the petitioner claims possess at least a bachelor's degree and are currently employed in management positions, the record does not contain any documentation, such as diplomas or transcripts, to corroborate that these individuals possess the degrees listed. Simply going on record without supporting documentary evidence is not sufficient to meet the burden of proof in this proceeding. *Matter of Treasure Craft of California*, 14 I. & N. Dec. 190 (Reg. Comm. 1972). Therefore, it cannot be concluded that the petitioner has established that it has, in the past, required the services of individuals with baccalaureate or higher degrees in a specific specialty for the offered position.

Additionally, counsel's reasoning is problematic when viewed in light of the statutory definition of specialty occupation. 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. As with employment agencies as petitioners, the Bureau 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 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. To interpret the regulations any other way would lead to absurd results: if the Service was 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 menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have bachelor's degrees. *See id.* at 388.

In this case, the proffered position of marketing manager does not meet the statutory definition of specialty occupation. The position does not require the theoretical and practical application of a body of highly specialized knowledge. Therefore, even though the petitioner has indicated that it requires a bachelor's degree in business administration or a related field for employment in the offered job, such a requirement is the petitioner's preference rather than an indication that the position is a specialty occupation requiring a bachelor's degree in a specific area of study.

Counsel's assertion that the degree requirement is common to the industry in parallel positions among similar organizations is not

persuasive. The record contains no evidence to demonstrate 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 bachelor's degrees in a specific specialty in parallel positions. It was held in *Matter of Obaigbena*, 19 I. & N. Dec. 533, 534 (BIA 1988) and *Matter of Ramirez-Sanchez*, 17 I. & N. Dec. 503 (BIA 1980), that the assertions of counsel do not constitute evidence.

The petitioner has failed to submit any evidence 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. Accordingly, the decision of the director will not be disturbed.

ORDER: The appeal is dismissed.