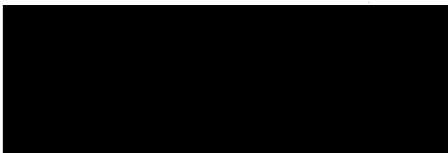


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U.S. Department of Homeland Security  
Citizenship and Immigration Services

**PUBLIC COPY**

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



FILE: WAC-02-082-53261 OFFICE: CALIFORNIA SERVICE CENTER

DATE:  
NOV 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:



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 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 nonimmigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a retailer of recreation products that employs six persons and has a gross annual income of \$1 million. It seeks to employ the beneficiary as a sales manager. The director denied the petition because the petitioner failed to establish that the offered position qualified as a specialty occupation.

On appeal, counsel submits a letter and additional evidence. Counsel states, in part, that the offered position qualifies as a specialty occupation.

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 position offered to the beneficiary 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.

The initial I-129 petition described the duties of offered position as managing and selling products for recreational and sporting use.

The petitioner's letter, that accompanied the I-129 petition, reported that the duties also entailed tracking and managing sales transactions and answering client inquiries. The letter explained that candidates must possess a bachelor's degree in business, or the equivalent, as well as have experience in sales. The letter further reported that the petitioner had an established practice of requiring, at a minimum, a bachelor's degree for all management positions.

On February 27, 2002, the director requested additional information about the job description and the position's requirements. He sought a detailed description of the work to be done, including specific duties; the percentage of time to be spent on each duty; the position's level of responsibility; the types of employees to be supervised; the minimum education, training, and experience necessary to perform the job; an explanation of why the position required the services of a person possessing a college degree or its equivalent in the occupational field; and evidence that would show the offered position qualified as a specialty occupation under 8 C.F.R. § 214.2(h) (4) (iii) (A).

In response, counsel submitted a letter, dated April 20, 2002, that amplified the duties of the offered position as follows:

1. Monday[:] early morning meeting with the owner of Quality Trading, Inc. discussing the past week's performance of the business as well as the week's

- expected performance or targets set, inventory report of the current stocks, reports on the arrival of exported shipments or goods ordered from sources, reports of the performance of sales force under his command. - 25 percent.
2. Follow up orders / shipments of line of products from sources - local (through sales representatives of foreign suppliers based in the [United States] and foreign (China, Korea, and other) through phone and/or through e-mail in the Internet. Also constantly surfing the Internet for items or products available worldwide that could be introduced in the [United States] market. - 25 to 35 percent (flexible)
  3. Join the four other members of the sales force in making sales through online, shipping the ordered items through UPS Online System. - 20 to 35 percent (flexible)
  4. Handles complaints from customers, checks products returned - defective or otherwise, attends to products being shipped to customers and products or items coming from suppliers or manufacturers. - 30 percent
  5. Late Friday afternoon[:] meeting with the sales force discussing lines of products to be given strong push, evaluation of their performance for the week as well as the goals set up for the coming week, giving pep talks to boost sales, discussing problems encountered and presenting possible solution to tackle them, and others that are relevant to the business. - 25 percent

The letter also stated that the beneficiary would supervise and work with the sales force, composed of persons who are either college graduates or have some formal education. The letter further explained that the beneficiary, who is fluent in the English, Filipino, and Chinese languages, would communicate with overseas suppliers in China and Korea, and with brokers, manufacturers, and sales people. Thus, counsel stated that the candidate must possess a bachelor's degree because it provides the necessary business acumen to perform the position.

On June 18, 2002, the director denied the petition, finding that the offered position failed to qualify as a specialty occupation. The director, referencing the Department of Labor's *Occupation Outlook Handbook (the Handbook)*, reported that the duties of the offered position mirrored those performed by retail store managers, and stated the following about the retail store manager position:

Knowledge of management principles and practices, often an essential requirement for a management position in

retail trade, is usually acquired through work experience. Many supervisors and managers begin their careers on the sales floor as sales clerks, cashiers, or customer service workers. In these positions, they learn merchandising, customer service, and the basic policies and procedures of the store. The educational background of retail sales worker supervisors and managers varies widely. Regardless of the education received, business courses, including accounting; administration; marketing; management; and sales; as well as courses in psychology; sociology; and communication; are helpful . . . . Most supervisors and managers who have post-secondary education hold associate or bachelor's degrees in liberal arts, social science, business or management.

The director explained that, although some education is helpful, a baccalaureate degree in a specific specialty is not normally an industry-wide minimum requirement for entry into a retail store manager position. The director also stated that the petitioner failed to establish at least one criterion under 8 C.F.R. § 214.2(h) (4) (iii) (A).

The director concluded his denial by stating that the offered position could be performed by a person whose educational training falls short of a bachelor's degree, and that the offered position's duties did not require professional skills.

On appeal, counsel states that the offered position more closely resembles a financial manager, not a retail store manager, and states that the petitioner erred in choosing the title of sales manager, instead of choosing the more proper title of financial manager. The letter asserts that the knowledge required to perform such specialized and complex duties is associated with the attainment of a bachelor's degree or higher. In addition, the letter states that the candidate must be fluent in English, Chinese, and Filipino, the three languages required to communicate with the petitioner's foreign suppliers.

On appeal, the petitioner submits a letter that states that the duties of the offered position include sales analysis, business to business sales, marketing, sales forecasting, and demographic studies. To show its rapid growth in sales, the petitioner provides a copy of its sales report.

Counsel's assertions on appeal are not meritorious. The petitioner fails to establish that the offered position qualifies as a specialty occupation.

To determine whether the position qualifies as a specialty occupation, Citizenship and Immigration Service (CIS) must examine the ultimate employment of the alien. *Cf. Defensor v.*

*Meissner*, 201 F. 3d 384 (5<sup>th</sup> 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 baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act.<sup>1</sup> 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 menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. See *id.* at 388.

On appeal, counsel alleges that the candidate must be fluent in English, Chinese, and Filipino, the three languages required to communicate with the petitioner's foreign suppliers. However, the petitioner has never asserted this claim. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Thus, counsel's allegation is unfounded.

With respect to the duties of the offered position, the 2002-2003 edition of the Department of Labor's *Occupational Outlook Handbook*, (the *Handbook*), is instructive in determining whether a position requires a baccalaureate or higher degree or its equivalent for entry into the occupation. On page 26, the *Handbook* shows the petitioner's offered position as encompassing both sales and marketing manager duties. For example, a marketing manager would "monitor trends that indicate the need for new products" and would "identify potential markets." Whereas the *Handbook* describes the sales manager as one who would "assign sales territories, set goals, and establish training programs for the sales representatives." Such managers "advise the sales representatives on ways to improve their sales performance." They also "analyze sales statistics gathered by their staffs to determine sales potential and inventory requirements and monitor the preferences of customers." And, they "maintain contact with dealers and distributors."

On page 28, the *Handbook* states the following with regard to training, advancement and other qualifications:

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<sup>1</sup> 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.

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. A bachelor's degree in sociology, psychology, literature, journalism, or philosophy, among other subjects, is acceptable. However, requirements vary, depending upon the particular job.

Specifically, for marketing, sales, and promotion manager positions the *Handbook* provides:

[S]ome employers prefer a bachelor's or master's degree in business administration with an emphasis in marketing. Courses in business law, economics, accounting, finance, mathematics, and statistics are advantageous.

The *Handbook* reveals that employers find a wide range of educational backgrounds suitable for entry into the proffered position. According to the *Handbook*, for example, an employer may find that a person with experience in a related occupation and an associate or bachelor's degree in any field of study is suitable for a sales manager position. Although some employers prefer a bachelor's or master's degree in business administration, most do not normally require a bachelor's degree in a specialized field.

In addition, the petitioner's sales manager position is not a specialty occupation because a baccalaureate or higher degree or its equivalent in a specific academic specialty is not the normal minimum requirement for entry into the particular position. Again, persons with a wide range of educational backgrounds find employment as sales managers. Consequently, the petitioner fails to establish the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) - that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

The petitioner fails to establish the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): it submits no evidence to show that other businesses also require a bachelor's degree. As already discussed, neither is the petitioner successful in showing that the duties of the offered position are so complex or unique that it can be performed only by an individual with a specific degree.

Likewise, the petitioner fails to provide documentary evidence to show that it normally requires a specific academic degree or its equivalent for the position. Thus, it fails to satisfy the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Similarly, the petitioner fails to show that 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 degree in a specific specialty. Thus, the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) is not met.

In summary, the petitioner fails to establish any of the four criteria under 8 C.F.R. § 214.2(h)(4)(iii)(A) to qualify the position as a specialty occupation.

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 appeal is dismissed. The petition is denied.