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U.S. Citizenship
and Immigration
Services



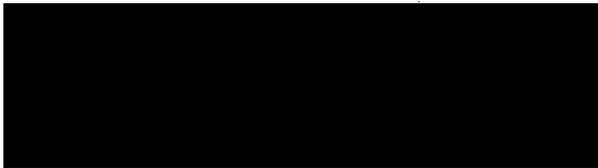
FILE: WAC 02 289 50891 Office: CALIFORNIA SERVICE CENTER Date: APR 23 2004

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)

ON BEHALF OF PETITIONER:

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prevent clearly unwarranted
invasion of personal privacy**

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

for Mai Johnson
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is an athletic and fitness club that seeks to employ the beneficiary as a marketing and business development manager. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to 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).

The director denied the petition because the proffered position is not a specialty occupation and the beneficiary is not qualified to perform a specialty occupation. On appeal, counsel submits a brief.

The AAO will first address the director's conclusion that the position is not a specialty occupation.

Section 214(i)(1) of the Immigration and Nationality Act (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.

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.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a marketing and business development manager. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's November 24, 2002 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail, in part: setting guidelines; supervising staff; implementing company policies; translating corporate strategy into marketing and strategy objectives; creating a corporate road map to meet market requirements, corporate operating requirements, and sales targets; and managing the strategic vision of the petitioner's future direction. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree or an equivalent thereof and several years of professional related experience.

The director found that the proffered position was not a specialty occupation because the proposed duties are not so complex that a baccalaureate degree is required. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel asserts that the proffered position is a specialty occupation based on the complexity of the proposed duties, which involve making business, analytical, marketing, and sales decisions. Counsel further states that the record contains opinions from two industry experts in support of her assertion. Counsel additionally states that the record contains evidence that the petitioner normally requires a degree for the proffered position and similar positions, and that this requirement is industry wide.

The record contains the following documentation pertaining to the requirements of the proffered position:

- Letter, dated November 29, 2002, from the president of Management Vision, a management consulting company, who states, in part: "When interviewing management-level staff and reviewing the candidates' resumes, we look primarily to applicants who have a Bachelor's degree (or the equivalent).";
- Letter, dated November 27, 2002, from the president of the Wisconsin Athletic Club, Inc., who states, in part: "Our upper level management positions (General Manager, Marketing Manager, Fitness Director and Operations Director), require a Bachelor's degree. . . . We obviously look for a degree in Physical Education or Exercise Fitness Management as a foundation. Many of our staff have business and marketing degrees too. . . . We find that having a manager with a Bachelor's degree lends prestige to the position."; and
- Internet profiles of various health club employees that reflect a variety of positions and educational backgrounds, including some degrees unrelated to their positions, and also reflecting various employees without degrees.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree.

Factors often considered by CIS when determining these criteria include: whether the Department of Labor's *Occupational 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." *See 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 AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The AAO does not concur with counsel that the proffered position is a specialty occupation. The proffered position is primarily that of a marketing manager. A review of the Advertising, Marketing, Promotions, Public Relations, and Sales Managers training requirements in the *Handbook*, 2004-2005 edition, finds that a wide range of educational backgrounds is suitable for entry into these positions, but many employers prefer those with experience in related occupations plus a broad liberal arts background. No evidence in the *Handbook* indicates that a baccalaureate or higher degree in a specific specialty, or its equivalent, is required for a marketing manager job.

Regarding parallel positions in the petitioner's industry, the petitioner submitted Internet job postings and employee profiles for a variety of positions/employees within the fitness industry. There is no evidence, however, to show that the advertised positions are parallel to the instant position. For example, the employees and positions profiled include trainers, fitness specialists, general managers, and corporate directors. The petitioner has not demonstrated, however, that the proposed duties of the proffered position parallel the duties of the Internet positions. Thus, the Internet documentation has little relevance.

The letter from [REDACTED] President of Management Vision, a management consulting company, is noted. Mr. [REDACTED] states, in part, that, when interviewing for management level-staff, his company looks primarily to those applicants who hold a bachelor's degree. Mr. [REDACTED] does not indicate that the bachelor's degree must be in a specific specialty. The letter from [REDACTED] President of the Wisconsin Athletic Club, Inc. is also noted. Mr. [REDACTED] states, in part, that having a manager with a bachelor's degree lends prestige to the position. It does not appear therefore that the degree requirement is related to the alleged complexity of the managerial positions at the Wisconsin Athletic Club, Inc. In view of the foregoing, the letters carry little weight.

The record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. On appeal, counsel submits the petitioner's website information for the positions of: regional manager; director of operations; group exercise director; and membership representative. The record, however, does not contain any evidence of the petitioner's past hiring practices demonstrating that the employer normally requires a baccalaureate degree in a specific specialty for the proffered position, and therefore, the petitioner has not met its burden of proof in this regard. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(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.

To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

The director also found that the beneficiary would not be qualified to perform the duties of the proffered position if the job had been determined to be a specialty occupation. However, as the AAO is dismissing the appeal because the job is not a specialty occupation, it will not discuss the beneficiary's qualifications.

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.