



U.S. Citizenship
and Immigration
Services

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FILE: WAC 02 029 51319 Office: CALIFORNIA SERVICE CENTER Date: APR 26 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:

[Redacted]

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**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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.

Mari Johnson

[Signature]
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 a nursing registry company that seeks to employ the beneficiary as a marketing manager. The petitioner, therefore, 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. On appeal, counsel states that Citizenship and Immigration Services (CIS) ignored job duties that were indicative of a specialty occupation. Counsel also refers to the *Dictionary of Occupation Titles (DOT)* classification of nurse registry director.

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 petitioner's letter of support dated October 12, 2001; (3) the director's request for additional evidence; (4) counsel's letter, dated January 8, 2002, that responds to the director's request; (5) the director's denial letter; and (6) 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 analyst. Evidence of the beneficiary's duties includes: the I-129 petition; the director's request for further evidence; and the petitioner's May 20, 2002 letter in response to the director's request for further evidence. According to the initial petition, the beneficiary's duties would primarily entail analyzing developments in the health care services market. In addition, the marketing director would negotiate contracts with customer/client healthcare facilities, and would monitor contract performance and modifications. Finally the marketing director would also oversee hiring, and training of sales staff, as well as market promotions and advertising. In the petitioner's response to the director's request for further evidence, counsel stated that the beneficiary would also have administrative and financial duties that included referring nurses to client hospitals; keeping records of the number and type of calls received; analyzing problems of the nursing registry to improve services and operations; assisting in recruiting nurses for emergencies; and having responsibility for the financial administration of the nursing registry. The petitioner indicated that it required an individual with education and experience in marketing for the position.

The director found that the proffered position was not a specialty occupation and described several of the duties described by the petitioner as general office manager/personnel duties. The director added that although the petitioner believed that it needed a person with a baccalaureate degree to be an effective spokesperson when dealing with professional level personnel in hospitals, this fact did not make the proffered position a specialty occupation. 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 states that CIS ignored the marketing responsibilities of the proffered position in its decision. Counsel also asserts that CIS ignored the *DOT* information on nurse registry directors submitted by the petitioner in its response to the director's request for further evidence.

Counsel asserts, in part, that the *DOT* information on nursing registry directors was not considered, even though submitted into the record. The *DOT* is not a persuasive source of information regarding whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation. For example, the SVP rating given in conjunction with job classifications is meant to indicate only the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience, and it does not specify the particular type of degree, if any, that a position would require. For this reason, the director did not err in discounting the *DOT* information.

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 *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. With regard to the instant petition, the record is confused as to the actual proffered position. For example, the petitioner submitted new job duties in its response to the director's request for further evidence that involved oversight of the actual nursing registry, as opposed to the marketing duties previously outlined in the original petition. These two job areas appear to be significantly distinct. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed is a specialty occupation. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. For purposes of this proceeding, therefore, only the original duties of marketing manager will be examined.

With regard to marketing managers, the 2004-2005 edition of the *Handbook* states the following:

A wide range of educational backgrounds is 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.

For marketing, sales, and promotions management positions, some employers prefer a bachelor's or master's degree in business administration with an emphasis on marketing. Courses in business law, economics, accounting, finance, mathematics, and statistics are advantageous. In highly technical industries, such as computer and electronics manufacturing, a bachelor's degree in engineering or science, combined with a master's degree in business administration, is preferred.

Thus, the *Handbook* does not establish that a marketing manager position requires a baccalaureate degree in a specific specialty. Without more persuasive evidence, the petitioner has not established that the proffered position is a specialty occupation.

Regarding parallel positions in the petitioner's industry, the petitioner submitted no further documentation regarding academic credentials required for other marketing managers in similar firms. 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. The petitioner stated in its response to the director's request for further evidence that the marketing manager position was a new job within the petitioner's staff. Therefore the petitioner cannot meet this criterion.

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. For example, the job duties of marketing manager appear primarily to entail analyzing the needs of the healthcare industry and the negotiating of contracts between the petitioner and medical facilities for nursing services. These duties do not appear to be so specialized or complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate degree. In addition, although the petitioner included the management of sales or marketing staff as part of the duties of the proffered position, the record is devoid of any information on any existing or future sales or marketing staff. Without more persuasive evidence, the petitioner has not established the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.

Beyond the decision of the director, it is noted that the petitioner failed to provide a certified Labor Condition Application at the time the I-129 petition was filed. The record reflects that the petition was received by the service center on October 19, 2001. The LCA submitted by the petitioner in its response to the director's request for further evidence is dated January 11, 2002. CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp., supra.*

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.