



U.S. Citizenship
and Immigration
Services

FD

[Redacted]

FILE: LIN 02 213 55403 Office: NEBRASKA SERVICE CENTER

Date: AUG 31 2004

IN RE: Petitioner:
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]

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.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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DISCUSSION: The service center director denied the nonimmigrant visa petition, and rejected the petitioner's subsequent motion to reconsider as untimely filed. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

Counsel's request that the director's June 16, 2003 decision be reversed because the director improperly rejected his motion to reconsider as untimely filed is noted. Counsel states that he did not receive the director's February 11, 2003 decision on a timely basis because it was returned to the director as "undeliverable." Counsel asserts that the "undeliverable" status of the mailing was due to either an error by the director or by the U.S. Postal Service. Documentation in the record, however, does not support counsel's assertion. On the Form G-28, Notice of Entry of Appearance as Attorney or Representative, which was signed by counsel and the petitioner on June 4, 2002, counsel provided the following zip code for his office address: 60606-4007. The director used this zip code that was provided by counsel to mail his February 11, 2003 decision. A review of the U.S. Postal Service's website at <http://zip4.usps.com> reveals that counsel's office zip code is actually 60606-4102 rather than 60606-4007. As such, the evidence in the record demonstrates that, due to the incorrect zip code provided by counsel, the director's mailing was returned as "undeliverable." For this reason, the director's decision to reject counsel's motion to reconsider as untimely filed was proper and will not be reversed.

The petitioner is a food equipment manufacturer that seeks to employ the beneficiary as an advertising manager. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to § 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 submits a brief.

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.

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; (5) the petitioner's motion to reconsider; (6) the director's decision rejecting the motion as untimely filed; and (7) 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 an advertising manager. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's June 4, 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: planning and executing the petitioner's advertising policies; developing and producing advertisements in trade journals and art trade shows; preparing copy for advertisements and company brochures; arranging photo spreads of equipment with photography studios; and working with graphic design studios to set up photo spreads and copy used in advertisements and trade journals. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in advertising.

The director found that the proffered position was not a specialty occupation because the proposed duties are not so complex as to require a baccalaureate degree. Citing to the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent in a specific specialty. 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, in part, that the proposed duties, which include analyzing sales data and determining trends in the industry, are so complex that a baccalaureate degree is required. Counsel further cites unpublished CIS decisions and asserts that such decisions and the expert opinions contained in the record demonstrate that a baccalaureate degree is required. Counsel also states that, in the DOL's Bulletin 2541 on Advertising in its *2002-03 Career Guide to Industries*, the DOL finds that the position of account executive or manager requires a bachelor's degree in marketing or advertising.

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. The AAO does not concur with counsel that the proffered position is a specialty occupation. No evidence in the *Handbook*, 2004-2005 edition, indicates that a baccalaureate or higher degree, or its equivalent, is required for an advertising manager job. Both the *Handbook* and the DOL's Bulletin 2541 on Advertising in its 2002-03 *Career Guide to Industries* indicate that a wide range of educational backgrounds is suitable for entry into an advertising manager position, but many prefer individuals with related experience plus a broad liberal arts background.

Regarding parallel positions in the petitioner's industry, the record contains letters from the following: [REDACTED] Midwest Sales Manager for the Marketing & Technology Group [REDACTED] Office Manager for [REDACTED] Convention Manager for the American Association of Meat Processors; [REDACTED] Exhibitor Service Manager for the American Meat Institute; [REDACTED] Advertising Manager for [REDACTED] Purchasing Manager for [REDACTED] Senior Marketing Manager for *The National Provisioner*.

Although the writers state that a bachelor's degree is required for a marketing manager position, none of the writers states that a bachelor's degree in a specific specialty is required. As such, the opinions of the writers support the findings of the DOL in its *Handbook*.

Counsel cites unpublished AAO decisions in support of the appeal. While 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Furthermore, neither counsel nor the petitioner has demonstrated that the proffered position is as complex as those in the unpublished decisions, which include a strategic management analyst, a market research analyst, and a fashion consultant.

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 states that the record contains an affidavit from the petitioner's vice president swearing that the minimum educational requirement for the petitioner's advertising manager position is a bachelor's degree with a major in advertising. The record, however, does not contain any evidence of the petitioner's past hiring practices 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)(4)(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 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.