

PUBLIC COPY



U.S. Citizenship
and Immigration
Services

Identifying data deleted to
prevent identity theft and
invasion of personal privacy

DEC 02 2004

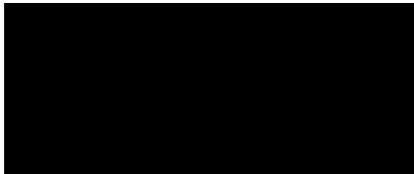


FILE: WAC 02 228 50671 Office: CALIFORNIA SERVICE CENTER Date:

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)

ON BEHALF OF PETITIONER:



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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the service center 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 wholesaler and distributor that seeks to employ the beneficiary as a merchandise 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 the proffered position is a specialty occupation. The petitioner submitted a timely Form I-290B on September 18, 2003 and indicated that a brief and/or additional evidence would be submitted to the AAO within 30 days. As of this date, however, the AAO has not received any additional evidence into the record. Therefore, the record is complete.

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; 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 merchandise manager. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail developing and supervising marketing and merchandising strategies and programs to achieve sales and profit objectives for food products and related commodities; supervising and evaluating marketing plans and programs; collaborating with companies to integrate food products and related commodities into marketing strategies; assessing and evaluating the management of objectives; developing systems to review product profitability; collaborating with others to coordinate and supervise all activities for the timely introduction of new food products and related commodities; supervising the development and production of advertising, marketing, merchandising, and promotional materials; consulting with attorneys, accountants, and others to ensure regulatory compliance; supervising advertising and marketing budgets; establishing employee performance standards; evaluating marketing and sales programs; evaluating competitors and developing programs to respond to competition; and ensuring projects meet the needs of clients. The petitioner stated that a candidate for the proffered position must possess a bachelor's degree with a major or concentration in business administration, merchandising, marketing, advertising, or a closely and directly related major.

The director determined that the proffered position was not a specialty occupation. According to the director, as described in the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*), the beneficiary's duties are performed by purchasers and buyers. The director stated that the *Handbook* reveals that although many firms prefer or desire a baccalaureate degree, it is clear that baccalaureate level of training is not a normal industry-wide requirement for entry into the occupation. The director found the submitted evidence unpersuasive in establishing that the petitioner normally requires applications to possess a bachelor's or higher degree in the field. The director stated that the proposed duties and level of responsibility did not indicate a complexity or authority which is beyond that normally encountered in the occupational field.

On appeal, counsel states that (1) the director's denial is contrary to the weight of the evidence; (2) the petitioner established that it required a candidate possessing a college degree with a major in business administration; (3) this is not a low-level trainee position that could be performed by a person with less than a bachelor's degree nor is it a salesperson or sales agent job; (4) the standard and common practice in the industry is to require a bachelor's degree with a major in business administration or a related field; and (5) the petitioner requires the services of a merchandise manager to expand its company.

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 first considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the particular position; a specific 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 in a specific specialty. 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)).

In determining whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act.

The AAO notes that the petitioning entity indicated that it is a wholesaler and distributor of watches, clocks, timepieces, and related goods and commodities. But the petitioner's job description in the June 20, 2002 letter revealed that some of the beneficiary's duties would involve food products. Given this apparent incongruity, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Since the petitioner failed to explain why some of the beneficiary's duties would involve food products, the probative value of the petitioner's statements relating to the beneficiary's duties is diminished.

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. A careful review of the *Handbook* discloses that the proffered position's duties are performed by marketing and sales managers. Marketing managers determine the demand for products and services offered by the firm and its competitors; identify potential markets such as business firms or the general public; develop a pricing strategy with an eye towards maximizing the firm's share of the market and its profits while ensuring that the firm's customers are satisfied; and monitor trends that indicate the need for new services and oversee product development. Sales managers analyze sales statistics gathered by their staffs to determine sales potential and inventory requirements and monitor the preferences of customers.

The *Handbook* reports that:

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.

For marketing and sales management positions, the *Handbook* states that some employers *prefer* a bachelor's or master's degree in business administration with an emphasis in marketing.

To qualify a position as a specialty occupation, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) indicates that a petitioner must establish that a baccalaureate or higher degree or its equivalent in a specific specialty is normally the minimum requirement for entry into the particular position. Based on the information in the *Handbook*, the petitioner cannot establish this given that only some employers prefer, but do not require, a bachelor's degree in business administration with an emphasis in marketing for entry into sales and marketing manager positions. That only some employers prefer a specific baccalaureate degree is insufficient to establish that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position, marketing specialist.

The evidentiary record contains an evaluation from [REDACTED] of International Education Council. In the evaluation, [REDACTED] stated that Occupational Brief #579 indicated that most large firms and government agencies want management trainees who have at least a bachelor's degree, and that many firms look for trainees with a master's or higher degree. [REDACTED] stated that according to Occupational Brief #605, more than 90 percent of all higher-level business managers have a college degree, and that a bachelor's degree in business is becoming necessary for entry into management work. [REDACTED] further stated that these publications and the *Handbook* show that many managers specialize in their field of expertise and that many corporations require a master's degree for advancement.

[REDACTED] evaluation is relevant. Nevertheless, it fails to establish that a baccalaureate or higher degree or its equivalent in a specific specialty is normally the minimum requirement for entry into the particular position. [REDACTED] statement, "more than 90 percent of all higher[-]level business managers have a college degree, and a bachelor's degree in business is becoming necessary for entry into management work," applies to all managerial jobs. As such, the statement fails to address the specific educational requirements of the particular position of merchandise manager. [REDACTED] statements, therefore, are inadequate to establish that a baccalaureate or higher degree or its equivalent in a specific specialty is normally the minimum requirement for entry into the particular position, merchandise manager.

The second criterion requires that the petitioner show that a specific degree requirement is common to the industry in parallel positions among similar organizations. 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Counsel states that the common practice in the industry is to require a bachelor's degree with a major in business administration or a related field for the proffered position. Yet, no evidence in the record supports counsel's statement. The statements of counsel on appeal are not evidence and thus are not entitled to any evidentiary weight. *See INS vs. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). The evaluation from [REDACTED] related to all managerial positions; it did not relate specifically to merchandise manager jobs. For this reason, the evaluation cannot be used to establish that a specific degree requirement is common to the industry in parallel positions among similar organizations.

No evidence is in the record that would show the proffered position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Again, the *Handbook* shows that the proffered position is performed by sales and marketing managers, jobs that do not require a baccalaureate degree in a specific specialty.

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position.

The evidentiary record fails to satisfy the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4): that the nature of the specific 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 *Handbook* shows that the proffered position is performed by sales and marketing managers, jobs that do not require a baccalaureate degree in a specific specialty.

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.