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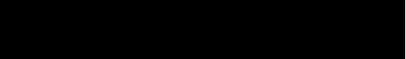
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DEC 02 2004

FILE: WAC 03 063 54507 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

Robert P. Wiemann, Director
Administrative Appeals Office

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 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 establishing a research methodology; leading the examination and analysis of statistical data in order to forecast marketing trends; developing pricing strategies; overseeing flow charts, diagrams, statistical and probability amalgams, past sales, pricing analysis, future trend reports, and other related marketing information; expanding the pool of commercial real estate clientele; researching expansion into the residential market; and attending meetings with clients. The petitioner stated that the beneficiary was tendered the proffered position because she possesses the equivalent of a bachelor's degree in mass communications and has work experience as a marketing manager.

The director determined that the proffered position was not a specialty occupation. Referring to the *Occupational Outlook Handbook* (the *Handbook*), the director stated that employers prefer, but do not require, a bachelor's degree in a specific specialty for marketing, promotions, and sales manager jobs. The director found the submitted job postings and two expert opinion letters unpersuasive in establishing that a bachelor's degree in a particular field is the industry-wide standard. Moreover, the director determined that the evidence did not establish that the petitioner normally requires a baccalaureate degree in the field or that the proposed duties and stated level of responsibility indicated a level of complexity or authority beyond what is normally encountered in the field. According to the director, the cited case of *Unico American Corp. vs. Watson*, 1991 WL 11002594 (C.D.Cal., Mar 19, 1991) is not binding precedent because the parties are not involved in the current case. *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Finally, the director stated that the submitted case from the AAO and the service center bore little evidentiary weight because they do not involve marketing manager positions.

On appeal, counsel states that administrative precedent, Internet job postings, and letters from experts and an employment agency established that a marketing manager position is a specialty occupation. According to counsel, the *Handbook's* preface indicates that it is not a guide for determining formal job evaluations. Counsel states that the court in *Unico American Corp.* held that CIS cannot rely on "standardized government classification systems" such as the *Handbook* without fully considering a petitioner's evidence, and claims that the submitted evidence established that the proffered position is a specialty occupation. Counsel claims that the regulation at 20 C.F.R. § 656.21(b)(2)(iv) indicates that if a job opportunity has been described with an employer "preference," it shall be deemed to be a job requirement for the purposes of the section. Counsel quotes a number of court decisions to demonstrate that a marketing manager job requires a specific baccalaureate degree. Counsel claims that the submitted expert opinion letters established that employers require specialized work experience and accept only a limited number of academic fields for a marketing manager position. Counsel contends that the evidentiary record demonstrates that a bachelor's degree in a particular field is the industry-wide requirement for entry into the proffered position.

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 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)).

Counsel asserts that CIS has already determined that the proffered position is a specialty occupation since CIS and the AAO has approved other, similar petitions in the past. Counsel's assertion is not convincing. The director properly stated that the submitted cases bear little or no evidentiary value given that they involve the occupations of a marketing research analyst and an investment analyst, jobs wholly unrelated to a marketing manager. Furthermore, each nonimmigrant petition is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii).

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 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 duties of the proffered position are indeed performed by a marketing manager. Counsel contends that the *Handbook* never clearly states the educational requirements of a marketing manager because it describes the professional requirements of a marketing manager along with those of advertising, promotions, public relations, and sales jobs. The *Handbook* does describe the educational requirements of a marketing manager along with other positions. But it plainly states that a specific baccalaureate degree is not required for a marketing manager job. The *Handbook* reports:

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.

The *Handbook* continues to more narrowly describe the requirements of a marketing manager job by stating:

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.

The director, therefore, properly concluded that the *Handbook* reveals that employers prefer, but do not require, a marketing manager to possess a bachelor's degree in a specific specialty.

Counsel's contention that the *Handbook's* preface indicates that it should not be used as a guide for determining formal job evaluations is taken out of context. The relevant passage in the *Handbook* reads:

The *Handbook* describes the job outlook over a projected 10-year period for occupations across the Nation; consequently, short-term labor market fluctuations and regional differences in job outlook generally are not discussed. Similarly, the *Handbook* provides a general, composite description of jobs and cannot be expected to reflect work situations in specific establishments or localities. The *Handbook*, therefore, is not intended and should not be used as a guide for determining wages, hours of work, the right of a particular union to represent workers, appropriate bargaining units, or formal job evaluation systems. Nor should earnings data in the *Handbook* be used to compute future loss of earnings in adjudication proceedings involving work injuries or accidental deaths.

This passage does not indicate that the *Handbook* should not be used as a guide for information about the duties and educational requirements of particular occupations. Using the guide as a "formal job evaluation system" is unrelated to using it for information about the duties and educational requirements of particular occupations.

Counsel states that the court in *Unico American Corp.* stated that CIS cannot rely on "standardized government classification systems," such as the *Handbook*, without fully considering a petitioner's evidence. The case referenced by counsel is not reported; thus, it is not binding precedent. Furthermore, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Counsel's reference to the regulation at 20 C.F.R. § 656.21(b)(2)(iv) to indicate that an employer's "preference" shall be deemed a job requirement is not persuasive. Counsel does concede in the appeal brief that an employer preference is deemed a job requirement only for "the purposes of this section" at 20 C.F.R. § 656.21(b)(2)(iv), relevant to the labor certification process before the United States Department of Labor. Moreover, 20 C.F.R. § 656.21(b)(2)(iv) states:

If the job opportunity has been or is being described with an employer preference, the employer preference shall be deemed to be a job requirement for purposes of this paragraph (b)(2).

Consequently, an employer preference is deemed a job requirement for the purpose of the paragraph at (b)(2) of 20 C.F.R. § 656.21; thus, it does not apply to the Act or the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Citing to the court's decision in *Tapis International vs. INS*, 94 F. Supp. 2nd 172 (D. Mass. 2000), counsel maintains that it establishes that the proffered position is a specialty occupation because expert opinion letters evince that employers require specialized work experience and accept only a limited number of academic fields for a marketing manager position.

Counsel misreads the court's finding in *Tapis International*. The court held that the term "or its equivalent" applies when a specific degree does not exist in an occupational field. This is not the situation for a marketing manager job. For marketing manager positions, the *Handbook* reveals that a wide range of educational backgrounds is suitable for entry into marketing managerial positions. Furthermore, the submitted expert opinion letters did not indicate that employers accept only a limited number of degrees for a marketing manager job. The letter from [REDACTED] stated that a candidate must possess a bachelor's degree in such areas as marketing, business administration, or within a social science discipline such as mass communications, psychology, or a related area. Likewise, [REDACTED] stated that a candidate must possess a bachelor's degree in such areas as marketing, business administration, or within a social science discipline such as mass communications or psychology. Thus, candidates must possess a bachelor's degree in marketing, business administration, or within the broad discipline of social science which encompasses areas such as psychology, sociology, history, environmental studies, anthropology, geography, and political science.

Based on the evidentiary record, the petitioner fails to establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the particular position, marketing manager. 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

To establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations - the evidentiary record contains two expert opinion letters, an employment agency letter, and information from the *Occupational Information Network (O*Net)*, and job postings.

This evidence is not persuasive. The AAO has already explained why the two expert opinion letters do not establish that a bachelor's degree in a specific specialty is required for the proffered position. The letter from the employment agency Top Notch merely stated that a wide variety of backgrounds are appropriate for a marketing manager position which include bachelor-degree holders possessing degrees in diverse fields such as business administration, marketing, economics, management, commerce, liberal arts, sociology, and philosophy. With respect to the *O*Net*, the DOL replaced the *Dictionary of Occupational Titles (DOT)* with *O*Net*. Both the *DOT* and *O*Net* provide only general information regarding the tasks and work activities

associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. The *Handbook* provides a more comprehensive description of the nature of a particular occupation and the education, training, and experience normally required to enter into and advance within the occupation. For this reason, CIS is not persuaded by a claim that the proffered position is a specialty occupation simply because of information from the *O*Net*. The director properly concluded that the 27 job postings failed to establish that a specific bachelor's degree was required industry-wide given that about 13 of the companies only preferred, but did not require a bachelor's degree. Consequently, the petitioner cannot establish that a baccalaureate degree in a specific specialty 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. 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 fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish 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. None of the proposed duties exceeds the scope of those performed by a marketing manager. Consequently, the petitioner fails to satisfy the fourth criterion at 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.

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.