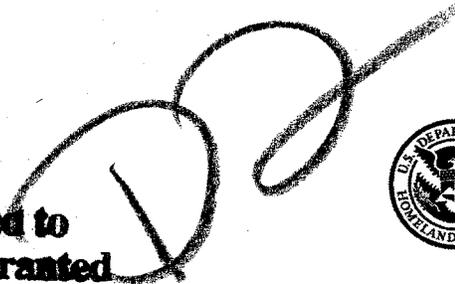


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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services



FILE: SRC 02 243 56177 Office: TEXAS SERVICE CENTER Date: FEB 25 2004

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

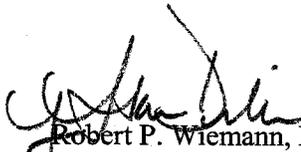
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



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 contractor of surplus and excess inventory that seeks to employ the beneficiary as a marketing director. 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 submits a brief.

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 director. Evidence of the beneficiary's duties includes: the Form I-129; the letter accompanying the Form I-129; 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: coordinating all marketing, advertising, promotional, and sales activities; gathering data on competitors; analyzing prices, sales, and marketing methods; coordinating the presentation of products to prospective clients; and determining the demand for products. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in marketing or the equivalent.

The director found that the proffered position was not a specialty occupation because the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A). The director discussed the submitted Internet announcements. Referring to the 2002-2003 edition of the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*), the director stated that the duties of the proffered position correspond to a marketing manager, and that the *Handbook* reports that a marketing manager position does not require a bachelor's degree in a specialized area.

On appeal, counsel states that the petitioner has satisfied the burden of proof in establishing that the proffered position is a specialty occupation. Counsel states that the petitioning entity purchases and sells surplus, salvage, closeouts, liquidation, and overstocked merchandise. Counsel asserts that the position has specialized and complex duties and that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. For example, counsel maintains that the beneficiary will collect data, establish facts, and draw conclusions that are interpreted by text, diagrams, and mathematical charts; analyze value assessments and market strategies; analyze statistical sales data for forecasting; and gather quantitative and qualitative data to develop strategic marketing analysis. Counsel claims that the duties of the proffered position are similar to the occupations of marketing analyst, marketing research analyst, and management analyst. Counsel refers to four petitions to support this claim. Moreover, counsel submits the following evidence to establish that the proffered position qualifies as a specialty occupation: (1) Internet printouts to demonstrate that marketing in the industry is technical, sophisticated, and highly competitive; (2) one letter each from Staffing Now, Inc. and Dr. Jonatan Jelen of Mercy College; (3) information from three Department of Labor publications: the *Occupational Outlook Quarterly*, *Occupational Outlook Handbook* (the *Handbook*), and the 2002-2003 edition of the *Occupational Projections and Training Data*.

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)).

With respect to the proffered position's duties, the petitioner's description of the duties varies significantly from the description provided by counsel in response to the request for evidence and on appeal. Given that the assertions of counsel do not constitute evidence, the AAO will disregard the statements of counsel that vary from the petitioner's job description set forth in the letter accompanying the I-129 petition. *Matter of*

Obaighena, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel's claim that the duties of the proffered position are similar to those of a marketing analyst, marketing research analyst, or management analyst and his reference to four petitions to support this claim, is without merit. In the first place, with respect to the cited petitions, counsel asserts that CIS has already determined that the proffered position is a specialty occupation since CIS has approved other, similar petitions in the past. This record of proceeding does not, however, contain all of the supporting evidence submitted to the Service Center in the prior cases. In the absence of all of the corroborating evidence contained in that record of proceeding, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the proffered position is parallel to the previously approved petitions. Moreover, 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). Second, the AAO 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. The AAO does not concur with counsel that the proffered position is analogous to marketing analyst, marketing research analyst, and management analyst positions. In the first place, the *Handbook* states that private industry, particularly economic and marketing research firms, management consulting firms, banks, securities and commodities brokers, and computer and data processing companies, employ about 9 out of 10 market research analysts. According to the *Handbook*, management analysts are mostly employed in management consulting and computer and data processing firms, and in Federal, State, and local governments.

The record shows that the petitioner has four employees, has an undisclosed income, and is a contractor of surplus and excess inventory. According to the *Handbook*, this kind of business is incongruous as to where a market research analyst is normally employed. Given the nature of the petitioning entity's business operations, the more appropriate classification of the offered position is marketing and sales manager. The *Handbook* describes marketing managers as developing a firm's marketing strategy; determining the demand for products and services offered by a firm and its competitors; identifying potential markets; determining pricing strategy; and monitoring trends. Sales managers analyze sales statistics. Thus, the duties of marketing and sales managers correspond to those of the proffered position.

According to the *Handbook*, a wide range of educational backgrounds are suitable for entry into advertising, marketing, promotions, public relations, and sales managerial jobs, but many employers prefer persons with experience in related occupations plus a broad liberal arts background. For example, employers accept a bachelor's degree in sociology, psychology, literature, journalism, or philosophy. With marketing, sales, and promotion management positions, some employers prefer a bachelor's or master's degree in business administration with an emphasis in marketing. However, the general trend is for many employers to accept candidates with experience in related occupations plus a broad liberal arts background. Whereas a smaller group of employers prefer candidates with a bachelor's or master's degree in business administration with an emphasis in marketing. The general trend contradicts the petitioner's assertion that a bachelor's degree in a

specific specialty is normally the minimum requirement for entry into the offered position. Furthermore, the submitted information from the *Occupational Outlook Quarterly* and the *Occupational Projections and Training Data* reports that marketing manager positions require a bachelor's degree plus experience. Neither publication states that the bachelor's degree must be in a specific specialty. These publications support the AAO's finding that a bachelor's degree in a specific specialty is not required to perform the duties of the proffered position.

The second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner establish that a degree requirement is common to the industry in parallel positions among similar organizations. Here, the submitted evidence does not establish this criterion. For example, the letter from Dr. Jonatan Jelen of Mercy College merely states that most companies in the field of marketing require a bachelor's degree in marketing as the minimum requirement for employment. The letter from Staffing Now, Inc. states that a bachelor's degree or equivalent in marketing is a prerequisite for a position in marketing and that the position of marketing manager is a specialty occupation. The letters are not persuasive because neither letter writer provides independent corroborating evidence to confirm the assertions. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The submitted evidence fails to show that the proffered position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. For example, the letters from Dr. Jelen and Staffing Now, Inc. are not persuasive because they are not supported by independent corroborating evidence. The Internet printouts do not demonstrate that marketing in the industry is technical, sophisticated, and highly competitive. For example, most of the printouts merely provide a list of companies with overstocks, salvage closeouts, and closeout merchandise. One printout entitled "True Closeout Merchandise! Welcome! Marcarmarshall Brokers Ltd." describes how easily one can design a web page to advertise products.

Counsel's assertion that the printouts demonstrate that marketing in the industry is technical, sophisticated, and highly competitive is without substance. A generic list of companies offering products for sale, whether the products are overstocks, salvage closeouts, or closeout merchandise, is irrelevant and has no probative value in establishing that marketing in the industry is technical, sophisticated, and highly competitive. Similarly, the "True Closeout Merchandise" printout does not establish that selling closeout merchandise requires sophisticated or highly competitive marketing techniques: the printout demonstrates how marketing closeout merchandise on the Internet is a very easy process. Moreover, as previously discussed, the proffered position's duties reflect those of marketing and sales managers. And, the three Department of Labor publications, the *Occupational Outlook Quarterly*, the *Handbook*, and the *Occupational Projections and Training Data* buttress the AAO's finding that the proffered position's duties do not require a bachelor's degree in a specific specialty.

There is no evidence in the record to demonstrate the third criterion - that the employer normally requires a degree or its equivalent for the position. 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO now turns to 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) - the nature of the specific duties are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. Counsel asserts that the position has specialized and complex duties and that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. Given that the AAO previously discussed the shortcomings of the submitted evidence, there is no evidence to support counsel's assertion.

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.