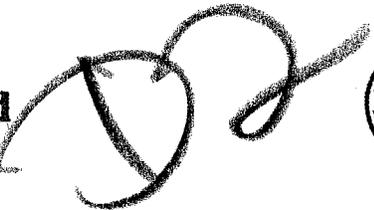


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U.S. Citizenship
and Immigration
Services

[Redacted]

FILE: WAC 02 070 50677 Office: CALIFORNIA SERVICE CENTER Date: **MAR 09 2004**

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

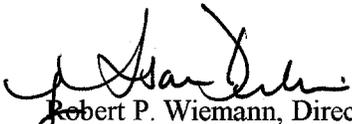
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

[Redacted]

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 service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded for entry of a new decision.

The petitioner is a skilled nursing facility that seeks to employ the beneficiary as a marketing administrator. The petitioner 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 beneficiary is not qualified to perform the specialty occupation. On appeal, counsel asserts that the director did not raise this issue in his request for evidence, and that it is unjust to deny the petition when the petitioner did not have an opportunity to respond to the director's concerns.

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 documents. The AAO reviewed the record in its entirety before issuing its decision.

In the director's request for additional evidence, he focused solely on whether the proffered position is a specialty occupation. The petitioner provided information in response to all of the director's requests. In his decision, the director implies that the position is, in fact, a specialty occupation that requires a bachelor's degree in marketing. The director then denied the petition based on the beneficiary's lack of a degree in marketing. As shall be discussed, however, it does not appear that the position is a specialty occupation, so the director never should have addressed the beneficiary's qualifications.

The petitioner is seeking the beneficiary's services as a marketing administrator. Evidence of the beneficiary's duties includes: the I-129 petition and the petitioner's response to the director's request for evidence. According to the December 13, 2001 letter in support of the petition, the beneficiary would perform duties that entail, in part: managing marketing projects targeting physicians at local hospitals to encourage patient referral to the petitioner's facility; organizing and maintaining graphics materials and mailing distribution lists; conferring with management and staff to present available services to hospitals and physicians; developing and maintaining marketing and client hospital and physician database; monitoring the effectiveness of marketing strategies and recommending modifications to those strategies; and coordinating business development and public relations activities. The petitioner states that the minimum requirement for this position is a bachelor's degree in business administration.

The director requested additional evidence to establish that the position is a specialty occupation. The petitioner submitted the requested evidence. In his decision, the director does not state that the position is a specialty occupation, but does state that the position requires a bachelor's degree in marketing, thereby implying that he found the position to be a specialty occupation. The position, however, is not a specialty occupation.

The AAO turns 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 Department of Labor's *Occupational Outlook Handbook (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 director determined that the position was similar to that of a marketing manager (the word manager was left out of the decision, but is the one that makes sense in context of the material from the *Handbook*), and that the "usual minimum requirement for employment as marketing [sic] is at least a bachelor [sic] or master's degree in business administration with an emphasis on marketing." However, the director mischaracterized the language from the *Handbook*, which states, "For marketing sales, and promotion management positions, some employers prefer a bachelor's or master's degree in business administration with an emphasis on marketing." (Emphasis added). This does not indicate that it is a usual minimum requirement, particularly when read in context of the previous paragraph, which states, "A wide range of educational backgrounds are 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.” This clearly indicates that a bachelor’s degree in a specific specialty is not required for entry into this field.

Regarding parallel positions in the petitioner’s industry, the petitioner submitted 12 Internet and newspaper job postings for various marketing positions. There is no evidence, however, to show that the employers issuing those postings are similar to the petitioner, or that the advertised positions are parallel to the proffered position. None of the companies is in health care, and there is no indication of the size of the companies. Thus, the advertisements have little relevance.

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. In the petitioner’s response to the director’s request for evidence and on appeal, counsel states that the person who previously performed the duties included in the proffered position has a bachelor’s degree in psychology, although no documentary evidence was provided. As discussed above, in order to establish that a position is a specialty occupation, the occupation must require a degree in a specific specialty. Since the person who previously performed the duties of the position had a bachelor’s degree in psychology, and the beneficiary has a bachelor’s degree in business administration, the petitioner has not established that a degree in a specific specialty is required, and therefore, the petitioner has not met its burden of proof in this regard.

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. 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.

The director also found that the beneficiary would not be qualified to perform the duties of the proffered position if the job had been determined to be a specialty occupation. However, as the AAO is remanding the matter because the job is not a specialty occupation, it will not discuss the beneficiary’s qualifications.

As the director based his decision on whether the beneficiary is qualified to perform a specialty occupation, rather than whether the position is a specialty occupation, the matter will be remanded to the director for further consideration. The director must afford the petitioner reasonable time to provide evidence pertinent to the issue of whether the position is a specialty occupation, as well as whether the beneficiary is qualified to perform the specialty occupation, and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for

eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's September 19, 2002 decision is withdrawn. The matter is remanded to him for further action and consideration consistent with the above discussion and entry of a new decision, which if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.