



U.S. Citizenship
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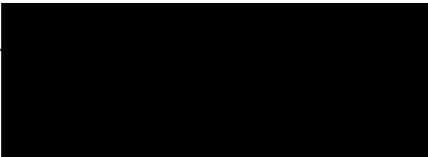
FILE: LIN 04 036 52376 Office: NEBRASKA SERVICE CENTER

Date: **AUG 16 2005**

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 Nebraska 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 provider of machinery for the manufacture of dietary supplement capsules and tablets, as well as ancillary equipment, with nine employees. It seeks to hire the beneficiary as a business development manager.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) counsel's response to the director's request for evidence; (3) the director's denial letter; and (4) Form I-290B, with counsel's brief and new and previously submitted documentation. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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 one 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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a 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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000). The critical element is not the title of the position nor an employer’s self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The petitioner states that it is seeking the beneficiary’s services as a business development manager. Evidence of the beneficiary’s duties includes: the Form I-129; counsel’s November 14, 2003 letter submitting the Form I-129; a November 18, 2003 letter of support from the petitioner; and counsel’s February 10, 2004 response to the director’s request for evidence. Although counsel’s response to the director somewhat revised the listing of the duties of the business development manager provided by the petitioner at the time of filing, the AAO will accept the February 10, 2004 description as defining the duties of the proffered position and will rely upon it for its analysis.

As stated by counsel, the position of business development manager would require the beneficiary to:

- Direct the promotion of all company products;
- Conduct research and monitor data regarding international economies, the economies of specific target nations, and economies of specific target markets;
- Develop and evaluate specific marketing strategies for each target market;
- Present marketing proposals to the company’s president;
- Coordinate efforts of various administrative departments to achieve effective implementation of the marketing strategies;
- Supervise one or two employees within the marketing department; and
- Evaluate the effectiveness of the marketing proposals adopted by the company.

To make its determination whether the employment just described qualifies as 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; and 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 considered by the AAO when determining these criteria include: whether the Department of Labor’s (DOL) *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports 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. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As counsel’s response to the director’s request for evidence emphasized the marketing duties of the proffered position, identifying the beneficiary as being solely responsible for the operation of the petitioner’s marketing department, the AAO turns first to the discussion of the employment of marketing managers in the 2004-2005 edition of the DOL *Handbook*. The work of marketing managers, which the *Handbook* includes within the occupation of advertising, marketing, promotions, public relations, and sales managers, is described at pages 23-24:

. . . . Advertising, marketing, promotions, public relations, and sales managers coordinate the market research, marketing strategy, sales, advertising, promotion, pricing, product development, and public relations activities.

Marketing managers develop the firm’s detailed marketing strategy. With the help of subordinates, including product development managers and market research managers, they determine the demand for products and services offered by the firm and its competitors. In addition, they identify potential markets Marketing managers develop 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. In collaboration with sales, product development, and other managers, they monitor trends that indicate the need for new products and services and oversee product development. Marketing managers work with advertising and promotion managers to promote the firm’s products and services and to attract potential users.

Based on the above description, the AAO concludes that the duties of the proffered position are closely aligned to those of a marketing manager and turns again to the *Handbook* for its discussion of the requirements for entry-level employment. The *Handbook*, at pages 24-25, reports the following educational requirements for those seeking employment as marketing managers:

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. However, requirements vary, depending upon the particular job.

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. Courses in business law, economics, accounting, finance, mathematics, and statistics are advantageous

Most advertising, marketing, promotions, public relations, and sales management positions are filled by promoting experienced staff or related professional personnel. For example,

many managers are former sales representatives, purchasing agents, buyers, or product, advertising, promotions, or public relations specialists

As the *Handbook* does not report that the occupation of marketing managers imposes a degree requirement on persons seeking employment, the AAO finds that the proffered position does not qualify as a specialty occupation under the first criterion at 8 C.F. R. § 214.2(h)(4)(iii)(A) – a baccalaureate or higher degree, or its equivalent, is normally the minimum requirement for entry into the particular position. While the AAO notes that certain employers may prefer degreed candidates, employer preference is not synonymous with the “normally required” language of the first criterion. To prove that a job requires the theoretical and practical application of a body of specialized knowledge as required by Section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor’s or higher degree in a specialized field of study directly related to the employment.

On appeal, counsel questions CIS’ reliance on the *Handbook*, stating that the complexity of the proffered position precludes its categorization under the generalized occupational discussions found in the *Handbook*. Rather than rely on a standardized government classification system, counsel contends that CIS should give deference to the petitioner’s requirements for its proffered employment, a position she asserts is supported by the court’s findings in *Unico American Corp. v. Watson*, 1991 WL 11002594 (C.D. Cal. 1991). Counsel’s reasoning is not persuasive.

The specific duties of each proffered position are, as counsel notes, ultimately dispositive in determining whether a position is a specialty occupation. However, CIS relies on the DOL *Handbook* for guidance in reaching its determinations regarding the nature of the employment as described by the duties of a proffered position, as well as the educational requirements imposed on those seeking entry-level positions. Even when the duties of the proffered position described in the record do not align with any particular occupational title, the *Handbook* remains a valuable resource for CIS analysis. In the instant case, the specific duties of the proffered position, as revised by counsel on February 10, 2004, are readily identifiable as the responsibilities normally shouldered by marketing managers.

Counsel cites *Unico American Corp. v. Watson* to support her contention that CIS should not rely on the *Handbook* in making determinations regarding the nature of the proffered position, but should defer to the petitioner’s degree requirement, which would establish the proffered position as a specialty occupation. However, the findings in the referenced case, which addressed the denial of an H-1B visa petition based on the beneficiary’s lack of qualifications for the proffered employment, are not relevant to the issue before the AAO – whether the proffered position may be classified as a specialty occupation. The AAO also notes that were CIS limited solely to reviewing a petitioner’s self-imposed requirements, then any individual with a bachelor’s degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree.

Counsel also contends that the petitioner has submitted the necessary evidence to establish its proffered position as a specialty occupation under the first criterion. She references the opinions expressed by two professors at Brigham Young University and an evaluation of the position from a faculty member at Saint Louis University in Missouri, all of which find the proffered position of business development manager to require the beneficiary to

hold a degree in the field of business administration or management, with a concentration in marketing. These individuals base their opinions on their extensive academic backgrounds and experience in the field.

The professors' opinions regarding the proffered position are relevant to these proceedings. However, as the record contains no independent evidence to substantiate them, they cannot establish that the proffered position normally imposes a degree requirement on those seeking entry-level employment. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (reg. Comm. 1972)). Further, the authority of the Saint Louis University professor to grant college-level credit for work experience or training is not probative in determining whether the petitioner's position must be performed by a degreed individual.

To determine whether the petitioner's position meets the second criterion – that a specific degree requirement is common to the industry in parallel positions among similar organizations or that the proffered position is so complex or unique that it can be performed only by an individual with a degree in the specific specialty – the AAO has considered the Internet job postings submitted by counsel at the time of filing, the letter provided by the vice president of ██████████ regarding its position of product marketing manager, and the opinions expressed in the letters and evaluation provided by faculty at Brigham Young University and St. Louis University respectively. None of this evidence, however, meet the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The six Internet announcements submitted by counsel either do not appear to have been posted by organizations similar to the petitioner or fail to describe parallel positions. Of the six employers that posted announcements seeking business development managers, one is a financial firm, three are engaged in some aspect of information technology, while another offers no meaningful description of its business. The single employer that, like the petitioner, appears to be in the manufacturing business provides no description of the actual duties of the position for which it is seeking an international sourcing business manager. As a result, these job advertisements do not establish that the petitioner's degree requirement is common in parallel positions among similar organizations, as required to satisfy the first prong of the second criterion.

The letter written by the vice president of ██████████ indicates that his company imposes a degree requirement for its position of product marketing manager. Although counsel asserts that ██████████ is similar to the petitioner in form and function, the letter provided by the firm's vice president does not describe, nor document, the nature of its business. Therefore, the AAO does not find it to be an organization similar to the petitioner. Without documentary evidence, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988). Further, although the letter states that a job description for the position of product marketing manager is provided, as well as a copy of the degree held by the individual in that position, there is no such documentation in the record. Accordingly, the ██████████ letter does not establish that its position of product marketing manager is parallel to the proffered position. However, even if the ██████████ submission had included the missing documentation, a letter from a single employer is insufficient proof that a petitioner's degree requirement is the norm within its industry.

The AAO also finds that the opinions of the faculty members at Brigham Young University and St. Louis University fail to satisfy the requirements of the second criterion. These generic statements regarding the requirements for employment as a business development manager are not responsive to the first prong of the second criterion, which requires the petitioner to establish that a degree requirement exists in parallel positions among similar organizations. Further, as previously noted, the opinions expressed by these individuals are unsupported by any independent documentation. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. See *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (reg. Comm. 1972)).

The AAO also concludes that the petitioner has failed to meet the second prong of the criterion – the position is so complex or unique that it can be performed only by an individual with a degree. The record contains no evidence that would support such a finding. Accordingly, the petitioner cannot establish its position as a specialty occupation under either prong of the second criterion.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; and 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 determine a petitioner's ability to meet the third criterion, CIS often reviews the position's employment history, including the names and dates of employment of those employees with degrees who previously held the position, as well as the petitioner's hiring practices with regard to similar positions. In the instant case, the petitioner has submitted no evidence to establish an employment history with regard to the proffered position. Accordingly, the AAO concludes that the petitioner's normal hiring practices cannot serve as the basis for qualifying the proffered position as a specialty occupation.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. In determining whether the duties of the proffered position meet the specialized and complex threshold of the fourth criterion, the AAO turns first to the discussion of the position's duties provided by counsel in response to the director's request for evidence.

As described by counsel, the beneficiary would be responsible for the operation of the petitioner's marketing department, developing, executing and evaluating the firm's marketing strategies for its products. In order to carry out these responsibilities, the beneficiary would be required to have an understanding of the various markets in which the petitioner sells its products, including any economic factors that might affect those markets, and the competition faced by the petitioner in the marketplace. He would be responsible for the supervision of one assistant and budget management within his department.

While the AAO finds the counsel's description of the duties of the proffered position to indicate that the petitioner would place significant responsibility upon the beneficiary, it does not find the duties the beneficiary would perform to require greater knowledge or skill than would be ordinarily be needed by a

marketing manager. Further, it does not find the position to combine different types of employment that might require the beneficiary to possess skills and qualifications beyond those of a marketing manager.

Counsel relies on the opinions expressed in the letters and evaluation provided by Brigham Young University and St. Louis University faculty respectively to establish the proffered position as a specialty occupation under the fourth criterion. However, as previously discussed, these opinions are unsupported by any independent documentation and are, therefore, insufficient to meet the petitioner's burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

On appeal, counsel asserts that the CIS decision in the instant case is at odds with previous H-1B decisions involving similar employment, noting that the AAO has previously approved H-1B petitions for marketing positions. However, CIS approval of previous petitions, even if for similar employment, does not provide a basis for approving the instant petition. CIS is not bound to approve applications or petitions where eligibility has not been demonstrated merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Each petition filing is a separate proceeding with a separate record and CIS is limited to the information contained in that record in reaching its decision. 8 C.F.R. §§ 103.2(b)(16)(ii) and 103.8(d).

Therefore, for the reasons already discussed, the record before the AAO fails to establish that the proffered position meets any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the AAO shall not disturb the director's denial.

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.