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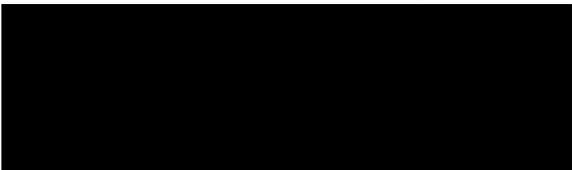
FILE: SRC 03 124 50291 Office: TEXAS SERVICE CENTER Date: FEB 03 2005

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 service center director 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 wholesale satellite Internet service provider that seeks to employ the beneficiary as a director of sales and marketing. 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 proffered position is not a specialty occupation. On appeal, counsel submits a brief.

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 director of marketing and sales. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's January 15, 2003 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: directing staffing, training and performance evaluations to develop and control the sales program; coordinating sales distribution by establishing sales territories, quotas, goals and advertising deals concerning sales and advertising techniques; researching market conditions in local, regional and national areas to determine potential sales; gathering information on competitors, prices, sales and methods of marketing and distribution; and developing the company's sales and marketing strategy. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in business or marketing.

The director found that the proffered position was not a specialty occupation. Citing to the Department of Labor's *Occupational Outlook Handbook (Handbook)*, the director noted that the minimum requirement for entry into a position as a sales and marketing manager was not a baccalaureate degree or its equivalent in a specific specialty. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states that the petitioner established that the position's duties are so complex that an individual must have a bachelor's degree to perform them, and that the position is most like a marketing research analyst. Counsel states that even if the director's assertion that the proffered position is a sales and marketing manager is correct, the position has a Specific Vocational Preparation (SVP) level of 8 (referring to the Department of Labor's *Dictionary of Occupational Titles (DOT)*), which requires over four years and up to and including eight years of educational preparation. In addition, counsel states that industry standards and the *Handbook* both support the contention that the position is a specialty occupation. Finally, counsel states that the director had previously approved the same beneficiary for the same position with a different petitioner.

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)).

The 2004-2005 edition of the *Handbook* describes educational requirements for entry into the marketing manager field:

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.

Counsel asserts that the *Handbook* supports the petitioner's claim that a degree is required for the proffered position. However, the *Handbook* clearly states that there is no requirement for a degree *in a specific specialty* for entry into this field. A wide range of areas of study would be appropriate preparation for a position as a sales and marketing manager, with only "some" employers preferring a specific specialty.

On appeal, counsel states that the duties of the proffered position parallel those of a marketing research analyst, as described in the *Handbook*. In reviewing the entry for marketing managers in the *Handbook*, however, it is clear that the market research-related duties of the proffered position are included in the position of a marketing manager. The *Handbook* indicates that the duties of a market research analyst are at a much higher level than the proffered position and include statistical analysis and devising methods and procedures for gathering data on past sales. Counsel also asserts, in part, that the *DOT's* SVP rating indicates that the position of a marketing manager is a specialty occupation. The *DOT* is not a persuasive source of information regarding whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience, and it does not specify the particular type of degree, if any, that a position would require.

Regarding parallel positions in the petitioner's industry, the petitioner submitted a total of 45 Internet job postings for marketing managers and sales managers in response to the director's request for evidence and on appeal. Twenty-two of the listings stated that a college degree was required, but did not specify a specific specialty. The balance of the listings required a degree in business administration, marketing, or a technical field. This does not establish an industry standard. In addition, there is no evidence to show that the employers issuing those postings are similar to the petitioner, or that the advertised positions are parallel to the instant position. Thus, the advertisements have little relevance.

The record does not include any evidence from professional associations regarding an industry standard. The petitioner submitted a letter from an individual who is president of a business that involves broadband communications, who stated that a sales and marketing manager would typically have a bachelor's degree in business. No evidence was submitted, however, to establish that this company is similar to the petitioner or that the duties of its sales and marketing manager are similar to the proffered position. Finally, it did not provide evidence regarding its hiring practices, or state how it was in a position to state that the industry standard for the position is a baccalaureate degree in business administration. The petitioner also submitted a position evaluation from a professor of marketing, which provided no substantive information regarding his

statement that a person should have a bachelor's degree in business administration with a specialization in marketing for the proffered position. Additionally, this information is in direct conflict with both the *Handbook*, which indicates only that *some* employers prefer a degree in business administration with an emphasis on marketing, as well as half of the job listings submitted by the petitioner. Neither source establishes that a degree in a specific specialty is a minimum requirement for entry into the occupation. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). In this case, the opinions are not in accord with either the information in the *Handbook* or with other sources. 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. Counsel states that the petitioner normally requires a degree for the position of sales and marketing director. There is no evidence in the record, however, documenting the petitioner's past hiring practices and therefore, the petitioner has not met its burden of proof in this regard. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(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. 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.