

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

D2

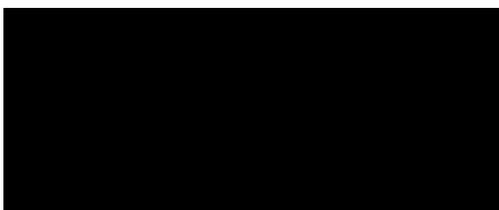


FILE: WAC 02 187 51775 Office: CALIFORNIA SERVICE CENTER Date: JUN 17 2005

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 California 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 an importer and wholesaler of sportswear with eight employees and a gross annual income of \$280,000. It seeks to hire the beneficiary as an account manager. The director denied the petition based on his determination that the petitioner had failed to establish that its proffered position was a specialty occupation. Additionally, the director determined that the petitioner had not established that the beneficiary was qualified to perform the duties in any specialty occupation.

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 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, a 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 an account manager. Evidence of the beneficiary’s duties includes: the Form I-129; a letter of support from the petitioner; and counsel’s March 18, 2003 response to the director’s request for evidence. According to this evidence, the beneficiary would perform duties that entail communicating with clients in a professional manner; researching market conditions within specific targeted industries; conducting organization assessment to establish goals, objectives, specifications for clients; advise clients of issues facing organization that may influence the engagement; responsible for the accounts profitability; meeting with clients’ management in order to assess their requirements pertaining to the company’s products/services; evaluating the requirements and participating in the planning and development of strategies to achieve these results; applying expertise in business communications and marketing in order to meet client’s objectives within the budget, time frame and reflecting client priorities; participating in the implementation of the accepted strategic plans; monitoring and evaluating the performance of product service assigned to client accounts and serve as liaison to identify both actual and potential problem situations at various client sites; after targeting problems, utilizing discretionary authority to implement solution to rectify the problems; developing work plan to conduct planning assignment; evaluating existing markets and perform industry competitor analysis; identifying prospective markets and developing strategies to maximize penetration; implementing strategies decided upon by management; and developing strategic partnerships.

The petitioner indicated that the position required a bachelor’s degree or equivalent.

The director requested additional evidence, specifically, a breakdown of the percentage of time to be spent on each duty. The director requested an advisory evaluation of the beneficiary’s foreign educational credentials by a reliable credentials evaluation service that specializes in evaluating foreign educational credentials. The director requested employment letters from previous employers establishing that the beneficiary has training and/or experience in the specialty occupation.

In response to the director’s request for evidence, counsel offered a partial description of the percentage of time the beneficiary would spend on the duties as follows:

- 20% - Evaluate existing markets and perform industry competitor analysis. Analyze and evaluate market opportunities and potentials for product expansion and appropriate marketing strategies.
- Identify prospective markets and develop strategies to maximize penetration. Estimate the demand for current products as well as new products and services.
- Inform management of the latest trends in the industry and recommend changes in policies and procedures. Implement the strategies decided by management.
- Develop strategic partnerships.
- Monitor and evaluate the performance of products/services assigned to client accounts and serve as liaison to identify both actual and potential problem situations at various client sites. Utilize discretionary authority to implement solutions to rectify the problems.
- Meet with clients' management to assess their requirements pertaining to petitioner's products and services. Evaluate the requirements and participate in the planning and development of strategies to achieve these results.

Counsel stated that the beneficiary would be working 40 hours per week and would not be responsible for the supervision of any employees. In the response, counsel indicated that the proffered position required a bachelor's degree in marketing, communication or a related degree. Counsel noted that the title of account manager is not listed with the *Handbook* but the job duties reveal that the position is similar to "both a marketing manager and/or a market research analyst." Counsel recites the *Handbook* information under both positions and states "it is a well-established fact that both marketing managers and market research analysts must normally have a bachelor's degree." Counsel refers to the Department of Labor's *O*NET* and stated that it indicated that both positions are [REDACTED] Considerable Preparation Needed." Additionally, counsel submitted various internet postings for account managers and noted that the proffered position is newly created. The petitioner submitted an educational evaluation which indicated that the beneficiary has attained the equivalent of a Bachelor of Business Administration degree from an accredited institution in the United States.

In his denial, the director noted that counsel asserted that some of the listed duties reflect some of those listed under market research analyst and other duties reflect those listed under marketing manager in the Department of Labor *Occupational Outlook Handbook (Handbook)*. The director found that the overwhelming number of duties, as described by the petitioner, were most similar to the duties of Advertising, Marketing, Promotions, Public Relations, and Sales Managers – occupations which do not normally require a baccalaureate level of study. The director found that the position did not meet any of the preceding criteria for classification as a specialty occupation.

On appeal, counsel recites the previously provided job duties. Counsel states that the position of account manager is a combination of both marketing manager and market reach analyst. Counsel states "[t]ogether, these duties require a candidate with a college degree to fulfill the position of an account manager."

According to the *Handbook*, market, or marketing, research analysts are concerned with the potential sales of a product or service. They analyze statistical data on past sales to predict future sales. They gather data on competitors and analyze prices, sales, and methods of marketing and distribution. Market research analysts devise methods and procedures for obtaining the data they need. The *Handbook* reports that after compiling the data, market research analysts evaluate them and make recommendations to their client or employer based

on their findings. They provide a company's management with information needed to make decisions on the promotion, design and distribution of the products or services.

Based on the record of proceeding, the AAO has determined that the proffered position is most similar to that of a marketing manager in the *Handbook*. According to the *Handbook*, marketing managers develop the firm's detailed marketing strategy. With the help of subordinates, marketing managers determine the demand for products and services offered by the firm and its competitors. In addition, they identify potential markets. According to the *Handbook*, 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. This is similar to the proffered position in that the duties include, among others, identifying prospective markets and developing strategies to maximize penetration; monitoring and evaluating the performance of products/services assigned to client accounts; serving as liaison to identify both actual and potential problem situations at various client sites; and utilizing discretionary authority to implement solutions to rectify the problems.

With respect to the educational qualifications required of marketing managers, the *Handbook* states:

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. 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.

Consequently, there is insufficient evidence in the record to establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the marketing manager position.

To establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations - counsel relies on submitted internet job postings from two clothing companies: [REDACTED]. This evidence fails to establish that a specific baccalaureate degree is common to the industry in parallel positions among similar organizations. Although the petitioner provided job postings for clothing companies, there is insufficient information in the record to establish that the advertising companies and the petitioner are similar organizations and that the advertised positions are parallel to the proffered position. For example [REDACTED] requires prior apparel wholesale sales experience with JC Penney or other major retailers. Consequently, the postings fail to establish that there is a specific baccalaureate degree that is a common industry-wide requirement.

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 specific 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. To the extent they are described in the record, the duties of the position are not so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. The duties parallel those in the *Handbook* for a marketing manager, an occupation that does not require a specific baccalaureate degree. The petitioner therefore fails to establish the fourth criterion.

Additionally, the director determined that the beneficiary was not qualified to perform the duties of the specialty occupation. However, as discussed above, the proffered position is not a specialty occupation, therefore, the beneficiary's qualifications do not need to be addressed.

Therefore, for the reasons related in the preceding discussion, 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.