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Services

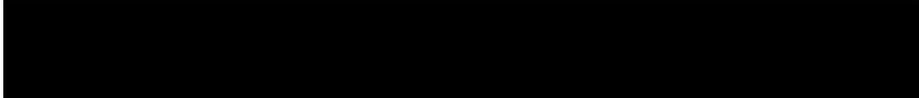
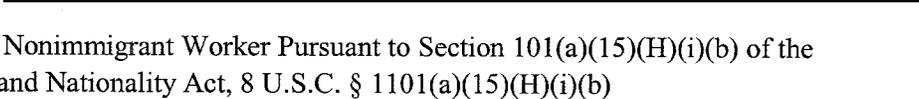
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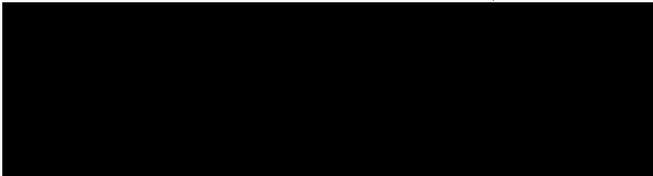
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FILE: WAC 01 286 50765 Office: CALIFORNIA SERVICE CENTER Date: **OCT 18 2005**

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

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 company engaged in the sales, marketing, and repair of jewelry. In order to employ the beneficiary as its sales and marketing manager, 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 on the basis that the petitioner had failed to establish that the proffered position met the requirements of a specialty occupation. The director determined, in part, that the duties of the proffered position reflect those of the occupational category discussed in the "Advertising, Marketing, Promotions, Public Relations and Sales Manager" section of the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*.¹

On appeal, counsel contends that the evidence of record establishes that the proffered position meets at least four of the five independently qualifying specialty occupation criteria of the the governing regulation, 8 C.F.R. § 214.2(h)(4)(iii)(A).

The director's decision to deny the petition was correct. The AAO bases its decision upon its consideration of the entire record of proceeding before it, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the director's request for additional evidence (RFE); (3) the materials submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief and attached documents.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

¹ In this decision the AAO's references will be to the 2004-2005 edition of the *Handbook*.

Consonant with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation:

which [1] 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 [2] 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. (Italics added.)

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) has consistently interpreted 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. Applying this standard, CIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position’s title or generalized descriptions of duties. It looks primarily for evidence about the specific duties, and about the nature of the petitioning entity’s business operations. 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). Neither the title of the position, abstract descriptions of its duties, nor an employer’s self-imposed standards are persuasive in the critical assessment that CIS must make: whether the evidence of record establishes that performance of 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 February 18, 2002 letter submitted by former counsel in response to the RFE contains this information about the petitioner's business operations:

[The petitioner] was established in 1994 and engages in the sales, marketing and repair service of precious, exquisite, and customized jewelry. It currently enjoys an approximate gross annual income of more than \$550,000 and a staff of five employees. [It] has two existing branches in Los Angeles and Sun Valley, California, and it is in the process of establishing its third branch in Los Angeles. The company's goal for 2002 is to hire three new employees for its second Los Angeles branch and to earn an estimated \$600-700,000 in annual sales from its three stores. Therefore, it is essential that they now broaden the company's sales and marketing campaign to include this new expansion.

The letter from former counsel includes the following information about the duties of the proffered position:

As a Sales and Marketing Manager, [the beneficiary] will be spending 50% of her time planning, establishing, directing and coordinating the sales and marketing operations of the business and overseeing the work of her staff: 20% reviewing market analyses to determine customer needs, volume potentials, product quality and styles, pricing and discount rates; 5% coordinating sales distribution, advertisements and promotions of existing and new products; 10% conferring with management to discuss possible or prospective clients and to outline new policies or sales promotions campaigns; 5% directing the preparation of special products' promotional features, such as the introduction of new and improved products and jewelry customization; 5% monitoring and analyzing sales promotion results to determine the cost effectiveness of existing promotional campaigns and the need to alter new campaigns; and 5% planning and preparing new advertising and promotional materials and arranging for store and product publicity. She will also be required to review operational records to project sales and to determine the profitability for each branch. In addition, [the beneficiary] will head a staff of two people that will include [employee], the sales assistant, and [employee], the marketing assistant, who will be assisting her in the day-to-day sales and marketing operations of the various store branches. [The beneficiary] may be implementing employee incentive programs, including bonuses, to increase motivation and inspire good customer service.

The evidence of record does not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I). This provision assigns specialty occupation status to those positions for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty related to the position's duties.

The information submitted into the record from the DOL's *Dictionary of Occupational Titles (DOT)* and *Occupational Information Network (O*NET)* is not probative. Neither the *DOT* nor the *O*NET* is 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. Their SVP ratings are meant to indicate only the total number of years of vocational preparation required for a particular position. An SVP rating 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.

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of a wide variety of occupations. The AAO finds no basis in the record for counsel's assertion that the proffered position is similar to that of a market research analyst. The proposed duties as described in the record of proceeding establish that the beneficiary would be working as a marketing manager in charge of the petitioner's overall advertising, marketing, promotions, public relations, and sales activities. The section on "Advertising, Marketing, Promotions, Public Relations, and Sales Managers" in the current, 2004-2005 edition of the *Handbook* (at pages 23-26) indicates that a bachelor's degree or higher, or the equivalent, in a specific specialty is not a normal minimum-entry requirement for such a position. No evidence of record refutes this information. Accordingly, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The petitioner has not satisfied either of the alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first alternative prong assigns specialty occupation status to a proffered position with a requirement for at least a bachelor's degree, in a specific specialty, that is common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by CIS 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.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As already discussed, the *Handbook* does not indicate that the proffered position requires a degree in a specific specialty. Although relevant, the two submissions from other firms in the petitioner's industry have little weight. They attest only to their hiring practices, do not comment on other firms' practices, and do not address the information in the *Handbook*. The record's job vacancy advertisements from other employers are not probative. They are too few to establish a common-to-the-industry hiring practice. The advertisements also exceed the scope of evidence relevant to this criterion, as the advertisers include employers outside the petitioner's industry (jewelry sales, sales, marketing, and repair). The petitioner has not demonstrated that the proffered position and those advertised are parallel, as required by this criterion, because the record does not contain sufficient information about the specific work performed in the proffered position and in the positions advertised.

Counsel's assertion that a bachelor's degree requirement "is standard for all industries employing Sales and Marketing Managers" is not substantiated by the evidence of record and will be given no weight. 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 Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Furthermore, 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).

The evidence of record does not qualify the proffered position under the second alternative prong of 8 C.F.R. § 214.2 (h)(4)(iii)(A)(2), which provides a petitioner the opportunity to show that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty. Here the evidence of record does not establish either such uniqueness or complexity. No evidence in the record distinguishes the proffered position from the general range of marketing management positions, for which the *Handbook* indicates that there is no normal minimum requirement for a bachelor's degree in a specific specialty.

The petitioner has not met the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) for a position for which the employer normally requires at least a baccalaureate degree or its equivalent in a specific specialty. As the petitioner has never before proffered the position in question, there is no basis for approving the petition under this criterion.

The evidence does not satisfy the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4) for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The petitioner has not provided any evidence to establish that the proposed duties are any more specialized and complex than the duties of the general range of sales manager positions, and neither the *Handbook* nor any other evidence of record establishes a usual association of those positions with at least a bachelor's degree in a specific specialty. The AAO has noted that, contrary to the requirement of the Act and the regulations for a degree in a specific specialty directly related to the duties of the position, counsel merely argues that the duties "require a bachelor's degree or its equivalent." (See section 4 at page 5 of the brief.)

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed.

Beyond the decision of the director, it is noted that the Labor Condition Application (LCA) was not certified until after the petition was filed. The record indicates that LCA was certified on September 13, 2001, and that the Form I-129 was filed on September 12, 2001. A certified LCA is a necessary and material part of the nonimmigrant worker visa petition. The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) expressly includes a certified LCA among the documents that a petitioner "shall submit" with an H-1B petition, and the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) states:

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupation specialty in which the alien(s) will be employed.

The petitioner did not comply with this requirement to secure an LCA certification before filing the petition. For this reason also, the petition cannot be approved.

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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed. The petition is denied.