

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



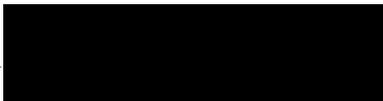
**U.S. Citizenship
and Immigration
Services**

D2

PUBLIC COPY



FILE: WAC 04 089 50438 Office: CALIFORNIA SERVICE CENTER Date: **JAN 27 2006**

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 materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be summarily dismissed. The petition will be denied.

The petitioner is a musical instrument manufacturer and distributor. It seeks to employ the beneficiary as a marketing communications specialist and to classify him as a nonimmigrant worker in a specialty occupation 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).

The director denied the petition on the ground that the record failed to establish that the proffered position qualifies as a specialty occupation.

The proffered position was described by the petitioner in its initial submission, as well as in its response to the director's request for evidence, as a "marketing communications specialist" with the following duties:

Data Gathering (20% of work-time)

Using all pertinent resources, THE EMPLOYEE will acquire all relevant data and information related to the industry in particular. This will involve observing the operational activities and interviewing personnel of the company to be familiar with the procedures involved in the business. [He] will read journals, reports, and other material to become familiar with the current events of the mobile technology. [He] will review published materials and recommend revisions or changes in scope, format, content and methods of reproduction, including online materials.

Identifying/Categorizing Information (10% of work-time)

This will include documenting, recording, and organizing information. THE EMPLOYEE will maintain records and files of work and revisions. [He] will compile, analyze and report on lead generation activities, including web site traffic, and on and off line marketing programs. [He] will manage all product support literature, i.e. brochures, datasheets, other printed and electronic materials. Lastly, [he] will manage content review and approvals and publish approved policies and procedures in the company's manual/handbook.

Generate Creative Output (30% of work-time)

In general, [he] may be involved in writing material regarding work methods and procedures and may be designated as our process-description writer. [He] will assist management in planning and creating strategies, tactics, activities and materials to convey the best advertising message to target markets. [He] will design, write, and prepare various marketing materials for print, including corporate brochures, direct mail pieces, training materials, and magazine ads. [He] will create content and graphics for marketing needs; create new advertising and direct mail pieces; develop online policy and procedure within company standards; generate new manuals and produce communications for release to the public or within the company; create training materials; design art and copy layouts for material to be

presented by visual communications media such as magazines, newspapers, television and packaging; study illustrations and photographs to plan presentation of material, product or service; determine size and arrangement of illustrative material and copy; select style and size of type; and arrange layout based upon available space, knowledge of layout principles, and esthetic design concepts. [He] will also develop and execute both online and offline marketing plans and programs in support of business development objectives; create direct marketing and promotional material. [He] will be responsible for the creative concept and development of new marketing tools.

Coordinate Production/Publication of Materials (10% of work-time)

THE EMPLOYEE may arrange for typing, duplication, and distribution of materials. [He] will review final layout and suggest improvements as needed. [He] will be responsible for publishing and distribution of all documentation. [He] will prepare and proofread all projects before releasing them to the printing company. [He] will also prepare notes and instructions for workers who assemble and prepare final layouts for printing.

Maintain Corporate Image (10% of work-time)

THE EMPLOYEE will work on corporate identity. [His] strong conceptual ability and experience in developing effective advertising in relation to the marketing recognition will come into play. This includes creating and maintaining our corporate image through proposals, packaging, sponsorship materials and advertising. [He] will establish and maintain a consistent "look and feel" across all marketing materials (print, presentation, and web). Moreover, [he] will assist the president with strategic marketing activities such as branding, messaging and look and feel of corporate materials. [He] will maintain the company's public relations, including updates, special promotions, copy writing, new features, look and feel, advertising and links. [He] will manage overall implementation of marketing projects.

The director determined that the proffered position is similar to that of a marketing manager, as described in the Department of Labor's *Occupational Outlook Handbook*, and found that the position did not qualify as a specialty occupation under any of the regulatory criteria enumerated at 8 C.F.R. § 214.2 (h)(4)(iii)(A).

On appeal the petitioner's president asserts that the proffered position was incorrectly described by his original attorney, is not a marketing communications specialist, and has different duties from those discussed above. The president states that he wants to hire the beneficiary to perform the following duties:

- Help manage the company's daily and long-term business activities and obligations.
- Serve the company's professional musician customers worldwide.
- Write and edit instructional materials of the unique Stick instrument and its two-handed string tapping method.
- Assist in production, purchasing, customer liaison, and special projects.

The duties of the proffered position as described in the appeal are completely different from the duties described prior to the director's decision. Though the petitioner's president asserts that he was not given the opportunity to review the information supplied by his original attorney and that it was submitted without the president's signature, the record shows otherwise. In his initial letter to the California Service Center, which accompanied Form I-129, the petitioner's president identified the proffered position as a marketing communications specialist, described the duties in language consistent with the job title (as recounted in the director's decision and by the AAO in the instant decision), and affixed his signature at the end of the letter. A petitioner may not make material changes to its petition in an effort to make a deficient petition conform to legal requirements. *See Matter of Izummi*, 22 I&N Dec. 169 (Assoc. Comm. 1998). "The AAO cannot consider facts that come into being only subsequently to the filing of the petition." *Id.* at 176. Accordingly, the new position description and supporting documentation submitted on appeal cannot be considered by the AAO in adjudicating the instant appeal.

As specified in the regulation at 8 C.F.R. § 103.3(a)(1)(v), "[a]n officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal." The petitioner has not specifically identified any erroneous conclusion of law or statement of fact in the director's decision, which correctly identified the proffered position, based on the petitioner's consistent description of the job duties prior to the decision, as a marketing manager which does not qualify as a specialty occupation.¹ Accordingly, the instant appeal must be summarily dismissed.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

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

¹ The procedure for filing an amended or new petition is explained in 8 C.F.R. § 214.2(h)(2)(E).