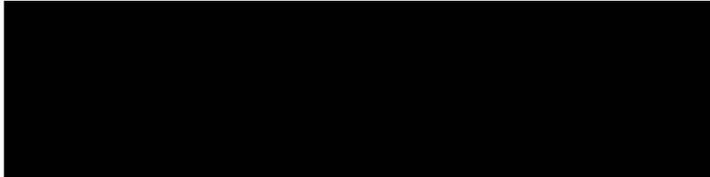


identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



Dr

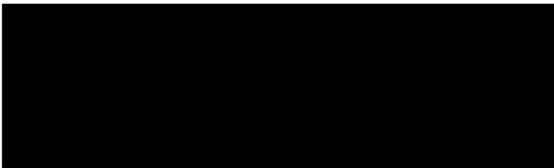
FILE: LIN 04 256 50037 Office: NEBRASKA SERVICE CENTER Date: **MAY 08 2006**

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

for Michael T. Kelly
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The 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 an information technology solutions provider that seeks to employ the beneficiary as a sales manager. The petitioner, therefore, 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 of his determination that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation. On appeal, the petitioner contends that the director erred in denying the petition, and that the proposed position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's RFE response and supporting documentation; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

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 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.

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

[A]n 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 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 proposed position.

The petitioner’s September 16, 2004 letter of support stated that the duties of the position would include directing the sale of the petitioner’s services to customers in Europe. This would entail establishing sales territories, quotas, and goals; establishing training programs for sales representatives; developing business with clients in the region; determining client requirements; and fulfilling job orders with qualified resources. In its November 4, 2004 response to the director’s request for evidence, the petitioner stated that it required at minimum a bachelor’s degree, preferably in marketing, business, or administration, for the position.

In determining whether a proposed position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty, as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the Department of Labor’s *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

The *Handbook’s* discussion of the duties of advertising, marketing, promotions, public relations, and sales managers states the following:

Sales managers direct the firm’s sales program. They assign sales territories, set goals, and establish training programs for sales representatives (See the *Handbook* statement on sales representatives, wholesale and manufacturing). Sales managers advise the sales representatives on ways to improve their sales performance. In large, multiproduct firms, they oversee regional and local sales managers and their staffs. Sales managers maintain contact with dealers and distributors. They analyze sales statistics gathered by their staffs to determine sales potential and inventory requirements and to monitor customers’ preferences. Such information is vital in the development of products and the maximization of profits.

In that the duties of the proposed position are similar to those of sales managers as outlined by the *Handbook*, the AAO turns to the *Handbook’s* discussion of the qualifications necessary for entry into the field. The *Handbook* states the following with regard to the educational qualifications required for sales 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. In small firms, where the number of positions is limited, advancement to a management position usually comes slowly. In large firms, promotion may occur more quickly.

Thus, the proposed position does not qualify for classification as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires a showing that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the type of position being proffered. The *Handbook* indicates that most sales manager positions are filled on the basis of experience. Moreover, the fact that some employers “prefer” a degree or that individuals possessing degrees “should have the best job opportunities” does not rise to this criterion’s standard of employers normally requiring at least a bachelor’s degree or its equivalent in a specific specialty. As such, sales managers do not qualify as specialty occupations under the first criterion.

The AAO also notes that the petitioner finds a bachelor’s degree of business administration acceptable for the proposed position, which precludes it from establishing the position as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(I). When a range of degrees, e.g., the liberal arts, or a degree of generalized title without further specification, e.g., business administration, can perform a job, the position does not qualify as a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). 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. As noted previously, CIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) to require a degree in a specific specialty that is directly related to the proposed position.

The AAO notes that the petitioner has submitted an advisory opinion from Jonathan Jelen, an assistant professor of business administration at Mercy College, dated September 29, 2004. Mr. Jelen lists the duties of the proposed position and then states that the position requires a bachelor’s degree in business administration, marketing, or a related field. Other than a bullet-pointed listing of its job duties, Mr. Jelen does not discuss his opinion in the context of the specific duties of the proposed position. While Mr. Jelen’s letter states that a degree is required, it strengthens the AAO’s conclusion that the proposed position does not require a degree in any particular field. Mr. Jelen does not conclude that a degree in a specific specialty directly related to the proposed position is required. As such, this advisory opinion does not aid the petitioner’s case.

Finally, the AAO will accord no weight to the information counsel and the petitioner submit from the Department of Labor’s *Dictionary of Occupational Titles (DOT)*, and from *O*Net*, as the *DOT* and *O*Net* are not persuasive sources 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 assessments (the SVP rating and the JobZone categories) are meant only to indicate the total number of years of vocational preparation required for a particular position. They do not describe how those years are to be divided among training, formal education, and experience, and do not specify the particular type of degree, if any, that a position would require.

For all of these reasons, the proposed position does not qualify for classification as a specialty occupation under the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the position.

Nor does the proposed position qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations.

The AAO has reviewed the job postings submitted by counsel in response to the director's request for evidence. Counsel, however, has failed to consider the specific requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) for establishing a baccalaureate or higher degree as an industry norm. To meet the burden of proof imposed by the regulatory language, the petitioner must establish that its degree requirement exists in parallel positions among organizations similar to the petitioner. Thus, for a job posting to be of probative value, the petitioner must demonstrate both that the advertised position is "parallel" to the proposed position and that the entity placing the advertisement is "similar" to the petitioner.

AIG provides retirement plans and investment programs, @WORK Medical Services is a healthcare recruiting and medical staffing company, the Emerson Electric Company manufactures electronic, electrical, and other related products and systems, Custom-Crete Oldcastle APG appears to be a concrete maker, SITA provides telecommunications and information systems to the air transport industry, and DMI is a manufacturing firm. None of these companies are similar to the petitioner, an information technology solutions provider.

Only three of the submitted job postings appear to come from companies similar to the petitioner: the postings from ARM, Inc., Systems Services Enterprises, and ITtoolbox. However, the duties of the positions listed on the advertisements are not sufficient to allow CIS to make a determination that the positions are similar to the proposed position. Moreover, three job postings are too few to establish an industry standard.

Nor do these postings establish that the proposed position requires a bachelor's degree in a specific specialty that is directly related to the proposed position. The job postings from ARM, Inc., AIG, @WORK Medical Services, Emerson Electric Company, Custom-Crete Oldcastle APG, Ittoolbox, and DMI do not specify a degree in any particular specialty; a degree in any field appears to suffice.

Only the positions at SITA and Systems Services Enterprises have requirements regarding the types of degrees that a candidate should possess. SITA requires an individual with an engineering, computer science, or telecommunications background, and Systems Services Enterprises requires someone with a degree in marketing, information services, or business. A degree in a specific specialty in a field directly related to the positions is not required.

Accordingly, the proposed position does not qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) requires the petitioner to prove that the duties of the proposed position are so complex or unique that only an individual with a degree can perform them. The nature of the duties of the proposed position as set forth in the petition does not support such a finding, as they are similar to those of sales managers as discussed in the *Handbook*, which do not require a degree in a specific specialty. The record contains no documentation to support a finding that the proposed position is more complex or unique than sales manager positions at other, similar organizations.

Therefore, the petitioner has not established that the proposed position qualifies as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor does the proposed position qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a showing that the petitioner normally requires a degree or its equivalent for the proposed position. To determine a petitioner's ability to meet this criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas.

In response to the director's request for evidence, the petitioner submitted evidence that four other sales managers hold bachelor's degrees. One sales manager holds a master's degree in business administration, another holds a bachelor's degree in business, another holds a bachelor's degree in international business, and another holds a bachelor's degree in management information systems.

In his denial, the director noted that the petitioner employs 125 individuals and submitted information regarding the educational background of four employees. The director noted that there was no indication that these were the only four sales managers within the company.

On appeal, the petitioner does not address this concern of the director. If the petitioner employs several sales managers but only a few have bachelor's degrees, then the petitioner cannot use them to establish eligibility under this criterion. However, the petitioner chose to ignore this concern of the director, which precludes the AAO from conducting an analysis under this criterion.

Accordingly, the petitioner has not established the proposed position as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), that it normally requires a degree or its equivalent for the position.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires a demonstration that 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 of the proposed position 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. There is no information in the record to support a finding that the proposed position is more specialized and complex than the general range of sales manager positions for which the *Handbook* indicates no requirement for the highly specialized knowledge associated with at least a bachelor's degree in a specific specialty. Therefore, the evidence does not establish that the proposed position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

On appeal, the petitioner contends that CIS approved another case involving a sales manager. However, each nonimmigrant petition is a separate proceeding with a separate record. See 8 C.F.R. § 103.2(b)(16)(ii). If the petition to which the petitioner refers was approved based upon the

same evidence contained in this record, its approval constitutes material and gross error on the part of the director. The AAO is not required 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). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director did approve a nonimmigrant petition based upon similar evidence, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The petitioner has failed to establish that the position qualifies for classification as a specialty occupation under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4). As the proposed position is not a specialty occupation, the beneficiary's qualifications to perform its duties are immaterial. Accordingly, the AAO will 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.

