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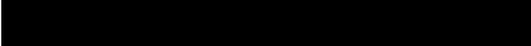
U.S. Citizenship
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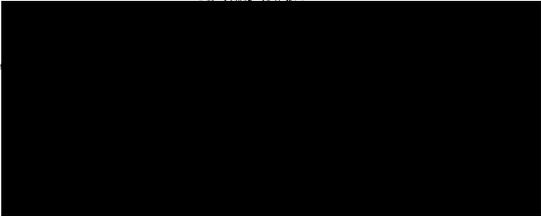


DZ

FILE: WAC 05 185 50587 Office: CALIFORNIA SERVICE CENTER Date: **SEP 07 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 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 home health agency that seeks to employ the beneficiary as a business development specialist. 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 ground that the proffered position is not a specialty occupation. Counsel submits a timely appeal.

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) the 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) the Form I-290B and counsel's letter. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a business development specialist. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the petitioner's support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties as follows: conduct service package, demographic, financial, economic, operational, market, or development research for business creation and expansion; track penetration levels and analyze financial, operational, managerial, and marketing problems and recommend strategies for change; compile and analyze information on the national, state, and local level regarding the demographic, economic, market, and development conditions and trends in southern California; prepare statewide, regional, and local planning studies and related action plans that are designed to identify opportunities, barriers, and courses of action; interpret, evaluate, and interrelate research data and develop integrated business analysis and projects to incorporate into decision-making; perform market research studies and market analysis of medical supplies and equipment; screen new product ideas and assist in advertising and sales promotions, including trade shows, and in developing marketing tools, advertising campaigns, and editorial materials; develop collateral materials for reference and marketing purposes; generate new brochures and develop marketing and sales literature for healthcare service packages; perform special projects and independent work of considerable importance, as deemed by management, in support of strategic planning and specific marketing initiatives, including implementing a procedure for management and business development specialists. Counsel's July 29, 2005 letter elaborated on the proposed duties. For the proposed position, the petitioner requires a bachelor's degree in marketing or a closely related field.

In the denial letter, the director found the proposed duties are encompassed within the Department of Labor's (DOL) *Occupational Outlook Handbook's* (the *Handbook*) classification of advertising, marketing, promotions, public relations, and sales managers, and that the *Handbook* indicates that the occupations in this classification do not require a baccalaureate degree in a specific academic discipline. The director found unpersuasive counsel's reference to evidence of CIS' approval of similar petitions. According to the director, the record did not contain evidence showing that the proposed position's duties were unique, complex, or more specialized and complex than any other marketing manager job.

On appeal, counsel states that the proposed duties require a college degree in marketing, and that the director did not consider the nature of the proposed duties in the context of the healthcare industry. The beneficiary will have contact with professionals such as social workers, physicians, health care associations, and care managers, counsel asserts, thus the beneficiary needs a similar academic foundation. Counsel points to petitions filed by other employers to show that CIS previously found that the offered position qualifies as a specialty occupation. According to counsel, the proposed position involves advanced professional responsibility and sophistication, and he states that the beneficiary and her peers will be supervised by managers of similar caliber. Counsel states that the petitioner's chief executive officer/president who previously performed the offered position holds a bachelor's degree in commerce. Counsel contends that the petitioner seeks a business development specialist because of business necessity.

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.

Counsel asserts that CIS has already determined that the proffered position is a specialty occupation since CIS has approved three other, similar petitions in the past. This record of proceeding does not, however, contain all of the supporting evidence submitted to the service center in the prior cases. For instance, two of the petitions do not have attached support letters, although the petitions indicated that such letters were attached. In the absence of all of the corroborating evidence contained in those records of proceeding, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the position offered in the prior cases are similar to the position in the instant petition.

In addition, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior cases were similar to the proffered position or were approved in error, no such determination may be made without review of the original record in its entirety. If the prior petitions were approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petitions would have been erroneous. CIS is not required to approve 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). Neither CIS nor any other 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).

Next, the AAO considers 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 2006-2007 edition of the *Handbook*, a resource that the AAO routinely consults, 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)).

In determining whether a 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 agrees with the director's conclusion that the proposed duties fall within the *Handbook's* description of a marketing manager. The *Handbook* describes this occupation as follows:

Marketing managers develop the firm's marketing strategy in detail. With the help of subordinates, including *product development managers* and *market research managers*, they estimate the demand for products and services offered by the firm and its competitors. In addition, they identify potential markets—for example, business firms, wholesalers, retailers, government, or the general public. Marketing managers develop pricing strategy to help firms maximize profits and market share while ensuring that the firm's customers are satisfied. In collaboration with sales, product development, and other managers, they monitor trends that indicate the need for new products and services, and they oversee product development. Marketing managers work with advertising and promotion managers to promote the firm's products and services and to attract potential users.

The beneficiary's duties are subsumed within the above description of a marketing manager. For example, like a marketing manager that "promotes the firm's products and services to attract potential users," she will develop marketing tools, generate new brochures, and develop marketing and sales literature for healthcare service packages. Marketing managers "monitor trends that indicate the need for new products and services." Similarly, the beneficiary will compile and analyze demographic, economic, market, and development conditions and trends; prepare planning studies to identify opportunities, barriers, and courses of action; interpret, evaluate, and interrelate research data and develop integrated business analysis and projects that are incorporated into strategic decision-making; perform market research studies and market analysis for medical supplies and equipment; and screen new product ideas and assist in advertising and sales promotions.

According to the *Handbook* employers do not require a marketing manager to possess a bachelor's degree in a specific specialty. It 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. 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. In highly technical industries, such as computer and electronics manufacturing, a bachelor's degree in engineering or science, combined with a master's degree in business administration, is preferred.

The fact that a marketing manager requires any baccalaureate degree rather than one that is directly relevant to the field will not suffice in establishing the offered position, which resembles a marketing manager, as a specialty occupation. No evidence in the record suggests that the proposed position is other than a marketing manager. Based on the above discussion and the evidence of record, the AAO finds that the petitioner fails to

establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1): that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the particular position.

The petitioner submits no evidence to establish the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) - that a specific degree requirement is common to the industry in parallel positions among organizations similar to the petitioner.

The petitioner has not satisfied the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as no evidence in the record shows the proffered position is so complex or unique that it can be performed only by an individual with a degree in a specialty. The *Handbook* reveals that a bachelor's degree in a specific academic discipline is not required for a marketing manager. The AAO has evaluated the evidence of record, which includes the organizational chart, tax and employee records, brochures, business license, newsletters, and other documents, and concluded that it does not establish that the position has a complexity or uniqueness requiring a baccalaureate degree in marketing or a related field. Thus, the petitioner fails to establish the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

To establish the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), the petitioner must show that it normally requires a degree or its equivalent for the position. Counsel states that the chief executive officer/vice-president holds a baccalaureate degree in commerce. The petitioner has not established that the chief executive officer/vice-president position is similar to that of the marketing manager. The petitioner has not demonstrated a past practice of normally requiring a baccalaureate degree in marketing or a related field for the offered position. Furthermore, the petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. 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 or 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.¹ To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388. Here, the offered position parallels a marketing manager, which is an occupation that the *Handbook* indicates does not require a baccalaureate degree in a specific field.

To satisfy the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), the petitioner must establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform such duties is usually

¹ The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *See id.* at 387.

associated with the attainment of a baccalaureate or higher degree. The *Handbook* reveals a bachelor's degree in a specific discipline is not required for a marketing manager. Furthermore, the AAO has considered the submitted evidence, which includes the organizational chart, tax and employee records, brochures, business license, newsletters, and other documents, and finds that it fails to establish that the nature of the proposed 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 in marketing or a related field. Accordingly, the petitioner fails to establish the criterion at 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 on this ground.

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.