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U.S. Citizenship and Immigration Services

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FILE: WAC 02 257 51328 Office: CALIFORNIA SERVICE CENTER Date: FEB 06 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

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 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, a designer, manufacturer, and wholesaler of jewelry, seeks to employ the beneficiary as a marketing/consultant. 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 because the proffered position is not a specialty occupation. On appeal, counsel submits a brief and previously submitted evidence.

Section 214(i)(l) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184 (i)(l), 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) Form I-129 and supporting documentation; (2) the director's denial letter; and (3) Form I-290B and supporting documentation. The AAO reviewed the record in its entirely before issuing its decision.

The petitioner is seeking the beneficiary's services as a marketing/consultant. Evidence of the beneficiary's duties includes: the Form I-129 and the letter accompanying the Form I-129. According to this evidence, the beneficiary would perform duties that entail, in part: overseeing, directing, and developing marketing and

sales activities. More specifically, the beneficiary will advise the company and dealers, distributors, and clients about marketing, sales, and advertising techniques; evaluate new business opportunities; assign sales territories; and perform market analysis to identify potential markets, determine the volume of sales, establish price schedules, and develop strategies to increase revenues. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in marketing, business, and/or related areas such as finance, economics, and communications.

The director found that the proffered position was not a specialty occupation because the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A). The director noted that the duties described in the instant petition are very similar to duties described in a previous petition which the petitioner had filed on behalf of the beneficiary and that the Immigration and Naturalization Service (the Service), now Citizenship and Immigration Services (CIS), had denied. The director concluded that the duties of the instant petition reflect those performed by marketing, sales, and public relations positions, and that individuals possessing less than a baccalaureate degree enter these occupations.

On appeal, counsel contends that the proffered position qualifies as a specialty occupation because the petitioner normally requires a bachelor's degree, or its equivalent, in business and marketing. Counsel further maintains that the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*) and the *Occupational Information Network* (*O*Net*) report that a marketing manager (consultant) requires at least a bachelor's degree to enter the position. Counsel states that the director's statement, that the duties of the proposed position could be performed by individuals possessing less than a bachelor's degree, is contrary to the evidence and academic, business, and government guidelines. Counsel claims that marketing managers, analysts, and consultants customarily possess at least a bachelor's degree. Counsel submits two letters, allegedly by recognized experts in the field of marketing, to confirm that a bachelor's degree, or its equivalent, is required in the industry.

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.

The AAO turns first to 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.

Citing two letters from experts, the *Handbook,* and *O*Net*, counsel claims that the petitioner satisfies the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) because candidates must possess at least a bachelor's degree to enter a marketing manager (consultant) position. The opinion letter from [redacted] Professor of Marketing, Albers School of Business, Seattle University, states that after reviewing the beneficiary's duties and leading texts, the duties of the proffered position are consistent with those performed by a marketing manager - a position which requires a bachelor's degree or its equivalent. The second letter from [redacted] Associate Professor of Marketing and Associate Dean and Director of Graduate Programs, Seattle Pacific University, states that marketing management jobs normally require at least a bachelor's degree in marketing, and that the proffered position would require a bachelor's degree in business administration with a specialization in marketing.

The AAO finds that counsel's claim and the opinion letters from alleged experts are insufficient to establish the first criterion. The *O*Net* provides only general information regarding the tasks and work activities

associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. The *Handbook* provides a more comprehensive description of the nature of a particular occupation and the education, training, and experience normally required to enter into and advance within that occupation. A review of the *Handbook* discloses that the duties of the proffered position correspond to those performed by marketing and sales managers, and the DOL explains that employers find a wide range of educational backgrounds suitable for entry into marketing and sales manager positions. For example, an employer may find a person with experience in a related occupation and an associate or bachelor's degree in any field of study suitable for a marketing or sales manager position. Although some employers prefer a bachelor's or master's degree in business administration, most do not normally require a bachelor's degree in a specialized field. Thus, according to the *Handbook*, the offered position would not qualify as a specialty occupation because employers do not require a bachelor's degree in a specific specialty.

Although the opinion letters from Professors [redacted] and [redacted] are probative, they are insufficient to satisfy the petitioner's burden of proof in establishing that the proffered position is a specialty occupation. Professor [redacted] opines that a bachelor's degree is required as the minimum entry requirement into a marketing manager position. Professor [redacted] bases his opinion on the following texts: *Principles of Marketing* by Kotler and Armstrong; *Marketing* by Berkowitz, Kerin, Hartley, and Rudelius; *Basic Marketing* by Perreault and McCarthy; and *The Employment Kit and Careers in Marketing* published by the American Marketing Association (AMA); as well as the AMA job bank website. Professor [redacted] states that marketing management jobs normally require at least a bachelor's degree in marketing, and that the proffered position would require a bachelor's degree in business administration with a specialization in marketing. Professor [redacted] proposition is based on resources published by the AMA and the career appendices in marketing texts by [redacted] and [redacted] and [redacted] and [redacted] and [redacted] This record of proceeding does not contain the documents on which Professors Obermiller and Karns base their opinions. In the absence of this documentary evidence, the AAO is unable to determine whether their statements are corroborated by independent evidence. 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). 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 Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

To establish the second criterion - that a degree requirement is common to the industry in parallel positions among similar organizations - counsel claims that the submitted letters from alleged experts attest that it is common in the industry to require a bachelor's for the proffered position. Counsel's claim is not persuasive. As previously discussed, although the opinion letters are relevant, they are unsubstantiated by independent evidence. In addition, the *Handbook* conveys that employers find a wide range of educational backgrounds suitable for entry into sales and marketing positions.

No evidence is in the record demonstrates that the proffered position is so complex or unique that it can be performed only by a person with a degree.

The AAO now considers the next criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. The evidence in the record contains a letter from the petitioner stating that the company's president presently performs the duties of the proffered position and that the

president holds a bachelor's degree in business administration. This letter, in itself, fails to establish the third criterion. 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. As previously discussed, the proffered position does not require a bachelor's degree in a specific specialty. Consequently, the petitioner does not establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The AAO now turns to counsel's claim 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. Evidence contained in the record does not substantiate this claim. Moreover, the *Handbook* conveys that marketing and sales manager positions do not require a bachelor's degree in a specific specialty. Thus, the final criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) is not established.

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.

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[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.