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U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 03 041 56954 Office: CALIFORNIA SERVICE CENTER Date: MAY 04 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.

Mari Johnson

For 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 distributor of metal products that seeks to employ the beneficiary as a senior marketing 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 because: (1) the proffered position is not a specialty occupation; and (2) the beneficiary is not qualified to perform a specialty occupation. On appeal, counsel submits a brief.

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

The petitioner is seeking the beneficiary's services as a senior marketing manager. Evidence of the beneficiary's duties includes: the Form I-129; the November 12, 2002 letter accompanying the Form I-129; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail, in part: collecting and analyzing market data such as demographics, trade barriers, governmental policies, currency, and political risks; initiating and organizing marketing or brand promotions such as media campaigns and trade shows; establishing and developing long-term relationships with suppliers, manufacturers and wholesalers/retailers; reviewing customer information such as buying patterns; conducting research on competitors; establishing pricing structures and projecting sales revenues in potential markets; devising plans to emulate competitors; participating in feasibility studies to open facilities elsewhere. The petitioner stated that a candidate must possess a bachelor's degree in marketing or international business or its equivalent such as a general bachelor's degree plus at least five years of experience in marketing in a commercial milieu.

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). Referring to the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*), the director found that the duties of the proffered position resemble those performed by a marketing manager, and that the *Handbook* explains that employers do not require a bachelor's degree in a specific specialty for this position. In addition, the director noted that the beneficiary is not qualified to perform the proffered position had it been deemed a specialty occupation.

On appeal, counsel states that the proffered position is a specialty occupation and the beneficiary is qualified to perform the position. Counsel states that the submitted evaluation performed by Dr. Sapp of Portland State University, a recognized authority in the area of business and marketing, attests that the proffered position requires the application of theoretical and practical knowledge of such a specialized nature that it requires a candidate possessing a bachelor's degree in marketing. Dr. Sapp, furthermore, attests that the beneficiary has the educational equivalent of a bachelor's degree in marketing. Counsel maintains that the petitioner normally requires a degree in marketing or its equivalent for the position. Counsel claims that the position's underlying duties and responsibilities are to perform market research analysis. The beneficiary will, counsel states, collect and analyze data, using statistical tools and reports, on the types of fasteners, manufacturers, pricing curves, and the competition in South America, Canada, and Mexico. As such, counsel avers that the proffered position qualifies as a specialty occupation because the AAO has already held that the positions of market research analyst and business analyst employed with import/export firms are specialty occupations.

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). As such, the proffered position is not a specialty occupation.

The AAO first 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 in a specific specialty is the normal minimum requirement for entry into the particular position; a degree requirement in a specific specialty 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 *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.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

Counsel claims that the petitioner satisfies the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). According to counsel, Dr. Sapp, a recognized authority in the area of business and marketing, attests that the position requires a candidate possessing a bachelor's degree in marketing. Counsel claims that performing market research analysis is the position's underlying responsibility, and that the AAO considers the positions of market research analyst and business analyst employed with import/export firms to be specialty occupations.

Counsel's claims and the submitted evidence are unpersuasive in establishing the first criterion. Dr. Sapp's opinion letter states, in part:

> It has been my experience that the position of senior marketing manager for an international company, such as Via Pacific, would, in fact, require someone with a bachelor's degree in either international business and/or marketing. I am confident that this would be considered the minimum educational requirements for such a position.

The letter continued:

> For companies [in] the situation of Via Pacific, it would be most common to find a bachelor's degree as a minimum requirement for even getting an interview as a senior marketing manager. I only have to review the interviewing schedule for our on-campus recruiters to see the requirement of a degree in marketing. Virtually every position of marketing manager requires, at a minimum, a bachelor's degree in marketing to even get an interview.

Although Dr. Sapp's opinion is relevant, Dr. Sapp fails to submit independent documentary evidence that would substantiate his opinion. 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). Thus, the weight of Dr. Sapp's opinion is greatly diminished.

With respect to counsel's claim that the beneficiary will perform market research analyst duties, counsel does not elaborate on how the proffered position is similar to a market research analyst. For example, counsel states that the beneficiary will collect and analyze data using statistical tools and reports; however, counsel's statements are vague, failing to describe research and statistical methodologies. Notably, the *Handbook*, a resource that the AAO routinely consults for its information about the duties and educational requirements of particular occupations, explains that many market research analyst positions in the private sector require graduate education, and that most positions are found in economic and marketing research firms, management consulting firms, banks, securities and commodities brokers, and computer and data processing companies.

Counsel's claim that the AAO has already held that the positions of market research analyst and business analyst employed with import/export firms are specialty occupations is irrelevant to this case. This record of proceeding does not contain all of the supporting evidence submitted to the service centers in the prior cases. In the absence of all of the corroborating evidence contained in that record of proceeding, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the instant petition is parallel to the previously approved petitions. Moreover, 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).

A careful review of the *Handbook* discloses that the director correctly determined that the duties of the proffered position are performed by marketing managers, and that the *Handbook*, indeed, reveals that a bachelor's degree in a specific specialty would not be required to perform this position. The *Handbook's* finding is buttressed by the petitioner's November 12, 2002 letter which states that the petitioner will accept a "general [b]achelor's degree plus at least [five] years [of] hands-on experience in marketing in a commercial setting" in lieu of a bachelor's degree in marketing or international business. Thus, the petitioner concedes that it does not require a bachelor's degree in a specific specialty. Accordingly, the petitioner fails to establish the first criterion.

The evidence in the record fails to establish the second criterion - that a degree requirement is common to the industry in parallel positions among similar organizations. As previously discussed, Dr. Sapp's opinion letter is deficient because no independent documentary evidence substantiates his opinion. In addition, no evidence is submitted that would show that the industry's professional association has made a degree a minimum entry requirement. There are no letters or affidavits in the record from firms or individuals in the industry attesting that such firms routinely employ and recruit only degreed individuals.

No evidence is in the record that would show the proffered position is so complex or unique that it can be performed only by an individual with a degree.

Counsel contends that the petitioner normally requires a degree in marketing or its equivalent for the position; thereby satisfying the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). This contention, however, is empty. 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.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish 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. As delineated by the petitioner, the duties of the proffered position are not so specialized and complex as to require a bachelor's degree in a specific specialty. As previously mentioned, the petitioner's degree requirement confirms that it will accept a bachelor's degree in any field as long as the candidate has relevant experience. As such, the petitioner fails to establish the fourth criterion.

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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.

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.

The director also found that the beneficiary would not be qualified to perform the duties of the proffered position if the job had been determined to be a specialty occupation. However, as the AAO is dismissing the appeal because the job is not a specialty occupation, it will not discuss the beneficiary's qualifications.

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.