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U.S. Citizenship
and Immigration
Services

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FILE: LIN 04 092 53412 Office: NEBRASKA SERVICE CENTER Date: DEC 27 2008

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 initially approved the nonimmigrant visa petition. Upon subsequent review of the record, the director issued a notice of intent to revoke (NOIR), and ultimately revoked, approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition's approval will be revoked.

The petitioner is an electrical apparatus, power quality, vibration analysis, and electromagnetic radiation reduction company that seeks to employ the beneficiary as a marketing and export 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 record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation, filed on February 13, 2004; (2) the director's approval of the petition, dated February 24, 2004; (3) the consular return memorandum, dated March 29, 2004; (4) the director's July 8, 2004 notice of intent to revoke the petition's approval (NOIR); (5) the petitioner's July 21, 2004 response to the NOIR; (6) the director's November 4, 2004 revocation; and (7) the Form I-290B and supporting documentation, received at the service center on December 6, 2004. The AAO reviewed the record in its entirety before issuing its decision.

After obtaining the H-1B approval notice, the beneficiary appeared at the United States consulate in Almaty, Kazakhstan to obtain the visa. The interviewing officer, however, denied the visa and returned the petition to the service center. The interviewing officer had two major concerns: (1) that the beneficiary did not appear qualified for the H-1B classification, and (2) that the applicant would not be performing the duties as set forth in the petition.

Several of the beneficiary's responses during the interview led the interviewing officer to the conclusion that the beneficiary appeared unqualified to perform the duties of the proposed position. When asked of her marketing background, the beneficiary noted that she had no practical experience in the field, but that she had taken one marketing course while obtaining her degree.¹ When the beneficiary told the interviewer that part of her job responsibilities would include Russian-English translation, according to the interviewer, "I again tried to speak English with her, but quickly switched back to Russian because the level of English was insufficient to carry on an interview."

The interviewing officer also interviewed the president of the petitioning entity, and this interview also caused the officer to question whether the beneficiary was qualified to perform the duties of the proposed position. According to the interviewer, "[h]e admitted that she [the beneficiary] has no existing specialized knowledge that would be used in the position in his company."

The beneficiary's and president's responses during their respective interviews also led the interviewing officer to the conclusion that the duties of the position would in fact not mirror the duties set forth in the petition. At the beginning of her interview, the beneficiary first told the interviewer that she did not yet know what she would be doing. Subsequently, the beneficiary told the interviewer that she would be doing marketing and Russian-English translation.

¹ The record reflects that the beneficiary earned a bachelor's degree in international economic relations at the Almaty University of Technologies and Business. An evaluation submitted by the petitioner states that this degree is equivalent to a bachelor's degree in international economics from an accredited college or university in the United States.

The interviewer then met with the petitioner's president. According to the interviewing officer, "I asked how he knew she was qualified for the position if he had not even told her what the position required, and he said he was confident that she could do the job."

The interviewer then asked the president about the specific duties of the proposed position:

I again asked for more information about what it is she would be doing, and he stated that he needs someone to handle everything, from making hotel reservations to greeting foreign and "State Department" visitors. . . .

I remarked that this is not the position described in the H1B petition or labor certification. He stated that he can't get anyone to fill even the position he had just described because "no one is willing to come to Blair, Wisconsin."

The interviewing officer thus concluded that the duties to be performed by the beneficiary would actually be those of an office manager:

The petitioner has admitted to the consular officer that the beneficiary is not currently qualified to perform the work described in the petition and that the beneficiary is actually being hired to act as an office manager. For these reasons, I ask that you reconsider the case in light of this new information.

The interviewing officer relayed these concerns to the service center, and the director, finding that these issues constituted good and sufficient cause, issued the NOIR on July 8, 2004.

The director's NOIR included the memorandum from the consulate relaying the interviewing officer's concerns and provided the petitioner 30 days during which to address these concerns. Specifically, the director noted that it did not appear as though the proposed position qualifies for classification as a specialty occupation and that beneficiary qualifies to perform the duties of a specialty occupation.

Counsel's July 21, 2004 response stated that English fluency is not a job requirement and that a position as a marketing/export manager requires an individual with a bachelor's degree. Counsel contended that the beneficiary qualifies to perform the duties of a specialty occupation on the basis of her degree. Counsel stated that the interviewing officer's allegation that the beneficiary would be performing the duties of an office manager is contrary to the evidence of record.

The director revoked the petition's approval on November 4, 2004, finding that the proposed position does not qualify for classification as a specialty occupation.

On appeal, counsel contends that "[t]he Service's revocation is not supported by the record." Counsel reiterates her earlier contention that the position proposed here is not that of an office manager, and states that the petitioner already employs an office manager. Counsel contends that the proposed position qualifies for classification as a specialty occupation, and that the beneficiary qualifies to perform the duties of a specialty occupation.

The AAO has conducted a *de novo* review of the record of proceeding. Upon review, it finds that the petitioner has not overcome the director's revocation. The AAO finds that the proposed position does not qualify for classification as a specialty occupation.

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.

In its February 10, 2004 letter of support, the petitioner proposed to hire the beneficiary as a “marketing and export manager.” According to the petitioner, the beneficiary’s duties would consist of directing foreign sales and service outlets; negotiating contracts with foreign sales and distribution centers to establish outlets; directing export correspondence, bid requests, and credit collections; arranging shipping details, such as export licenses, customs declarations, and packing, shipping, and routing of products; preparing foreign language sales manuals; expediting import-export arrangements and maintaining current information on import-export tariffs, licenses, and restrictions; developing a detailed marketing strategy; determining demand for products and services offered; identifying potential markets; and developing a pricing strategy with an eye toward maximizing the firm’s share of the market and its profits while ensuring that customers are satisfied.

In determining whether a proposed position qualifies as a specialty occupation, CIS looks beyond the title of the proposed 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 AAO notes that the petitioner's president told the Department of State that "he needs someone to handle everything, from making hotel reservations to greeting foreign and 'State Department' visitors." The AAO finds that these are the duties of an administrative assistant and secretary as defined in the *Handbook*, not those of a marketing and export manager, and it will adjudicate the petition accordingly.² Counsel states on appeal that the petitioner already employs an office manager and does not require two such positions. However, the duties described by the president at his interview are not those of a marketing and export manager, and conflict with the duties set forth in the petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Counsel has submitted no explanation as to why the president set forth duties for the beneficiary that differed from those in the petition. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

The duties of the proposed position, as established by the petitioner at the time of his interview with the U.S. Consulate in Almaty, are found within the *Handbook's* description of the duties of secretaries and administrative assistants:

As the reliance on technology continues to expand in offices, the role of the office professional has greatly evolved. Office automation and organizational restructuring have led secretaries and administrative assistants to assume responsibilities once reserved for managerial and professional staff. . . .

Secretaries and administrative assistants are responsible for a variety of administrative and clerical duties necessary to run an organization efficiently. They serve as information and communication managers for an office . . . and disseminate information by using the telephone, mail services, Web sites, and e-mail. They also may handle travel and guest arrangements.

The *Handbook* reports the following educational requirements for those seeking employment as secretaries and administrative assistants:

High school graduates who have basic office skills may qualify for entry-level secretarial positions. However, employers increasingly require extensive knowledge of software applications, such as word processing, spreadsheets, and database management.

² The AAO notes that the petitioner's president stated that he desires the services of the beneficiary as a result of his observation of the exemplary fashion in which she carried out her duties as an office manager.

As such, the proposed position does not qualify for classification as a specialty occupation under the first criterion, 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. However, no such evidence has been presented. 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 the second criterion requires that the petitioner prove that the duties of the proposed position are so complex or unique that only an individual with a degree can perform them. However, there has been no demonstration that the proposed position is more complex or unique than secretary or administrative assistant positions in other, similar organizations, which would not require a degreed individual. Therefore, the petitioner has not established that the proposed position qualifies for classification 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 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. However, no such evidence has been presented.

Finally, the AAO turns to the criterion 8 C.F.R. § 214.2(h)(iii)(A)(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. To the extent that they are depicted in the record, the duties do not appear more specialized or complex than those associated with other secretary or administrative assistant positions. The evidence does not establish that this particular position requires the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Accordingly, the proposed position does not qualify for classification as a specialty occupation under any of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). Counsel and the petitioner have failed to overcome the director's revocation of the petition. Accordingly, the director's decision will be affirmed.

The AAO notes further that the duties as set forth in the initial filing do not constitute a specialty occupation. The duties set forth by the petitioner in the initial filing are similar to those of marketing managers and administrative services managers as described in the *Handbook*.

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

Marketing managers develop the firm's detailed marketing strategy. With the help of subordinates, including *product development managers* and *market research managers*, they determine 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 with an eye towards maximizing the firm's share of the market and its profits 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 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 *Handbook* provides the following information regarding the duties of administrative services managers:

Administrative services managers perform a broad range of duties in virtually every sector of the economy. They coordinate and direct support services to organizations as diverse as insurance companies, computer manufacturers, and government offices. These workers manage the many services that allow organizations to operate efficiently. . . .

Specific duties for these managers vary by degree of responsibility and authority. First-line administrative services managers directly supervise a staff that performs various support services. Mid-level managers, on the other hand, develop departmental plans, set goals and deadlines, implement procedures to improve productivity and customer service, and define the responsibilities of supervisory-level managers. . . .

In small organizations, a single administrative services manager may oversee all support services. . . .

The nature of managerial jobs varies as significantly as the range of administrative services required by organizations. . . .

The *Handbook* states the following with regard to the educational qualifications required for marketing 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.

The *Handbook* states the following regarding the educational requirements for administrative services managers:

Educational requirements vary widely, depending on the size and complexity of the organization. In small organizations, experience may be the only requirement needed to enter a position as office manager . . . In large organizations, however, administrative services managers normally are hired from outside and each position has formal education and experience requirements.

Specific requirements vary by job responsibility. For first-line administrative services managers or secretarial, mailroom, and related support activities, many employers prefer an associate degree in business or management, although a high school diploma may suffice when combined with appropriate experience. For managers of audiovisual, graphics, and other technical activities, postsecondary technical school training is preferred. Managers of highly complex services, such as contract administration, generally need at least a bachelor's degree. . . .

Thus, the position initially proposed in the petition does not qualify for classification as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), 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 many marketing manager and administrative services manager positions are filled on the basis of experience. Moreover, the fact that degrees are preferred for some positions or that individuals possessing degrees have the best job opportunities does not establish that employers normally require at least a bachelor's degree or its equivalent in a specific specialty. As such, marketing managers and administrative services managers do not qualify as specialty occupations under the first criterion.

Nor does the position qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). As noted *supra*, 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. No evidence to satisfy this prong has been submitted.

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 position as originally proposed does not support such a finding, as they are similar to those of marketing managers and administrative services managers as discussed in the *Handbook*, which do not require a degree. The record contains no documentation to support a finding that the position would be so complex or unique that, in contrast to many marketing and administrative services positions with no degree requirement, it could only be performed by an individual with at least a bachelor's degree, or its equivalent, in a specific specialty.

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

Nor would the 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. As noted previously, no such evidence has been presented.

To the extent that they were depicted in the record, the original duties of the proposed position did 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 original position proposed by the petitioner would be more specialized and complex than the general range of marketing manager and administrative services 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 position would qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Accordingly, the AAO finds that the duties of the position proposed initially by the petitioner did not warrant classification as a specialty occupation, and that the director correctly revoked the petition.

Pursuant to 8 C.F.R. § 214.2(h)(11)(B)(iii)(5), the director may revoke an H-1B petition if approval of the petition violated paragraph (h) of 8 C.F.R. § 214.2, or involved gross error. In this instance, approval of the petition was in violation of paragraph (h) of the cited regulation because the petition contained statements (i.e., the description of the proposed duties) that were not true and correct, and further because approval of the petition violated paragraph (h) of 8 C.F.R. § 214.2 in that the position is not a specialty occupation. See 8 C.F.R. § 214.2(h)(11)(iii)(2).

No evidence has been offered to overcome the grounds for revocation, and the AAO will not withdraw the director's decision.

Beyond the decision of the director, the AAO finds that the beneficiary is not qualified to perform the services of the occupation. Counsel contends that "there are no requirements in the H-1B regulations covering what level of English is required of H-1B workers." While this is generally true, the AAO notes that the beneficiary must be qualified to perform the duties of the position, as described in the petitioner's February 10, 2004 letter of support, including such duties as directing export correspondence, analyzing shipping details, expediting import-export arrangements, developing a detailed marketing strategy, and ensuring that customers are satisfied. Further, the beneficiary stated at the interview that part of her job would be Russian-English translation. These duties could not be performed in the United States without the ability to speak English. Thus, the petitioner has not established that the beneficiary is qualified to perform the services of the occupation. For this additional reason, the petition may not be approved.

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 director's November 4, 2004 decision is affirmed. Approval of the petition is revoked.