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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

W2



MAY 01 2009

FILE: WAC 07 130 52721 Office: CALIFORNIA SERVICE CENTER Date:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California 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 petitioner is engaged in the retail of cigars and novelty items. It seeks to employ the beneficiary as a business development 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 based on a finding that the evidence of record did not establish that the job offered qualified as a specialty occupation. On appeal, counsel submits a brief and additional evidence.

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.

United States Citizenship and Immigration Services (USCIS) 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.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS 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 nor 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.

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, appeal brief, 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 business development manager. According to the petitioner's letter of support dated April 1, 2007, the beneficiary's U.S. employment would entail the following:

- Design, construct, and operate financial models to support the company's cigar, cigarette, and cell phone retailing finance transactions, [m]odeling and [a]nalytics advisory, and launch new locations (30%).
- Analyze and review the company's current structure and operations, with a focus on management, distribution, and financing. Make recommendations on streamlining business processes and increasing service based on findings in the industry (10%).
- Research, analysis, and due diligence in support of the company's investment activities, or in servicing requests from outside investors (20%).
- Lead the company's efforts to evaluate and understand opportunities to expand its retail store location financing business and create the company's strategy for pursuing these opportunities (10%).
- Identify current resources and new resources required to cater to the target markets and develop a promotional strategy to more easily and successfully enter targeted market areas (20%).

- Complete feasibility studies on the potentiality of finding new investors. Advise management on findings and prepare reports with recommendations on which areas are potentially the most lucrative (10%).

In a request for evidence issued on April 23, 2007, USCIS instructed the petitioner to submit documentation establishing that the U.S. entity meets the criteria for H-1B petitions involving a specialty occupation. Namely, the petitioner was asked to provide, *inter alia*, job listings from organizations similar to the petitioner showing the educational background required to perform the duties of the position; copies of the petitioner's past and present position announcements; evidence of the petitioner's past employment practices to show the educational requirements for prior individuals hired in a similar position; and further discussion of the petitioner's business explaining how its business model is unique from other retail operations in a similar industry and why the performance of specialized or complex duties is required. In other words, the petitioner must establish that its business is so specialized or distinct that an individual with a baccalaureate degree or higher in a specific field of study is required to perform the duties of the proposed position.

In response, the petitioner provided a letter dated July 7, 2007, restating the job description with a percentage breakdown as initially offered in the April 1, 2007 letter of support. The petitioner reiterated its need for an individual skilled in market research and analysis. Some of the documents submitted with the response included the following: 1) printouts from Internet websites and job banks such as Cyber Coders and CareerBuilder.com; 2) a copy of the Internet advertisement used to solicit applicants for the proposed position; and 3) the petitioner's second quarterly wage report for 2007, which showed that the petitioner had four employees at the time the Form I-129 was filed.

In the denial dated November 15, 2007, the director concluded that the beneficiary's proposed position is similar to that of a marketing manager as described in the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) under the title Advertising, Marketing, Promotions, Public Relations, and Sales Managers. Based on the information offered in the *Handbook*, the director found that a bachelor's degree or higher was not a prerequisite for entry into the occupation and further found that the petitioner failed to establish that a degree in a specific field is common to the type of sales industry in which the petitioner operates or that the petitioner has a past practice of hiring people with a baccalaureate degree or higher in a specific specialty. Lastly, the director discussed the petitioner's organizational complexity, finding that the record lacks evidence to establish a need for a person in a specialty occupation.

On appeal, counsel disputes the director's findings, asserting that the proffered position is "extremely complex involving professional responsibilities in areas of designing, constructing, and analyzing financial models; analyzing and reviewing the petitioner's current financial structure and operations; leading the company in efforts to expanding retail store locations; and analyze and create a strategy to pursue expansion opportunities." Counsel further argues that the proffered position requires theoretical knowledge in accounting, finance, and marketing, which can only be acquired with a minimum of an undergraduate degree in business administration. Lastly, counsel explains that while

the petitioner does not require any employee to actually produce copies of their professional degrees, the petitioner nevertheless requires baccalaureate degrees for a number of positions within its organization, including the position being offered to the beneficiary. The AAO finds that counsel's arguments are not persuasive and that the director properly concluded that the petitioner failed to establish that the position being offered to the beneficiary is a specialty occupation.

To determine whether the duties just described are those of 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 is the normal minimum requirement for entry into the particular position; and 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 considered by the AAO when determining these criteria include: whether the *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, 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)).

The AAO will now examine the beneficiary's proffered position and whether the duties of the position are those of a specialty occupation. It is noted that in an April 1, 2007 letter, the petitioner compared the beneficiary's proffered position to that of a marketing manager as discussed in *O*Net*, which provided the following overview regarding marketing managers:

Determine the demand for products and services offered by a firm and its competitors and identify potential customers. Develop pricing strategies with the goal of maximizing the firm's profits or share of the market while ensuring the firm's customers are satisfied. Oversee product development or monitor trends that indicate the need for new products and services.

With regard to the educational requirement for marketing managers, *O*Net* indicates that while most of these occupations require a four-year baccalaureate degree, some do not. The *Handbook*, to which the director deferred as a point of reference, includes a similar job description for marketing managers and also indicates that a baccalaureate or master's degree in business administration is preferred by some employers. Based on this information, the director concluded that a baccalaureate degree was not a minimum requirement for entry into the proffered position.

Furthermore, the petitioner's description of the beneficiary's duties is so generic, so nonspecific that it precludes the AAO from determining precisely what tasks the beneficiary would perform for the petitioner on a daily basis. For instance, while the job description attributes 30% of the beneficiary's time to designing, constructing, and analyzing financial models, the petitioner fails to define this abstract terminology in the context of its particular sales operation. The petitioner also provided no

explanation of its current financial model, if any, such as to provide some insight into the tasks entailed in designing, constructing, and analyzing such a model. Although the petitioner attributed another 20% of the beneficiary's time to creating a promotional strategy by identifying current and new resources, there is no indication as to the methods, i.e., specific tasks that would be utilized to identify the resources that are intended to serve as a focal point of the promotional strategy. The petitioner was equally unclear as to the tasks that would be involved in first narrowing the list of potential investors and then creating reports and charts to present to those investors, which would cumulatively consume an additional 30% of the beneficiary's time.

It is noted that without an adequate job description, the AAO is unable to determine whether the *responsibilities of the proffered position would require the beneficiary to hold the minimum of a baccalaureate or higher degree or its equivalent to perform them.* In the present matter, the above analysis of the beneficiary's job descriptions indicates that at least 80% of the beneficiary's time would be spent on largely unknown or unspecified tasks. Accordingly, the AAO finds that the record does not establish that the proffered position qualifies as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

The AAO now turns to a consideration of whether the proffered position may qualify as a specialty occupation under either of the prongs of the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). In response to the director's request for evidence, the petitioner submitted three *Internet job announcements advertising business development manager positions to establish the proffered position as a specialty occupation under the first prong of the second criterion – the degree requirement is common to the industry in parallel positions among similar organizations.* However, as noted by the director, the job listings provided in response to the RFE are for job openings in the healthcare information management, manufacturing consumer packaging, and the utilities industries, which are not similar to the petitioner's industry. As a result, these announcements cannot establish a degree requirement in parallel positions.

Further, the AAO also concludes that the record before it does not establish that the position qualifies as a specialty occupation under the second prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) – the position is so complex or unique that it can be performed only by an individual with a degree. As discussed above, the petitioner has provided a deficient job description, lacking a detailed description of the proposed tasks to be performed by the beneficiary, which precludes a finding as to the degree of complexity or uniqueness of the proffered position. Accordingly, the petitioner cannot establish its position as a specialty occupation under either prong of the second criterion.

The AAO next considers the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(3) and (4): the employer normally requires a degree or its equivalent for the position; and the nature of the specific duties is so *specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree.*

To determine a petitioner's ability to meet the third 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. Documenting past employment practices is one way in which a petitioner may be able to establish employment as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). *See* 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). In the instant case, the petitioner has submitted no evidence regarding its past hiring practices with regard to the proffered position or other similarly-situated employees. Accordingly, it cannot establish the proffered position as a specialty occupation under the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner's degree requirement for the proffered position is not evidence of its normal hiring practices.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that a petitioner establish that the nature of the specific duties of the position 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. Again, the AAO points out the importance of a detailed description of job duties without which it is virtually impossible to ascertain the degree of complexity of the position or the knowledge required of the potential candidate intended to fill that position. There is no evidence in the record to establish that the responsibilities of the proffered position, which require the beneficiary to collect, review, and analyze data, are particularly specialized or complex, or that they require greater knowledge or skill than that normally needed by persons employed generally in other management positions. Nor is there sufficient evidence to suggest that the beneficiary would be required to possess skills and qualifications, such as a baccalaureate degree in business, management, or a related field, in order to perform such duties. Accordingly, the AAO concludes that the proffered position is not a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

A petitioner must establish that a beneficiary is coming temporarily to the United States to perform services in a specialty occupation. Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b); 8 C.F.R. § 214.2(h)(1)(ii)(B)(1). The petitioner has failed to establish that the proffered position qualifies as a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

ORDER: The appeal is dismissed. The petition is denied.