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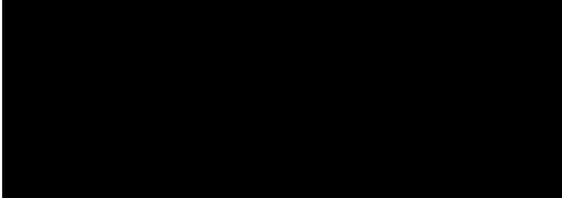
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U.S. Citizenship  
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FILE: EAC 06 216 51058 Office: VERMONT SERVICE CENTER Date: OCT 05 2007

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:

SELF-REPRESENTED

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 F. Kelly*  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont 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 fabricates communication towers. It seeks to employ the beneficiary as a sales associate.<sup>1</sup> Accordingly, 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).

On October 31, 2006, the director denied the petition determining that the record did not establish the proffered position as a specialty occupation. On appeal, counsel for the petitioner asserts the position of its "sales associate" is very specialized. The petitioner submits a new labor condition application (LCA) with an amended job title and new rate of pay.

The record of proceeding before the AAO contains: (1) the Form I-129 petition filed July 18, 2006; (2) the director's October 25, 2006 request for evidence (RFE); (3) the petitioner's October 27, 2006 response to the director's RFE with documentation; (4) the director's October 31, 2006 denial decision; and, (5) the Form I-290B and the petitioner's letter of explanation and new LCA in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

The issue in this matter is whether the petitioner has established that the proffered position is a specialty occupation.

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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An 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

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<sup>1</sup> In response to the director's RFE, the petitioner amends the title of the position to Latin America Operations Manager and submits a different position description.

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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The petitioner initially requested the services of the beneficiary for a sales associate position. The petitioner described the proffered position as:

Sales Associate: Responsibilities include but not limited to customer development and increased sales of Communication Towers in the country of Mexico. The position requires customer focus with comprehensive communications skills and the ability to express self verbally. Must be a strategic thinker, inquisitive, innovative, and creative in order to build relationships, network, link resources and apply business practices. Additional responsibilities will be added as needed.

The petitioner provided an LCA certified June 27, 2006 listing the position as a sales associate position with a prevailing wage in the Boonville, Missouri area of \$31,161 and the proffered salary as \$32,000.

In response to the director's RFE, the petitioner indicated that the proffered position was for that of a Latin America Operations Manager who would: manage and coordinate the activities of the production of international crews, at production, delivery, construction and inspection of the petitioner's transmission structures; review the structural inspection processes; perform technical cost analysis; review production orders and delivery dates to plan operations; prepare cost analysis and labor needs and present plans to accounting to ascertain funding of projects; interpret, analyze, and provide data analysis of labor; prioritize and schedule workload; communicate and coordinate interdepartmental functions; manage performance measures and provide reports to supervisor; and other duties as assigned.

On October 31, 2006, the director denied the petition determining that the sales associate position identified in the LCA form (Form 9035E) is completely different from the operations manager position described in

response to the RFE. The director determined that the petitioner had not submitted additional information substantiating that the position of sales associate is a specialty occupation. The director concluded that the proffered job is not a specialty occupation.

On appeal, in a letter dated November 3, 2006, the petitioner explains that it knew when the petition was filed that the proffered position would not be a "normal" sales associate position but that was the only job description/title the petitioner had to put the beneficiary in at the time. The petitioner indicates that a job analysis of the beneficiary's position revealed the position included not only international sales but also operations and project management. The petitioner indicates that a new title, "Latin America Operations Manager" better fits the new job description and that a new LCA was filed changing the rate of pay. The petitioner submits a new LCA certified November 7, 2006 that identifies the job title as Latin American Sales/Operations Manager and indicates the prevailing wage in the Boonville, Missouri area is \$38,667 and the offered salary for the position is \$39,000.

The AAO concurs with the director's determination that the initial description, title, and wage as identified on the LCA is inconsistent with the job description and title submitted in response to the director's RFE. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the position's associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a specialty occupation. *See e.g. Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. As the director determined, the information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new duties to the job description.

The petitioner does not submit evidence or argument on appeal substantiating that a sales associate position as identified on the Form I-129 and the LCA is a specialty occupation. In this matter, the petitioner only notes that a sales associate position was the position available when the petition was filed and that its sales associates are all operation/project managers. The petitioner offers a new LCA changing the title of the position and the salary, implicitly acknowledging that the initially described position did not qualify as a specialty occupation. However, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The AAO acknowledges the petitioner's explanation of its circumstances as submitted on appeal but observes further that the new LCA is certified on November 7, 2006, almost four months after the petition was filed, and additionally changes the title of the position and increases the salary by \$7,000. The AAO notes that the regulation requires that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner must obtain a certified LCA from the Department of Labor in the occupational specialty in which the H-1B worker will be employed. *See* 8 C.F.R. § 214.2(h)(4)(i)(B). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of a labor certification application with the Department of Labor when submitting the Form I-129. When the instant petition was filed, the only LCA in

the record was for a sales associate position with a salary of \$32,000. Thus, the record shows that, at the time of filing, the occupation in which the beneficiary would be employed was a sales associate position, a position that is not a specialty occupation.

The petitioner has not established that a sales associate position is a specialty occupation as defined at section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1) and further has not provided evidence that the proffered position when the petition was filed satisfies any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petition will be denied and the appeal dismissed for the above stated reason. 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.