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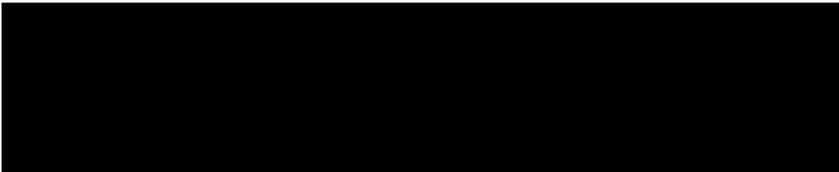
FILE: WAC 03 218 50930 Office: CALIFORNIA SERVICE CENTER Date: MAR 20 2008

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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition. The petitioner filed a motion to reconsider/reopen or alternative appeal to the Administrative Appeals Office (AAO). The director declined to treat the matter as a motion and forwarded the proceeding to the AAO for consideration. The AAO then summarily dismissed the appeal on the grounds that the petitioner failed to specify how the director made any erroneous conclusion of law or statement of fact in denying the petition. The AAO also noted that the petitioner failed to present any additional argument or evidence on appeal to overcome the decision of the director. The matter is again before the AAO on the petitioner's motion to reconsider/reopen which was filed on August 22, 2005. A supplemental motion to reconsider/reopen was submitted by the petitioner's new counsel on May 31, 2007. The motion to reopen/reconsider will be granted, and the AAO's decision summarily dismissing the appeal will be withdrawn. The appeal will be dismissed. The petition will be denied.

The petitioner is a produce importer and seeks to employ the beneficiary as an international sales coordinator. 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 first issue to be considered is whether the petitioner's motion to reopen/reconsider should be granted.

The AAO summarily dismissed the petitioner's appeal, finding that the petitioner failed to identify specifically any erroneous conclusion of law or statement of fact for the appeal, and noted that the petitioner did not present any additional argument or evidence on appeal to overcome the decision of the director. The AAO further noted that counsel for the petitioner failed to respond to the AAO's faxed request for a brief or additional evidence supporting the appeal. The record of proceeding, including the petitioner's motion and supplemental motion to reopen/reconsider establishes the following:

1. The Form I-129 was filed on July 23, 2003;
2. The director denied the petition on November 7, 2003;
3. The petitioner filed the Form I-290B on December 5, 2003, indicating that a brief and/or additional evidence supporting the appeal would be filed within 30 days;
4. The petitioner filed with the Service Center, by overnight courier, a "Motion To Reconsider/Motion To Reopen/Brief In Support Of Appeal" on December 30, 2003;<sup>1</sup>
5. The Service Center forwarded the record of proceeding, absent the motion/brief of December 30, 2003, to the AAO on February 11, 2004;
6. The AAO requested by faxed notice, on July 10, 2005, the brief and/or evidence that counsel indicated on the Form I-290B he would be submitting within 30 days of the filing of the appeal. No response was received by the AAO to that request;
7. The AAO summarily dismissed the appeal on August 4, 2005;
8. The petitioner submitted a motion to reconsider/reopen the AAO's decision on August 22, 2005; and

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<sup>1</sup> The petitioner submitted a tracking sheet, along with a brief dated December 22, 2003, showing delivery of a package to CIS on December 30, 2003.

9. The petitioner submitted a supplemental motion to reconsider/reopen on May 31, 2007.

Counsel has presented new facts to be considered in a reopened proceeding, and those facts are supported by documentary evidence. The record establishes that prior counsel for the petitioner filed with the Service Center a brief in support of its motion/appeal on December 30, 2003, within 30 days of the filing of the appeal. The motion to reopen shall accordingly be granted and the proceeding shall be reopened. 8 C.F.R. § 103.5(a)(2). Further, the petitioner's motion to reconsider shall be granted in that the motion properly states reasons for reconsideration establishing that the decision was incorrect based on evidence of record at the time of the initial decision. A brief in support of the appeal detailing the reasons for appeal was submitted to the Service Center in a timely manner. 8 C.F.R. § 103.5(a)(3). The AAO's August 4, 2005 decision summarily dismissing the appeal of the petitioner is withdrawn, and a decision on the merits of the appeal shall be rendered based on all evidence of record.

The director denied the petition because the position did not qualify as a specialty occupation. The final issue to be considered is whether the proffered position qualifies as a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in 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:

[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 are 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) the 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; (5) the Form I-290B with supporting documentation; (6) the petitioner’s motion to reopen/reconsider and supporting brief; and (7) the petitioner’s supplemental motion to reopen/reconsider and supporting brief. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary’s services as an international sales coordinator. Evidence of the beneficiary’s duties includes the Form I-129 petition with attachment and the petitioner’s response to the director’s request for evidence. According to this evidence the beneficiary would:

- Coordinate the petitioner’s sales activities;
- Negotiate with suppliers and buyers regarding products, prices and delivery time;
- Coordinate shipping procedures;
- Negotiate quality control specifications between suppliers and the petitioner;
- Facilitate inventory, timely invoicing and payments to vendors related to sales and management to meet marketing needs;
- Coordinate file and spreadsheet management related to sales, shipments, P & L, and weekly pricing, etc.;
- Prepare quotations and coordinate the issuance of booking orders to source points and customers;
- Negotiate with foreign shipping companies for cheaper ocean freights;
- Arrange shipping details and maintain current sea freight vessel schedules and rates;
- Report to the petitioner’s approved cargo and general liability insurance vendor;

- Analyze the demand and supply position of fresh fruits, vegetables, etc., in the U.S. market and prepare annual and seasonal estimates of purchase and sales; and
- Determine quantities to be imported and negotiate with shipping companies for better rates.

The petitioner requires a minimum of a bachelor's degree in agriculture for entry into the proffered position.

The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook (Handbook)* for information about the duties and educational requirements of particular occupations. The duties of the proffered position are essentially those of sales and marketing managers discussed in the *Handbook*. The *Handbook* notes that a wide range of educational backgrounds is suitable for entry into marketing, promotions, and sales manager positions, but that many employers prefer related experience plus a broad liberal arts background. Bachelor's degrees in sociology, psychology, literature, journalism, philosophy, or other subjects are suitable. Requirements will vary, however, depending on the duties of a particular position. For example, some employers prefer a bachelor's or master's degree in business administration with an emphasis in marketing, for marketing, sales, and promotion management positions. In highly technical industries such as computer and electronics manufacturing a degree in engineering or science combined with a business degree may be preferred. The *Handbook* notes that most advertising, marketing, promotions, and sales management positions are filled by promoting experienced staff or related professional or technical personnel. Many managers are former sales representatives, purchasing agents, or promotions specialists. A baccalaureate or higher degree in a specific specialty or its equivalent is not, therefore, the minimum requirement for entry into the position. A degree in a wide range of disciplines will suffice. The petitioner has failed to establish the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

While the petitioner's previous counsel stated that the duties of the proffered position are most similar to the duties of a marketing manger,<sup>2</sup> present counsel states that they are most similar to the duties of a sales engineer. The duties detailed for the position are not similar to those of a sales engineer. The *Handbook* notes that using their engineering skills, sales engineers help customers determine which products or services provided by the sales engineer's employer best suit their needs. These occupations are frequently referred to as manufacturers' agents, sales representatives, or technical sales support workers, and often work with production, engineering, or research and development departments to determine how products and services could be designed or modified to meet the customer's needs, and advise on how to best utilize the products or services provided. Sales engineers use their technical skills to demonstrate to potential customers how and why the products or services they are selling would suit the customer better than competitors' products. These are clearly not duties related to the proffered position. As noted above, the duties to be performed by the beneficiary in the petitioner's business environment fall within those noted for marketing, sales and promotions managers.

The petitioner asserts that a degree requirement, in a specific specialty, is common to the industry in parallel positions among similar organizations. In support of this assertion the petitioner submitted copies of four job advertisements for sales coordinator positions. The advertisements submitted, however, do not establish the

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<sup>2</sup> The petitioner noted in its December 22, 2003 "Motion To Reconsider/Motion To Reopen/Brief In Support Of Appeal" that the duties of the proffered position are most similar to those of marketing managers.

petitioner's assertion as none of the advertisements are from organizations similar in nature and scope to that of the petitioner. Further, four advertisements are not sufficient in scope to determine an industry educational standard for a particular position. The evidence submitted fails to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner asserts that it normally requires a degree in a specific specialty for the offered position, but offers no evidence in support of that assertion. Simply going on the record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N 190 (Reg. Comm. 1972)). To determine whether a proffered position may be established as a specialty occupation under the third criterion – the employer normally requires a degree or its equivalent for the position – the AAO usually 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. In the instant case, the petitioner has submitted no evidence regarding its hiring practices. Accordingly, the record does not establish the proffered position as a specialty occupation under the third criterion. 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 (5<sup>th</sup> 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. 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. The petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the record does not establish that the duties to be performed by the beneficiary are so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. Nor does the record establish that the duties are so complex or unique that they can be performed only by an individual with a degree in a specific specialty. The duties appear to be routine in the industry for sales and marketing management positions in the petitioner's work environment, and are regularly performed by individuals with a wide range of education in a number of different disciplines. As stated in the *Handbook*, many of these managers hold liberal arts degrees, and others may hold degrees in business, two unrelated educational fields. The petitioner finds the beneficiary qualified for the position by virtue of his foreign degree in agriculture.<sup>3</sup> The record does not establish that the duties of the position are so unique or specialized and complex that they can only be performed by an individual with a degree in a specific educational discipline.

The petitioner also makes reference to the *O\*Net* and *Dictionary of Occupational Titles (DOT)* to establish that the offered position normally requires a baccalaureate level education. The petitioner's assertions in this

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<sup>3</sup> A credentials evaluation services determined the beneficiary's foreign degree to be equivalent to a bachelor's degree in agricultural engineering from an accredited institution of higher education in the United States.

regard are not persuasive. Neither the *DOT's* SVP rating nor a Job Zone category indicate that a particular occupation requires the attainment of a baccalaureate or higher degree, or its equivalent, in a specific specialty as a minimum for entry into the occupation. An SVP rating and Job Zone category are meant to indicate only the total number of years of vocational preparation required for a particular position. Neither classification describes how those years are to be divided among training, formal education, and experience, nor specifies the particular type of degree, if any, that a position would require. The petitioner has failed to established the referenced regulatory criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) or (4).

The petitioner has failed to establish that the offered position meets any of the criteria listed at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the AAO shall not disturb the director's denial of the petition.

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 and the appeal shall accordingly be dismissed.

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