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U.S. Citizenship  
and Immigration  
Services



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FILE: SRC 03 225 54268 Office: TEXAS SERVICE CENTER Date: JAN 05 2005

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.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition. 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 start up company that plans to sell and distribute dental alloys and light emitting diodes (LED) lighting components. It seeks to employ the beneficiary as a sales engineer. 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 the position is not a specialty occupation and the beneficiary is not qualified to perform the duties of the position. On appeal, counsel states that the proffered position is a specialty occupation and submits further documentation.

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.

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 petitioner's letter of support; (3) the director's request for additional evidence, dated August 21, 2003; (4) the petitioner's response to the director's request; (5) the director's denial letter; and (6) 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 sales engineer. The petitioner described itself as a startup company with no employees that planned to sell and distribute dental supplies, primarily gold alloys with a secondary business of selling high luminosity lighting components which was in the planning stage. The beneficiary would travel one to three weeks a month and provide technical support to customers about products. The petitioner stated that it required a candidate for the position to have work experience and an academic degree, but did not specify any particular academic degree.

The director described the duties of the position as the sales of metal alloys. The director denied the petition and referred to the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* classification of salespersons. According to the director, the *Handbook* indicated that the academic background of salespersons varied, and that most firms required a strong educational background and increasingly prefer or require a bachelor's degree, as the job requirements have become more technical and analytical. The director noted that the *Handbook* did not indicate that a baccalaureate degree in a specific specialty was required for entry into the proffered position. The director also determined that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states that the duties of the position are unique and complex, and, thus, the position is a specialty occupation. Counsel further states that the petitioner needs a salesperson who is empowered with the theoretical knowledge necessary to deal with delicate issues that arise in sales efforts. Counsel also states that the beneficiary's education in electronic and electrical engineering is highly integrative of areas such as electrical, optical, and material science. Counsel notes that the beneficiary is good at setting up computer networks, and this skill will allow him to travel and work simultaneously. The petitioner submits a letter that describes its sales philosophy, and further explains how the beneficiary's educational credentials are suitable for the position. In addition, the petitioner submits addenda to its letter that includes a brochure on SB Lucius, Inc., and articles on photonics, LEDs, and solid-state physics.

Upon review of the record, the petitioner has established none of the criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO turns first to 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; 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 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)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. While the *Handbook* clearly establishes that a sales representative position does not require a bachelor's degree in a specific specialty, it also establishes that a baccalaureate degree in engineering is required to enter the position of sales engineer. Nevertheless, the AAO concurs with the director that the proffered position is not a sales engineer, but rather a sales representative. In its response to the director's request for further evidence, the petitioner stated that its principal business will be the wholesale and retail distribution of dental supplies, in particular, gold alloys for dental labs. In addition, the agreement between the petitioner and SBLucius, Inc., states that the petitioner is responsible for the promotion of the dental alloy products. On appeal, the petitioner also describes the beneficiary's position as "salesperson." The duties of promotion and sales of metal alloys are not analogous to the duties of a sales engineer. Thus, the *Handbook* does not establish that the proffered position requires a baccalaureate degree in a specific specialty for entry into the position.

With regard to parallel positions in similar businesses, the petitioner provided no further documentation. The petitioner did not provide documentation from professional associations or individuals in the industry as to whether a baccalaureate degree in a specific specialty is required for entry into the profession. The petitioner also did not provide sufficient documentation to support the complexity or uniqueness of the proffered position. While the petitioner provided several articles on the material science, solid state physics and photonics, the complexity of such fields are not relevant to the duties of the proffered position, namely, the promotion and sales of metal alloys for dental labs. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. The petitioner stated in its petition that it needed a part-time marketing manager. The petitioner did not establish that it had ever previously employed a marketing manager. Therefore the petitioner cannot meet this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(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 of a salesperson for a startup company with one product to distribute do not appear specialized or complex. The fact that the beneficiary would contact Korean dental labs in the U.S. does not add any complexity or specialization to the job duties. Without more persuasive evidence, the petitioner has not established the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). Thus, the petitioner has failed to establish that the proffered position is a specialty occupation.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

With regard to the beneficiary's qualifications, the petitioner submitted an educational equivalency document that established the beneficiary possesses both a bachelor's and master's degree in electrical engineering from Korean universities. The document established that these degrees are the equivalent to U.S. degrees in the same disciplines from an accredited college or university. According to the *Handbook*, the beneficiary is qualified to perform the duties of a sales engineer in an electrical/electronics or related industry. However, the 2004-2005 edition of the *Handbook* also notes that a sales engineer entails work with both customers and with the production, engineering, or research and development departments of a company. These job duties are not analogous to those outlined by the petitioner in the instant petition. In addition, the record contains no evidence that the beneficiary has any sales experience. The record does document that the beneficiary has only one course at the graduate level in materials and engineering that perhaps could have provided the beneficiary with some background in metal alloys. Accordingly, the beneficiary's qualifications are not relevant to the proffered position. Thus, the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation or that the beneficiary is qualified to perform the duties of the proffered position. Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(12). The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). With regard to the instant petition, the petitioner has to establish that it is a viable business concern with viable employment for the beneficiary prior to filing the Form I-129 petition. According to the petitioner, its primary business is the distribution of metal alloys to dental labs, and its secondary business is selling LED components to clients in the interior lighting industry as well as traffic light manufacturers. The petitioner described this second business activity as in the planning stage. The petitioner provided copies of invoices for metals, as proof of its intended business activity, and a one-year agreement between itself and SB Lucius, Inc., to be the metal alloy company's exclusive sales representative. As correctly noted by the director, the only documented business activity is the petitioner's invoice of the purchase of dental alloys from SB Lucius, Inc., for the sum of \$2,837. There is no evidence in the record that the petitioner has actually sold or distributed any dental alloys. The petitioner did not submit any contracts to substantiate its projected income of \$140,000. Based on the evidence in the record, the petitioner had no viable business in operation, or bona fide position available, at the time it submitted the instant petition. The petitioner failed to establish that the beneficiary will be coming to the United States to

perform services in a specialty occupation as required by 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)(*I*). 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 with regard to whether the proffered position is a specialty occupation and whether the beneficiary is qualified to perform the duties of the position.

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