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U.S. Citizenship
and Immigration
Services

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FILE: WAC 03 222 50267

Office: CALIFORNIA SERVICE CENTER

Date: FEB 04 2005

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, Director
Administrative Appeals Office

DISCUSSION: The 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 is a four-person, high-tech business-consulting firm established in 2001 that seeks to employ the beneficiary as a director of advertising and new business development for three years. It is thus endeavoring to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to §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 determined the petitioner had not established the proffered position as a specialty occupation. On appeal, counsel counters that the proffered position is a specialty occupation and that the director based his decision on grounds that he contends are wrong because they ignore a federal district court precedent and were not raised in the director's request for evidence.

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), provides in part for nonimmigrant classification to qualified 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 "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and 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.

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.

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 director related to the proffered position.

In reaching its determination on the appeal, the AAO considered the entire record of proceeding, which contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) counsel's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, annotated with reasons for the appeal, and the documents accompanying it.

The petitioner's July 24, 2003 petition support letter lists some of the job duties of the proffered position as follows:

1. Identifying existing data on business activity and new markets;
2. Performing forecasting and planning based on market data;
3. Revising faulty marketing plans;
4. Developing advertising strategies for new and existing markets;
5. Identifying new business opportunities;
6. Writing ad and business proposals to clients;
7. Managing existing relationships with media and vendors;
8. Executing business strategies to earn revenue;
9. Monitoring daily progress in product development; and,
10. Planning and directing development of communications to ensure that the public is informed of the company's programs and accomplishments.

On appeal, counsel first argues that the director denied the petition on grounds not raised in his request for evidence, to wit, requiring the petitioner to satisfy one of the four criteria set forth in 8 C.F.R. §214.2(h)(4)(iii)(A). The director is required to send a request for evidence when initial evidence or eligibility information is missing. 8 C.F.R. §103.2(b)(8). The petitioner's initial submission contained evidence of eligibility for a specialty occupation, although it did not fully establish eligibility. Thus, the director's discretionary decision not to request further evidence of eligibility for a specialty occupation was in compliance with 8 C.F.R. §103.2(b)(8). See U.S. Citizenship and Immigration Services, Interoffice Memorandum, William R. Yates, "Requests for Evidence" (May 4, 2004).

The petitioner has failed to establish that any of the four criteria enumerated above are present in this proceeding.

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; 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 Department of Labor's (DOL) *Occupational Outlook Handbook (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. Minn. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

Counsel asserts that the proffered position is a specialty occupation based upon the petitioner's support letter requiring a bachelor's degree in marketing or a related field; seven job ads for marketing manager requiring at least a four-year bachelor's degree; and a prior AAO decision determining a marketing manager position met the H-1B requirements for an H-1B specialty occupation.

The AAO notes that the petitioner's July 24, 2003 letter listing some of the minimum requirements for entry included a bachelor's degree in business administration, "substantial experience" in international trade, and that the candidate "must bring established contacts with international vendors and potential clients."

In these proceedings, the duties of the position are dispositive and not the job title. The proffered position appears to combine the duties of a public relations manager with those of a marketing and advertising manager. The *Handbook* finds no requirement of a baccalaureate or higher degree in a specialized area for employment in positions of public relations, marketing or advertising manager. A wide range of educational backgrounds is considered suitable for entry into public relations, marketing and advertising managerial positions. Some employers prefer a bachelor's or master's degree in public relations or journalism, but bachelor's degrees in various liberal arts fields are also acceptable. In addition, certain personal qualities and participation in in-house training programs are often considered as significant as the beneficiary's specific educational background.

A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close corollary between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration or liberal arts, without further specification, does not establish the position as a specialty occupation. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988).

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) provides that a petitioner must establish that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. Because the *Handbook* reports that only some of the employers prefer, but do not require, a bachelor's degree in a specific specialty as the normal minimum requirement for entry into marketing and sales manager jobs, the petitioner fails to establish the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The submitted job postings and letter and counsel's statement on appeal fail to establish the second criterion – that a specific degree requirement is common to the industry in parallel positions among similar organizations. The postings are inadequate because they require a candidate to possess a bachelor's degree, but they do not require a specific specialty.

Further, no evidence establishes that the proffered position is so complex or unique that only an individual with a degree in a specific specialty can perform it. 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Based upon the job duties of the proffered position, the record contains no evidence showing that the high-tech business-consulting firm presents the beneficiary with problems so complex or unique as to require someone with a bachelor's degree or higher or the equivalent in a specific specialty.

Counsel states that the petitioner now requires a specific bachelor's degree for the proffered position. This does not establish a past practice of normally requiring a bachelor's degree or its equivalent in a specific specialty, however. The petitioner thus cannot establish the third criterion. 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The fourth criterion requires that the petitioner establish that the nature of the specific duties 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 in a specific specialty. 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The beneficiary's proposed duties are not "highly specialized activities" in marketing or sales. In fact, they do not rise above the duties performed by sales and marketing managers as described in the *Handbook*. Once again, the *Handbook* reports that employers do not require a bachelor's degree in a specific specialty for marketing and sales management positions. Consequently, the petitioner fails to establish the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In his brief, counsel cites various non-precedent decisions in support of the petition. While 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Counsel further cites *Tapis International v. I.N.S.*, 94 F. Supp. 2d 172 (D. Mass., 2000), which examined the need for CIS' agency predecessor, the legacy Immigration and Naturalization Service, to weigh specialized work experience of an applicant under the "equivalent" language of 8 C.F.R. § 214.2(h)(4)(iii)(A) and the statutory counterpart. *Tapis* held that CIS should consider a position as a specialty occupation even though a petitioner requires a business administration degree with an emphasis in marketing or advertising. The marketing manager position, as set forth in the job duties, falls short of meeting the requirements of a specialty occupation.

In view of the foregoing, it is concluded that the petitioner has not demonstrated that the proffered position is a specialty occupation within the meaning of the regulations.

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.