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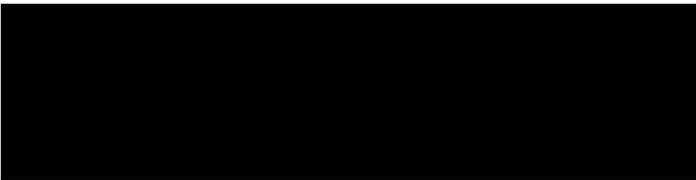
FILE: WAC 04 206 51639 Office: CALIFORNIA SERVICE CENTER Date: FEB 23

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 director of the 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 sustained. The petition will be approved.

The petitioner is a spam firewall software and hardware manufacturer that seeks to employ the beneficiary as an international sales manager and to classify her 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 his determination that the petitioner had failed to establish that its proposed position was a specialty occupation. On appeal, counsel submits a brief and additional evidence.

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 one 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” to mean not just any bachelor’s or higher degree, but one in a specific specialty that is directly related to the proposed position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation including evidence that the beneficiary has maintained lawful status, the petitioner’s employer support letter, the beneficiary’s educational credentials, an approved labor condition application (LCA), and information regarding the petitioner’s viability; (2) the director’s denial letter; and (3) Form I-290B, with counsel’s brief and new documentation including literature reflecting the petitioner’s presence in the international spam market, a second employer support letter from the petitioner, the excerpt from the *Dictionary of Occupational Titles(DOT)* for a sales manager, letters from the beneficiary’s previous employers, and a letter from an economics professor at the Whitworth College School of Global Commerce and Management. The AAO reviewed the record in its entirety before reaching its decision.

The petitioner states that it is seeking the beneficiary's services as an international sales manager. Evidence of the beneficiary's duties includes: the Form I-129; a July 13, 2004 letter of support from the petitioner; and a November 10, 2004 letter of support from the employer.

At the time of filing, the petitioner stated that the beneficiary's duties would entail managing all sales activity for the petitioner in Florida, South America and select European countries; analyzing relevant sales and market statistics to formulate effective sales policies and procedure and assisting dealers in promoting sales of the petitioner's line of products; conducting market analyses and reviewing sales data to determine customer demand of the petitioner's product and the sale volume potential; developing the sales and promotional campaigns that meet the petitioner's projected sales goals, representing the petitioner at trade association meetings, promoting the petitioner's product line through interfacing directly with decision makers of small and large business as well as potential distributors for the petitioner's system; making financial expenditure recommendations and submitting budgets to appropriate funding for research and development work of the petitioner's product line based on her knowledge of the technical capabilities of the petitioner's products and her analysis of the needs of the market place. The petitioner stated the candidate must have a bachelor's degree in international business or a related field.

In his denial, the director agreed with the petitioner that the proposed duties were those of a sales manager but found that the petitioner had not submitted sufficient documentation to establish that the proposed position was a specialty occupation.

On appeal, counsel contends that the director should have issued an RFE if he was not satisfied with the documentation submitted with the initial petition and that the position is a specialty occupation due to the global nature of the petitioner's business and the resulting complexity of the proposed duties. The petitioner offers the following elaboration of the proposed duties: managing and directing the petitioner's sales force to achieve sales and profit goals outside of the United States; profiling and recommending sales and marketing strategies and setting short and long term sales goals utilizing international business practices in regards to economic, social, political, and cultural factors characteristic of the different countries and regions the petitioner serves; anticipating agreements pertaining to customs and elicitation according to NAFTA, EU and the Latin American Common Markets; working with marketing personnel to develop international reseller marketing collateral and sales plans through research and analysis of market conditions and opportunities in specific countries; accurately designing sales initiatives for maximum profitability using knowledge of international market differences, such as price volatility due to exchange rates and unique customs and country specific attitudes; advising the petitioner's dealers, distributors, and clients concerning sales and advertising strategies for the petitioner's products in the global spam firewall networking market; analyzing relevant sales and market statistics using international business techniques to formulate effective sales policies and procedures to better assist foreign distributors in promoting the petitioner's products; reviewing existing sales data to determine projected international customer demand and sales volume potential for all the petitioner's products; analyzing sales and production numbers; identifying new market opportunities; advising dealers, distributors, and clients concerning sales and advertising strategies concerning the sale of the petitioner's products in those markets. The petitioner contends that its domestic sales manager position would only require an individual with a bachelor's degree in business or marketing but that its international sales manager requires a specific degree in international trade. The petitioner contends that the duties of its proposed position are so specialized that they require the specific knowledge usually associated with at least a bachelor's degree in international trade. To support these assertions, the petitioner submits a more detailed description of the proposed duties, a letter from an economics professor at the Whitworth College School of Global Commerce and Management, letters from two of the beneficiary's previous employers, and literature relating to the business the petitioner does all over the world.

The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook (Handbook)* for its information about the duties and educational requirements of particular occupations. Based on the entire record of proceeding, the AAO finds that the proposed position is a dual position – that of a marketing manager/sales manager. The AAO agrees with the director and the petitioner that the duties resemble those of a sales manager but also finds that the position includes the essential duties of a marketing manager. According to the *Handbook*, marketing managers develop the firm's detailed marketing strategy. With the help of subordinates, marketing managers determine the demand for products and services offered by the firm and its competitors. In addition, they identify potential markets. According to the *Handbook*, marketing managers develop pricing strategy with an eye towards maximizing the firm's share of the market and its profits while ensuring that the firm's customers are satisfied. This is similar to the proposed position in that the duties include profiling and recommending marketing strategies, working with marketing personnel to develop international reseller marketing collateral, and identifying new market opportunities. According to the *Handbook*, sales managers direct the firm's sales program. They maintain contact with dealers and distributors, analyze sales statistics to determine sales potential and inventory requirements and monitor the preferences of customers. This is similar to the proposed position in that the duties include, among others, advising dealers, distributors, and clients on sales and advertising strategies concerning the sale of the petitioner's products in foreign markets; and conducting market analyses and reviewing sales data to determine customer demand of the petitioner's product and the sales volume potential.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title. To determine whether or not the position requires the theoretical and practical application of a body of highly specialized knowledge, CIS considers the specific duties of the proposed position, combined with the nature of the petitioning entity's business operations.

The AAO first turns to the criteria at 8 C.F.R. 214.2(h)(4)(iii)(A)(I) - a bachelor's or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. To determine whether or not this criterion has been established, the AAO turns to the *Handbook's* discussion of the educational requirements for particular occupations. With respect to the educational qualifications required of marketing and sales managers, the *Handbook* states:

A wide range of educational backgrounds is suitable for entry into advertising, marketing, promotions, public relations, and sales managerial jobs, but many employers prefer those with experience in related occupations plus a broad liberal arts background. For marketing, sales and promotions management positions, some employers prefer a bachelor's or master's degree in business administration with an emphasis on marketing.

The *Handbook* indicates that jobs in these fields do not require a specific bachelor's degree for entry into these fields. Employers consider those with liberal arts degrees and relevant work experience suitable for jobs in this area. As employers prefer, but do not require, marketing and sales managers to possess bachelor's degrees in specific fields of study, the petitioner fails to establish that a bachelor's or higher degree, in a specific field of study, is the normal minimum requirement for entry into marketing and sales manager positions under 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

The AAO turns next to the first alternative prong of the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) - that a specific degree requirement is common to the industry in parallel positions among similar organizations. To determine if a position is a specialty occupation under this criterion, CIS generally considers whether or not letters or affidavits from companies or individuals in the industry attest that such companies "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)). There is no evidence in the record to establish this criterion. Therefore, the proposed position does not qualify as a specialty occupation under the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO now turns to the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) – the employer normally requires at least a bachelor’s degree or its equivalent, in a specific field of study, for the position. To determine whether a petitioner has established this criterion, the AAO generally reviews the petitioner’s past employment practices, including the histories of those employees who previously held the position, as well as their names, dates of employment, and copies of their diplomas. In the instant case, the petitioner states that the position is newly created to allow the petitioner to expand into new markets. The petitioner is therefore unable to provide evidence to establish its normal hiring practices for the proposed position. In the absence of an employment history for the proposed position, the petitioner fails to establish that the position qualifies as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO turns to the criteria related to the complexity, uniqueness, or specialized nature of the proposed position – the second alternative prong of the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2)) and the fourth criterion, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) 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. The evidentiary record establishes that the beneficiary’s specific duties are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor’s or higher degree in international business or trade.

Various documents in the evidence of record indicate that the proposed position is more complex than the usual range of marketing or sales manager positions, which the *Handbook* indicates may be performed by persons without bachelor’s degrees in international business or any related specialty. The petitioner has documented the fact that it has 35 employees, it is a \$9.5 million company, and that it expanded globally in 2004 to distribute its computer software and hardware in Europe, Asia, and Latin America.

The evidentiary record reveals that the beneficiary must possess critical theoretical knowledge of international business practices and concepts commonly gained through the completion of a bachelor’s program in international business or trade. The knowledge to perform the duties of the position is usually associated with the attainment of a bachelor’s or higher degree in international business. As they are described in the record, the knowledge to perform the duties of the proposed position is usually associated with the attainment of a bachelor’s or higher degree in international business or a related field.

Thus, the petitioner has established that the proposed position is a specialty occupation.

The AAO notes that the beneficiary is qualified to perform the duties of the proposed position: she holds a bachelor of arts in international business from Whitworth College located in California.

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 sustained that burden.

ORDER: The appeal is sustained. The petition is approved.