

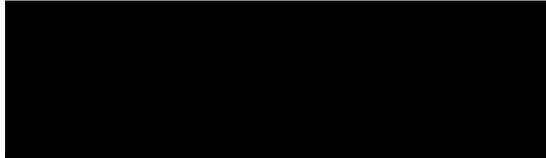
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U.S. Citizenship
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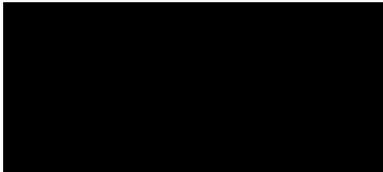
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FILE: WAC 04 044 50383 Office: CALIFORNIA SERVICE CENTER Date: JAN 11 2006

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 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 dismissed. The petition will be denied.

The petitioner provides software development and consultancy, with 10 employees. It seeks to employ the beneficiary as an account manager. The director denied the petition based on his determination that the petitioner had failed to establish that its proffered position was a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) counsel's response to the director's request for evidence; (3) the director's denial letter; and (4) Form I-290B, with counsel's brief and new and previously submitted documentation. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, a petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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.

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 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.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. 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 (5th Cir. 2000). The critical element is not the title of the position nor 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.

The petitioner states that it is seeking the beneficiary’s services as an account manager. Evidence of the beneficiary’s duties includes: the Form I-129; a letter of support from the petitioner; and counsel’s response to the director’s request for evidence.

At the time of filing, the petitioner stated that the beneficiary’s duties entail studying the market (15% of time); negotiating the appropriate projects meeting the skills of IT professionals (20% of time); marketing the software services to end user companies (20% of time); meeting clients and studying their needs (10% of time); coming up with strategies to solve clients' needs using IT services (15% of time); coordinating between clients and software development teams for successful project execution (10% of time); participating in the development of partnerships/collaborative efforts with the customer that will enhance the desired objectives of project initiatives; developing internet product services offerings with database and intensive products; providing client management and serving as liaison between software team and client (10% of time). The petitioner indicated that the position required a master’s degree in business administration, management or engineering and experience in a related position in management, business development and marketing and a technical field.

The director requested additional information about the proffered position, including specific job duties, the percentage of time to be spent on each duty, and level of responsibility. The director requested a copy of the petitioner’s organizational chart. Additionally, the director requested evidence that the position meets one of the above listed criteria. The director requested information about the petitioner such as copies of quarterly wage reports, business license, federal income tax returns, and a company profile.

In response, counsel provided the above listed percentage of time for the various duties of the proffered position. Counsel asserted that the proffered position meets all of the above listed criteria. Counsel contended that an account manager is a professional position in the IT industry. The petitioner provided information about the services and products it provides. The petitioner provided a copy of its lease agreement. The petitioner provided an organizational chart which indicated the position of president and CEO and VP of sales and [illegible]. An additional position included an accountant. The third position listed is a project manager who is indicated as managing the programmers and systems analysts. The last position is that of the account manager who appears to manage the sales and marketing associates. The petitioner provided a list of employees which did not include the title of accountant or project manager. The petitioner indicated that it previously petitioned for an H-1B for an account manager which was approved and explained that the beneficiary of the approved petition did not join the petitioner and the position remains open. The petitioner provided one internet job posting for an account manager. The petitioner provided four quarterly

tax returns with quarters ending March 31, 2004 and December 31, 2003 which included the beneficiary. The quarterly wage reports indicated between 4 and 8 employees. The petitioner provide its Form 1120 Corporate Income Tax Return indicating \$342,646 in gross receipts or sales and \$236,147 in salaries and wages.

The director denied the petition because he determined that the proffered position was similar to that of a marketing manager as described in the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) under the title Advertising, Marketing, Promotions, Public Relations, and Sales Managers. The director referred to the *Handbook* as revealing that a wide range of educational backgrounds is suitable for entry into the position of marketing manager. The director noted that the petitioner submitted one job listing but that one listing was not sufficient evidence of a degree requirement being common to the industry. The director found that the petitioner did not establish that it normally requires a degree for the position. Additionally, the director determined that the record contained insufficient information to establish the specialized and complex nature of the proffered position.

On appeal, counsel asserts that the nature of the proffered position is specialized and complex and that the director did not review the entire job description. Counsel refers to the response to the request for evidence as noting that the incumbent in the position needs to "study the market for the needs of particular skill and to make sure the consultants have the required skills requirement in demand [sic]." Counsel highlights that the incumbent will coordinate the technical interviews, training and placement. Counsel asserts that the job duties of the proffered position are so complex that the degree in management or a related field is required. Counsel asserts that it is not a marketing manager position but one of a marketing and management analyst. Counsel refers to the educational requirements listed in the *Handbook* for the position of management analysts as indicating that most employers in private industry generally seek individuals with a master's degree in business administration or a related discipline. Counsel also refers to the duties ascribed to a market research analyst and notes that the *Handbook* indicates that a master's degree is the minimum requirement.

On appeal, counsel augments the position description and indicates that the duties include: establishing research methodology and designing format for data gathering; identifying, examining and analyzing statistical data; forecasting market trends. However, counsel appears to have altered the position description on appeal to encompass duties attributed to a market research analyst. 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). Citizenship and Immigration Services 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 was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner did not submit this position description in response to the director's request for evidence and now submits it on appeal. However, the Administrative Appeals Office will not consider this evidence for any purpose. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director. Therefore, the AAO will only review the description submitted in the initial petition and in response to the director's request.

Based on the record of proceeding, the AAO has determined that the proffered position is not a market research analyst and is most similar to that of a marketing manager in the *Handbook*. 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 proffered position in that the duties include, among others, studying the market (15% of time); and marketing the software services to end user companies (20% of time). Although counsel asserts on appeal that "the employer is not in the business of selling products, they don't need sales representatives or marketing managers" the AAO notes that the petitioner's organizational chart indicates that its sales and marketing associate positions are listed under the purview of the account manager.

With respect to the educational qualifications required of marketing 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.

Consequently, there is insufficient evidence in the record to establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the marketing manager position. Therefore, the petitioner has not satisfied the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

To establish the first alternative prong of the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations - counsel relies on one submitted internet job posting for an account manager. The posting does not indicate that a degree in a specific specialty is required. Consequently, the posting fails to establish that there is a specific baccalaureate degree that is a common industry-wide requirement.

The petitioner has also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not establish that the particular position proffered here is so complex or unique that it can be performed only by a person with at least a baccalaureate degree in a specific specialty.

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a specific degree or its equivalent for the position. The petitioner submits a letter as evidence of its hiring history indicating that it hired an account manager under an H-1B petition who did not join the company in 2002. The petitioner has been in business since 1998 and did not submit any evidence of its hiring history for the position before 2002. The employee who was to have joined the petitioner did not enter on duty, thus the petitioner has not established a hiring history for the position of account manager. Further, the petitioner did not submit any corroborating evidence such as a copy of the degree or proof of employment of the previous hires. Going on 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 Dec. 190 (Reg. Comm. 1972)).

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. To the extent they are described in the record, the duties of the position are not so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. The duties of the proffered position are typical of a marketing manager. The petitioner has not established that the duties to be performed

for its business, an IT consulting company, are so complex as to require a degree in a specific specialty. Additionally, the information the petitioner provided stated that it provides permanent and contract staffing for health care professionals and has not described how the beneficiary in the proffered position will perform account manager duties in this non-IT employment area. The duties parallel those in the *Handbook* for a marketing manager, an occupation that does not require a specific baccalaureate degree. The petitioner therefore fails to establish the fourth criterion.

Therefore, for the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position is a specialty occupation. 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.

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