



U.S. Citizenship
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Services

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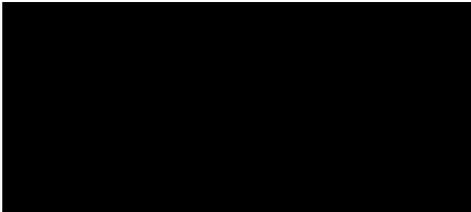
FILE: LIN 04 094 52431 Office: NEBRASKA SERVICE CENTER Date: JAN 27 2008

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, Director
Administrative Appeals Office

DISCUSSION: The director of 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 an importer, wholesaler, and retailer of Oriental rugs. It seeks to employ the beneficiary as a marketing representative. 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 on the ground that the proffered position is not a specialty occupation. On appeal, counsel submits a brief and additional evidence.

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 director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the

director's denial letter; and (5) 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 marketing representative. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the petitioner's support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail developing and upgrading marketing strategies that will expand and maximize the target market; analyzing the sales team and the rug maintenance department to recommend strategies for increasing productivity and sales; determining the marketing and advertising resources; developing business plans; evaluating area profiles; conducting direct mail to those areas deemed most beneficial; strategizing and coordinating advertising and promotional events and designing flyers, brochures, websites, and other promotional tools; having responsibility for sales presentations, presentations to company staff, and for educational/informative presentations via television, radio, and newspapers; gathering a database of potential wholesale clients such as interior designers, furniture stores, interior designer suppliers, and rug retailers; serving as the representative in arranging appointments with clients for the sales team; and managing the upkeep of established accounts. Counsel's June 29, 2004 letter elaborated on the proposed duties. For the proposed position, the petitioner requires a bachelor's degree, or its equivalent, in marketing or a related field and two years of experience.

The director was not persuaded that the proposed position resembles a market research analyst, as that occupation is described in the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*, as the director stated that the petitioner is not in the type of industry that normally needs a market research analyst. The director found that the proposed position resembles managerial positions in marketing, advertising, and promotions, and stated that the *Handbook* reports that those occupations do not require a baccalaureate degree in a specific specialty. The director concluded that the petitioner failed to establish any of the criteria under 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states that the director failed to properly consider the evidence and that the denial is unreasonable and unsupported. Counsel cites *Young China Daily vs. Chappell*, 742 F. Supp. 552 (N.D. Cal. 1989), and asserts that the case indicates that the size of an employer and the employer's past employment practices bear no relevance to the need for a professional and that it is the duties to be performed that matter. Counsel states that the court discussed the applicability of the *Dictionary of Occupational Titles (DOT)*. Counsel states that in earlier correspondence the petitioner stated that in performing the proposed duties the beneficiary "will utilize traditional methods of market research analysis through person-to-person surveys, telephone surveys, and consumer satisfaction surveys." Counsel also states that "we learned through analysis of survey data, that we could increase profitability by offering maintenance and cleaning of our rugs and thus, we have implemented an advertising campaign targeting these customers;" and that the beneficiary will "rely on principles of public relations campaigning, marketing programs, consumer behavior, and promotion management." According to counsel, the director concluded that the petitioner does not need a market research analyst on the ground that it is a small Oriental rug company. Counsel asserts that the director misinterprets the *Handbook* as it indicates that most industries, regardless of size, employ market researchers. Counsel emphasizes that the petitioner needs a market research analyst to expand its products, services, and

market share. Counsel states that the petitioner's past hiring practices are not relevant in determining whether the proposed duties require a bachelor's degree in a specific specialty. According to counsel, because the *Handbook* reveals that the proposed position resembles a market research analyst, the proposed position requires a baccalaureate degree in a specific specialty. Counsel states that assuming that the proposed position resembles a marketing, advertising, and promotions manager, then it qualifies as a specialty occupation based on the *Handbook's* information about the educational requirements of those occupations.

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

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 *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. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

In determining whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations.

In the denial letter, the director questioned the petitioner's need for a market research analyst. The AAO does not agree with the director's conclusions regarding the industries in need of market research analysts. Based on the discussion of the occupation in the 2004-2005 edition of the *Handbook*, it indicates that such analysts may reasonably be found in virtually every industry and business seeking to enhance the sales of its products and/or services. However, the AAO does share the director's concerns regarding the employment that has been described by the petitioner.

The *Handbook* states the following with regard to the employment of marketing research analysts:

Market, or marketing, research analysts are concerned with the potential sales of a product or service. Gathering statistical data on competitors and examining prices, sales, and methods of marketing and distribution, they analyze data on past sales to predict future sales. Market research analysts devise methods and procedures for obtaining the data they need. Often, they design telephone, mail, or Internet surveys to assess consumer preferences. They conduct some surveys as personal interviews, going door-to-door, leading focus group discussions, or

setting up booths in public places such as shopping malls. Trained interviewers usually conduct the surveys under the market research analyst's direction.

After compiling and evaluating the data, market research analysts make recommendations to their client or employer on the basis of their findings. They provide a company's management with information needed to make decisions on the promotion, distribution, design, and pricing of products or services. The information also may be used to determine the advisability of adding new lines of merchandise, opening new branches, or otherwise diversifying the company's operations. Market research analysts also might develop advertising brochures and commercials, sales plans, and product promotions such as rebates and giveaways.

At the time of filing, the petitioner's description of the proposed duties corresponded to those of managerial positions in marketing, advertising, promotions, and sales. In response to the director's request for evidence, counsel's June 29, 2004 letter stated that the proposed position resembles a market research analyst and that the beneficiary:

[W]ill utilize traditional methods of market research analysis through person-to-person surveys, telephone surveys, and consumer satisfaction surveys. Marketing surveys are proven to be an effective way to better understand a consumer base including consumer needs and consumer behaviors. With data collected from such surveys, we can identify which areas of our business we must improve to reach varied targeted market areas.

The evidence in the record does not support counsel's analogy of the proposed position to a market research analyst or her assertion that the beneficiary will perform the duties described in the above passage. In the February 9, 2004 letter the petitioner indicates that the beneficiary will "conduct direct mail to those areas she deems most beneficial." Although the duty to "conduct direct mail" lacks specificity, it does not seem to pertain to the duties described in the June 29, 2004 letter, which was furnished in response to the request for evidence. 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). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary is a specialty occupation. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The AAO finds that the introduction of these duties in response to the request for evidence significantly change the job description depicted in the February 9, 2004 letter that was offered at the time of filing. As such, the AAO will not consider these job duties in this proceeding. In addition, the assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO agrees with the director's conclusion that the proposed duties are a combination of those of marketing, advertising, and promotions managers. Some of the duties also reflect those of a sales manager.

The *Handbook* describes a marketing manager as one who determines the demand for products and services; identifies potential markets such as business firms or the general public; develops a 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; monitors trends that indicate the need for new services and oversees product development; and works with advertising and promotions managers to promote a firm's products and services. Similar to these duties, the beneficiary will work on marketing strategies; determine the resources that should be used for marketing and advertising; evaluate area profiles; and gather a database of potential wholesale clients. The *Handbook* depicts advertising and promotions managers as handling advertising and promotions. These duties correspond to the beneficiary's duties of conducting direct mail to those areas deemed most beneficial; strategizing and coordinating advertising and promotional events; and designing flyers, brochures, websites and other promotional tools. According to the *Handbook*, sales managers direct a sales program such as advising the sales representatives on ways to improve their sales performance, maintaining contact with dealers and distributors, setting goals, and establishing training programs for sales representatives. Similar to this, the beneficiary will be responsible for sales presentations, presentations to company staff, and for educational/informative presentations via television, radio, and newspapers; will serve as the representative in arranging appointments with clients for the sales team; and will manage accounts once established.

With respect to the educational requirements of these occupations, the *Handbook* explains:

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.

The *Handbook* reports that 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"; and for "advertising management positions, some employers prefer a bachelor's degree in advertising or journalism." The *Handbook*, therefore, reveals that employers do not require a baccalaureate degree in a specific specialty for managerial positions in marketing, sales, promotions, and advertising. As such, the AAO disagrees with counsel's assertion that the *Handbook* indicates that a bachelor's degree is required for marketing, advertising, and promotions managers.

Based on the evidence in the record, the petitioner fails to establish the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the particular position.

The petitioner submits no evidence to establish the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) - that a specific degree requirement is common to the industry in parallel positions among similar organizations.

The petitioner has not established the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) as no evidence in the record shows the proffered position is so complex or unique that it can be performed only by an individual with a baccalaureate degree in a specific specialty. As already discussed, the proposed duties

are a combination of those of managerial positions in marketing, sales, promotions, and advertising; and the *Handbook* explains that those occupations do not require a baccalaureate degree in a specific specialty. Consequently, the petitioner fails to establish the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

No evidence in the record establishes the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3): that the petitioner normally requires a degree or its equivalent for the position.

To satisfy the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) the petitioner must establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. The record reflects that the proposed duties are a combination of those of managerial positions in marketing, sales, promotions, and advertising, which are occupations that the *Handbook* explains do not require a baccalaureate degree in a specific specialty. Thus, the petitioner fails to establish this last criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.