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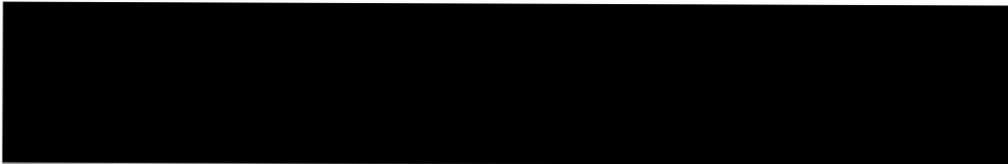
FILE: EAC 05 163 52725 Office: VERMONT SERVICE CENTER Date:

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.

for *Michael P. Kelly*
Robert P. Wiemann, Chief
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 email marketing and customer intelligence solutions firm. It seeks to employ the beneficiary as an account manager. 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 based on his determination that the record failed to establish the proffered position as 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; (4) the director's denial letter; and (5) Form I-290B, with counsel's brief. 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, the 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 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.

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) consistently 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 seeks the beneficiary’s services as an account manager. Evidence of the beneficiary’s duties includes: the Form I-129; the petitioner’s April 27, 2005 cover letter in support of the petition; and counsel’s August 5, 2005 response to the director’s request for evidence. As stated by the petitioner’s director of human resources in the petitioner’s April 27, 2005 cover letter, the proposed duties are as follows:

- Applying critical knowledge of psychology principles in order to understand customers’ buying habits; using this information to help clients; using this information to help clients develop marketing strategies;
- Targeting specific demographics as potential customers to guide clients in identifying, capturing, and retaining customers;
- Understanding the customer mind set to draft marketing emails for clients to send to potential customers;
- Utilizing psychology background and knowledge of human behavior to help clients build and improve their email marketing strategies;

- Participating in public relations activities such as setting up, testing, and deploying clients' email marketing campaigns using our proprietary, web-based application;
- Interacting with clients on a daily basis, including training them in the use of the application and helping them interpret the results of their campaigns; and
- Ensuring that client issues are resolved or escalated to the appropriate individuals.

In his denial, the director found that the petitioner had not established that the proffered position requires a bachelor's degree in a specific specialty. The director found further 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, in part, that the petitioner has demonstrated that the proffered position meets all four criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). Counsel states further that the proffered position is equivalent to the position of "Industrial-Organizational Psychologists" from the Department of Labor's (DOL) *O*Net*, a position for which individuals with a degree in psychology are frequently employed. Counsel also states that the record of evidence includes job postings and expert opinions as supporting documentation.

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

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The AAO does not concur with counsel that the proffered position is a specialty occupation. The AAO also does not concur with counsel that the proffered position is equivalent to the position of industrial-organizational psychologist, a position that requires a master's degree in psychology according to the *Handbook*, 2006-07 edition, under the category of psychologists. In this case, the beneficiary holds a U.S. Bachelor of Arts degree in psychology. The proffered position in this case is that of an account manager, which falls under the DOL's category of advertising, marketing, promotions, public relations, and sales managers. No evidence in the *Handbook*, 2006-07 edition, under the category of Advertising,

Marketing, Promotions, Public Relations, and Sales Managers, indicates that a baccalaureate or higher degree in a specific specialty, or its equivalent, is required for an account manager job.

The record contains an evaluation from a university professor, who asserts that a bachelor's degree in psychology or a related field is relevant and necessary for the proffered account manager position. The opinion rendered by the professor, however, is not probative. Despite his self-endorsement, neither the professor's letter, his resume, nor any other evidence of record substantiates that he is qualified as an expert on industry-wide recruiting and hiring practices regarding account managers. Further, the professor does not provide any evidence in support of his assertion or rely on industry surveys, data or other documentation to reach the conclusion that the position requires a degree in management. The *Handbook* is a compilation of results of nationwide industry questionnaires, surveys and personal interviews by the Department of Labor, and indicates that there is no specific degree requirement for entry into the field. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

The record also contains letters from three professors of the beneficiary's alma mater, Ohio Wesleyan University, who assert, in part, that the beneficiary's field of study in psychology is relevant to the proffered position. The professors' observations are noted. They, however, do not argue or demonstrate that the proffered position requires a bachelor's degree in psychology.

Regarding parallel positions in the petitioner's industry, counsel submits Internet job postings for account managers. There is no evidence, however, to show that the employers issuing those postings require a bachelor's degree in a specific specialty. Thus, the advertisements are not probative.

For the reasons discussed above, the petitioner has not satisfied any of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (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. On appeal, counsel asserts that the petitioner normally requires that its account managers have at least a bachelor's degree. Counsel asserts further that, although the petitioner accepts bachelor's degrees from various specialty fields for its account manager position, the position still qualifies as a specialty occupation because “the position is multi-faceted and the degree required for the particular position varies depending on the client assignment and specific marketing strategy.” A review of the educational backgrounds of the petitioner's account managers, which include fields such as English, Spanish, creative writing, and a variety of others, reflects that the petitioner does not require a degree in a specific specialty for the proffered position. Counsel's assertion that the position still qualifies as a specialty occupation is noted. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

CIS must examine the ultimate employment of the alien and determine whether the position qualifies as a specialty occupation, regardless of the petitioner's past hiring practices. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position or 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. To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

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.

On appeal, counsel states, in part, that the letter from the petitioner's director of client services "establishes the significance of [the beneficiary's] education in preparing her for the complex duties of the [proffered position] . . ." The information in the record about the proposed duties does not establish that they exceed in scope, specialization, or complexity those usually performed by account managers/advertising, marketing, promotions, public relations, and sales managers, an occupational category for which the *Handbook* indicates no requirement for or usual association with a baccalaureate or higher degree in a specific specialty. Also, in regard to the proposed duties that relate specifically to "the qualitative and quantitative study of how people think and behave," as discussed in the letter from the petitioner's director of client services, the petitioner has not demonstrated that these activities elevate the complexity of the proffered position to require a bachelor's degree in a specific specialty. To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petitioner indicates that it is a wholly owned subsidiary of Experian, with 13,000 employees and \$1.5 billion gross annual income. The record, however, does not demonstrate that the marketing and account management duties will be performed for Experian. While the size of a company is not a factor in determining whether or not a position is a specialty occupation, the complexity of the duties in relation to the petitioner's business must be analyzed. The record, as presently constituted, does not sufficiently describe the duties in relation to the business of Cheetamail to allow the AAO to determine whether the complexity of the duties requires a baccalaureate degree in the specialty. 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)).

As related in the discussion above, 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.