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U.S. Citizenship
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Services

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FILE: EAC 06 162 52045 Office: VERMONT SERVICE CENTER

Date: **JAN 25 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:

SELF-REPRESENTED

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska 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 grocery merchant wholesaler established in 1999. It claims to have six employees and \$1,890,000 in gross annual income. It seeks to employ the beneficiary as a sales and distribution manager. Accordingly, the petitioner 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).

On March 27, 2007, the director denied the petition determining that the record did not establish that the proffered position is a specialty occupation. On appeal, the petitioner asserts that the director improperly reviewed the evidence submitted and that the proffered position is a specialty occupation requiring a bachelor's degree. The issue in this matter is whether the petitioner has established that the proffered position is a specialty occupation.

The record contains: (1) the Form I-129 filed May 3, 2006 and supporting documentation; (2) the director's October 16, 2006 request for evidence (RFE); (3) the petitioner's December 4, 2006 response to the director's RFE; (4) the director's March 27, 2007 denial decision; and, (5) the Form I-290B and the petitioner's brief in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

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) 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.

On the Form I-129, the petitioner stated that the proffered position is that of a "sales and distribution manager." In the petitioner's April 26, 2006 letter appended to the petition, the petitioner provided the following job description of the proffered position:

Provide aggressive marketing/promotion/sales and distribution of general line groceries to our customers; develop marketing strategies; negotiate agreements with Eastern European countries; create and implement sales training program for sales representative [sic] and resolve customer complaints regarding sales and services with application of the principal of social psychology.

The petitioner also included a summary report for sales managers issued by the Department of Labor's *O*NET Online (O*NET)* and asserted that the Department of Labor's *Dictionary of Occupational Titles (DOT)* indicates that the position of a sales and distribution manager required a minimum of a bachelor's or higher degree plus two years of experience.

In a December 4, 2006 response to the director's RFE, the petitioner repeated the job description previously provided and again referenced the *O*NET's* discussion of sales managers. The petitioner also asserted that the Department of State Wage Library indicated that sales managers require work experience and a bachelor's or higher degree. The petitioner also submitted several letters to establish that the beneficiary's degree in education is suitable training for a sales position. In addition, the vice-president of one of the beneficiary's former foreign employers in a November 5, 2006 letter indicated that his company was involved in the sales business and that his company "constantly hire[d] employees with similar background or level of education, like [the beneficiary's] to both organize and manage business." The vice-president added that the president and the vice-president of the company had master's degrees from a foreign university. In a November 14, 2006 letter submitted by a different former, foreign employer of the beneficiary, the author indicated that the beneficiary had the opportunity to work with the president of the company who had graduated from the Rivno Construction Institute; the first vice-president who had graduated from Kiev Engineer-Construction Institute; and the second vice-president who had a master's degree from the Kiev Economical-Trade Institute. The petitioner also supplied a letter dated November 17, 2006 from a foreign company in the "international trade

business" indicating that it hired people with experience who had not necessarily graduated from institutes or universities.

On March 27, 2007, the director denied the petition determining that the SVP (Specific Vocational Preparation) numbers and job codes used by the DOT are not a gauge of education but of training and occupational preparation and do not establish whether a position is classifiable as a specialty occupation. The director noted that the proffered position corresponded to the Department of Labor's *Occupational Outlook Handbook's (Handbook)* discussion of sales representatives and sales managers. Upon review of the *Handbook's* report regarding the educational requirements to perform the duties of a sales representative or sales manager, the director determined that the *Handbook* did not require such a position to have a baccalaureate or higher degree in a specific specialty. The director further determined that the petitioner had not established: that it had previously required a baccalaureate degree for the proffered position; that other businesses similar to the petitioner required individuals with specialized degrees to perform the duties of parallel positions; or that the nature of the proposed 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 director concluded that the petitioner had not established that the proffered position qualified as a specialty occupation.

On appeal, the petitioner asserts: (1) the director ignored the seven letters submitted from related institutions and businesses confirming that the beneficiary's background and experience is a must in the industry; (2) the director did not consider the uniqueness of the beneficiary's duties; and (3) the director misread the *Handbook's* discussion of a teacher as a perfect match for a sales manager position.¹ The petitioner also contends that the position is complex and unique and adds:

[The] beneficiary's background and expertise are essential for soliciting new accounts in Europe and USA, for addressing client's questions and concerns, for conflict mediations, for advertising, sale promotions and, marketing, for effective communications in multi languages (Russian, Polish, Ukrainian, English) that create additional sales pitch. Beneficiary's responsibility also includes creation of the sale strategy and training programs for sale representative [sic] with application of the principal of psychology.

The AAO does not find the evidence of record persuasive in establishing the proffered position is a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO routinely consults the *Handbook* for information about the duties and educational requirements of particular occupations as one method to determine whether a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into a particular position. The *Handbook* discusses the occupation of "sales manager" under the heading "advertising, marketing, promotions, public relations, and sales managers." The *Handbook* reports:

¹ The petitioner also notes that the director did not comment on its deletion of a request to change the beneficiary's status, requesting instead notification of the beneficiary's classification at the office in Warsaw, Poland. The AAO finds this point moot as the petitioner has not established the proffered position is a specialty occupation, thus it is unnecessary to comment on the petitioner's request.

Sales managers direct the firm's sales program. They assign sales territories, set goals, and establish training programs for the sales representatives. . . . Sales managers advise the sales representatives on ways to improve their sales performance. In large, multiproduct firms, they oversee regional and local sales managers and their staffs. Sales managers maintain contact with dealers and distributors. They analyze sales statistics gathered by their staffs to determine sales potential and inventory requirements and to monitor customers' preferences. Such information is vital in the development of products and the maximization of profits.

The *Handbook* also discusses the occupation of marketing managers in the section on advertising, marketing, promotions, public relations and sales managers. The *Handbook* reports:

The objective of any firm is to market and sell its products or services profitably. . . . Advertising, marketing, promotions, public relations, and sales managers coordinate the market research, marketing strategy, sales, advertising, promotion, pricing, product development, and public relations activities.

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Marketing managers develop the firm's detailed marketing strategy. With the help of subordinates, including *product development managers* and *market research managers*, they estimate the demand for products and services offered by the firm and its competitors. In addition, they identify potential markets Marketing managers develop pricing strategy to help firms maximize profits and market share while ensuring that the firm's customers are satisfied. In collaboration with sales, product development, and other managers, they monitor trends that indicate the need for new products and services and oversee product development. Marketing managers work with advertising and promotion managers to promote the firm's products and services and to attract potential users

Upon review of the petitioner's brief description of the proffered position, the AAO finds that the position corresponds generally to the *Handbook's* statements regarding the occupation of a sales manager and of a marketing manager. The petitioner states generally that the beneficiary will: provide marketing/promotion/sales and distribution services; negotiate with Eastern European countries; solicit new accounts; create and implement a sales training program; create a sales strategy; and resolve customers' complaints. These duties are similar to the *Handbook's* report that sales managers maintain contact with dealers and distributors, direct the firm's sales program, and establish training programs for sales representatives. The petitioner's indication that the beneficiary will develop marketing strategies and participate in promotion is indicative of an individual who also has some marketing responsibilities.

Upon review of the *Handbook's* discussion of the educational requirements associated with the above positions, the AAO finds that neither a sales manager position nor a marketing manager position are positions that require the attainment of a baccalaureate degree or higher in a specific field of study. The *Handbook* reports that sales supervisors usually acquire knowledge through work experience and that the educational backgrounds for this position vary widely. The *Handbook* reports that a wide range of educational

backgrounds is suitable for entry into marketing manager positions and that while employers prefer applicants with bachelor's degrees they do not require them. It is the variety of paths that are available to individuals pursuing a position as a sales manager or a marketing manager that preclude these positions from consideration as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). Stated another way, when the requirements to perform a position include avenues other than the attainment of a baccalaureate degree to successfully perform the duties of the position, the position is not a specialty occupation.

The AAO acknowledges counsel's reference to the *O*NET* and *DOT* regarding a sales manager position. However, the *O*NET* and *DOT* provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. Neither the *O*NET* nor the *DOT* describe how those years are to be divided among training, formal education, and experience and neither specify the particular type of degree, if any, that a position would require. The AAO does not consider the *O*NET* or the *DOT* to be a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. The record does not demonstrate that the occupation of a sales manager or a marketing manager would require the beneficiary to have attained a bachelor's degree or its equivalent in a specific specialty.

Moreover, the petitioner's implication that the beneficiary's background and expertise are the criteria used to establish that a position is a specialty occupation is not persuasive. Although the AAO agrees that an individual with a background in teaching and social psychology would be prepared to perform the duties of the proffered position, the AAO does not find that *only* an individual with such education would be able to perform the duties of the proffered position. A beneficiary's background and educational experience do not make a position a specialty occupation. Rather it is whether the duties of the position require the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation. In this matter, the description of duties does not include duties that can be performed only by those individuals with a bachelor's or higher degree in a specific field. The petitioner has not explained why the routine duties of a sales or marketing manager would require the attainment of a baccalaureate or higher degree, and has not otherwise demonstrated that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the proffered position. The petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO now turns to consider whether the petitioner may qualify the proffered position under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), whether a degree requirement is the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree. A review of the evidence of record finds it insufficient to establish the proposed duties comprise a position that is identifiable with an industry-wide educational standard, or distinguishable, by its unique nature or complexity, from a similar but non-degree-requiring position. The AAO acknowledges the letters submitted by the petitioner to establish an industry-wide educational standard for the proffered position. First, the majority of the letters submitted indicate only that the beneficiary's education and experience are suitable to perform the duties of the proffered position. As discussed above, the AAO agrees that the beneficiary is

qualified to perform the duties of a sales or marketing manager, but finds that the proffered position as described is not a specialty occupation. Second, three of the letters submitted while referring to the companies' policies regarding the hiring of employees, do not provide documentary evidence substantiating the claim that the companies have hired individuals with bachelors or higher degrees. Moreover, the letters do not contain sufficient information regarding the duties of the individuals who are claimed to have bachelors or higher degrees to demonstrate that the positions are parallel to the proffered position and do not include adequate evidence establishing that the foreign businesses are similar to the petitioner. Going on the 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 190 (Reg. Comm. 1972)). Further, one of the three letters from a company in the international trade business indicates that it hires employees with experience, not necessarily individuals who have graduated from institutes or universities. The letters submitted do not establish that organizations similar to the petitioner "routinely employ and recruit only degreed individuals," in a specific discipline. Thus, the petitioner has not established that a degree requirement is common to the industry in parallel positions among similar organizations. The petitioner has not established the first prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner in this matter has also failed to establish the second prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) which requires that the proffered position be of such complexity or uniqueness that it can be distinguished from other positions within the same industry. The record does not contain evidence detailing what duties of the sales manager position require the attainment of a baccalaureate or higher degree. The record lacks evidence or analysis establishing that particular duties of the proffered position differ from the routine duties of a skilled salesperson/manager or a marketing manager. The AAO does not find that the evidence of record establishes that the specific duties of the proposed position are more specialized and unique than those of a typical sales or marketing manager or are so complex or unique that they can be performed only by an individual with a degree in a specific discipline. The petitioner has not provided evidence to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The record also fails to demonstrate that the petitioner has a history of recruiting and hiring degreed candidates for the proffered position. To determine whether the petitioner has fulfilled the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. Although the petitioner states that it has been in the business since 1999, it has not provided evidence of its past hiring practices for this position. Again, 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. at 165. The AAO also observes that 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 non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate degrees or higher degrees. The record does not establish that the petitioner has satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The AAO now turns to the fourth criterion and whether the petitioner has established that the duties of the proffered position are sufficiently specialized and complex to require knowledge usually associated with the

attainment of a baccalaureate degree in a specific discipline and, therefore, establish the proffered position as a specialty occupation under the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). The duties of the proffered position show that the tasks relate primarily to the routine duties of a sales manager or a marketing manager. Although the petitioner asserts that the duties of the position are complex and unique, the petitioner has not explained what particular duties of the proffered position comprise tasks that require the application of specialized or complex knowledge associated with the attainment of a baccalaureate degree or higher degree. The petitioner has not adequately explained how the duties of the proffered position differ from those of a generalist position in sales or marketing. The AAO notes that the petitioner includes the ability to speak several languages as important to the proffered position; however, knowledge or fluency in other languages is insufficient to elevate the proffered position to one that is complex, unique, or specialized. Further, knowledge or fluency of other languages is not a skill that is attained only through or is usually associated with a bachelor's or higher degree in a specific discipline. In this matter, the record suggests that the petitioner is relying on the beneficiary's general education and experience to establish that the proffered position is a specialty occupation. However, the position itself must comprise duties that are specialized and complex to be designated a specialty occupation. Although the position may require skill, the petitioner has not established that that skill may be attained only through the specialized coursework attendant to a four-year university level education in a specific discipline. The petitioner has not established that the proffered position requires the performance of duties that require a bachelor's degree in a specific discipline. The petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4).

The petition will be denied and the appeal dismissed for the above stated reason. 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.