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U.S. Department of Justice

Immigration and Naturalization Service

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: LIN 01 050 55188 Office: NEBRASKA SERVICE CENTER Date: JAN 10 2003

IN RE: Petitioner: [redacted]
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)

IN BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center, and the matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a real estate management company in Columbus, Ohio, with 35 employees and an annual gross annual income of six million dollars. It seeks to temporarily employ the beneficiary as a Director of Marketing for a period of three years. The director determined that the petitioner had not established that the proffered position was a specialty occupation.

On appeal, counsel submits additional information to compare the proffered position with a marketing research analyst position. Counsel also submits more information on director of marketing positions.

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.

8 C.F.R. 214.2(h)(4)(ii) defines the term "specialty occupation" as:

> an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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.

The issue in this proceeding is whether the petitioner has established that the position offered to the beneficiary is a specialty occupation.

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.

In the original petition, the petitioner stated that the beneficiary would work as a Director of Marketing. The petitioner expanded on the job duties as follows:

> The Director will be responsible for all advertising, promotion marketing, and sales and public relation duties for Lincoln Park West. The Director will develop a detailed marketing strategy: He will design and direct advertising campaigns, track vacancies and forecast leasing schedules, study competitors to se price points for rentals and identify market trends.
>
> The Director will manage leasing agents, through weekly meetings, training, performance evaluations, and oversight of model apartments and community tours of facilities. He will make sure that model apartments are attractive and well maintained and that community tours generate an appropriate and profitable level of rental activity. The Director will set rental rates and a monthly marketing and advertising budget with the approval of the President, and ensure that all marketing materials are accurate and available. He will observe economic, social and political trends in the Columbus area that may effect Lincoln Park West; he will track changes in consumer preferences and rental habits, and make recommendations for programs that will enhance the complex's desirability as a place to live.
>
> The Director will coordinate all community activities. He will provide recreational, educational, and social values to community residents. Lincoln Park West wishes each resident to improve intellectually and socially while living there. In addition to handling scheduling and equipping of programs and community rooms, the Director will be responsible for Activity Coordinators, who will work with the residents. The Director will be responsible for community outreach to ensure that the Latino community is aware of available resources.

With regard to available resources for Latino community, the petitioner stated:

> Lincoln Park West also offers a broad range of innovative social services to its residents. Through the exclusive COLLEGE LINK program, Lincoln Park West contributes a portion of monthly rents toward college tuition for residents and/or their children. The complex has an onsite library with Internet access, and offers educational, language courses, and guest lecturers in many fields.

The petitioner added:

> Columbus, Ohio has experienced a rapid increase in Latino population as the area's growing economy has many jobs to offer. Columbus schools have experienced a 76% increase in Latino enrollment in the last three years. Lincoln Park West's attractive combination of reasonable rents, bilingual services, and high level of educational and social activities has brought us a large number of Latino tenants. Lincoln Park West can attract and serve this community better with a bilingual Director of marketing. The minimum educational requirement for this position is a bachelor's degree in Marketing or a business discipline or its equivalent, and fluency in written and spoken Spanish and English.

The petitioner stated that the beneficiary had a bachelor's degree in marketing and also a postgraduate diploma in marketing. The petitioner also provided a educational equivalency evaluation from the company, Multinational Education and Information Services, Inc., that stated the beneficiary had the equivalent of a U.S. bachelor's degree in marketing.

On February 5, 2001, the director asked for further evidence that the petitioner had received a certified Labor Condition Application, Form ETA 9035, and also for further evidence that the proffered position met one of the criteria for a specialty occupation as outlined in 8 C.F.R. §214.2(h)(4)(iii)(A). In particular, the director drew attention to the need for documentation to show that it is a normal practice for similar firms to employ individuals with baccalaureate degrees in a specific specialty in parallel positions and for specific documentation to show that the petitioner employed individuals with baccalaureate or higher degrees in a specific specialty had been employed by the petitioner in the past.

In response, the petitioner submitted a certified LCA dated December 1, 2000. The petitioner also submitted copies of advertisements from the Internet for the position of Director of Marketing from various industries. The petitioner also referred to

the Department of Labor's (DOL) Occupational Outlook Handbook (Handbook) job classification of marketing, advertising, and public relations managers in examining the minimum requirements for the proffered position and the unique or specialized nature of the duties for the proffered position. The petitioner submitted no further information on whether it had previously required its directors of marketing to have a bachelor's degree or its equivalent.

On January 25, 2002, the director denied the petition stating that the petitioner's evidence had not established that the petitioner required a baccalaureate or higher degree, in a **specialized area** for the proffered position. (Emphasis in original.) The director stated that the section of the Handbook that examined the classification of marketing, advertising and public relations managers found no requirement for a baccalaureate or higher degree in a specialized area for employment in the field. The director stated: "[d]egrees in business and in liberal arts fields appear equally welcome." The director also found that the Internet job vacancy announcements for marketing managers submitted by the petitioner demonstrated that a bachelor's degree was required as opposed to a bachelor's degree in a specialized area.

On appeal, counsel asserts that the duties of the proffered position encompass more than the usual duties of a marketing director, as described in the Handbook. Counsel further asserts that "a large portion of the beneficiary's job duties will require him to study competitor's rates to set price points, identify market trends and track changes in consumer preferences and rental habits, make recommendations for programs that will enhance the complex's desirability as a place to live, etc."

Counsel maintains that the proffered position includes duties that can be classified as duties performed by both a marketing director and a marketing research analyst. Counsel further asserts that such duties would require a bachelor's degree in a specialized area. Counsel also refers to a previous Administrative Appeals Office (AAO) decision that determined that a president and director of marketing was qualified as a member of the professions based on his education and experience. Finally, counsel submits additional copies of Internet job vacancy advertisements for marketing directors.

Upon review of the record, a basic distinction can be made between the reasoning underlying the director's decision and the petitioner's assertions. 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 bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act.[1]

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[1] The court in Defensor v. Meissner observed that the four

As stated previously, the statute establishes that the petitioner must show that the proffered position requires a baccalaureate degree or higher, or the equivalent, in a specific specialty. (Emphasis added.) To interpret the criteria in 8 C.F.R. 214.2(h)(4)(iii) (A) as solely requiring a bachelor's degree is an incorrect interpretation.

In addition, counsel's statement on appeal with regard to the proffered position being classified as a market research analyst is not persuasive. The Service does not use a title, by itself, when determining whether a particular job qualifies as a specialty occupation. The specific duties of the proffered position combined with the nature of the petitioning entity's business operations are factors that the Service considers. With regard to the classification of marketing research analysts included under economists and market research analysts, the Handbook on page 239 states the following:

> Market, or marketing, research analysts are concerned with the potential sales of a product or service. They analyze statistical data on past sales to predict future sales. They gather data on competitors and analyze prices, sales and methods of marketing and distribution. Like economists, market research analysts devise methods and procedures for obtaining the data they need. They often design telephone, personal, or mail interview surveys to assess consumer preferences. Trained interviewers, under the market research analyst's direction, usually conduct the surveys.
>
> After compiling the data, market research analysts evaluate it and make recommendations to their client or employer based upon their findings.

With regard to where market research analysts are employed, the Handbook on page 240 states:

> [p]rivate industry provided about nine out of ten jobs for salaried workers, particularly economic and marketing research firms, management consulting firms, banks, securities and commodities brokers, and computer and data processing companies.

While counsel asserts that the beneficiary will perform duties that involve studying the competitor's rates to set price points,

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criteria at 8 C.F.R. 214.2 (h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." See Defensor v. Meissner 201 F.3d 388 (5th Cir. 2000)

identifying market trends, and tracking changes in consumer preferences and rental habits, the proffered position at a real estate management firm does not appear analogous to the Handbook's position classification and employment of market research analysts. The more appropriate job classification for purposes of this proceeding appears to be marketing manager.

Factors often considered by the Service when determining the industry standard include: whether the DOL's Occupation Outlook 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." Shanti, Inc. v. Reno, 36 F.Supp.2d 1151, 1165 (D.Min. 1999)(quoting Hird/Blaker Corp. v. Slattery, 764 F.Supp. 872, 1102 (S.D.N.Y. 1991)).

The DOL's Occupational Outlook Handbook, (Handbook) 2002-2003 Edition, on page 26, within the Advertising, Marketing, Promotions, Public Relations, and Sales Managers classification, states: "College graduates with related experience, a high level of creativity, and strong communication skills should have the best job opportunities." With regard to marketing managers, on page 27, the Handbook states:

> Marketing managers develop the firms' detailed marketing strategy. With the help of subordinates, including product development managers and market research managers, they determine the demand for products and services offered by the firm and its competitors. In addition, they identify potential markets-for example, business firms, wholesalers, retailers, government, or the general publics. 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. 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.

On page 28, the Handbook states the following with regard to training, advancement and other qualifications:

> A wide range of educational backgrounds are 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 promotion management positions,

> some employers prefer a bachelor's or master's degree in business administration with an emphasis on marketing. Courses in business law, economics, accounting, finance, mathematics, and statistics are advantageous.

The general trend in this classification as documented in the Handbook appears to be that within the overall field, many employers prefer persons with experience in related occupations plus a broad liberal arts background, while a smaller subset of employers within the marketing, sales and promotion field prefer to hire persons with a bachelor's or master's degree in business administration with an emphasis in marketing. This trend would not support the petitioner's assertion that a baccalaureate degree or higher is normally the minimum requirement for entry into a director of marketing position. Thus, the petitioner has not established the first criterion found in the regulations with regard to specialty occupations.

With regard to the second criterion, namely that the degree requirement is common to the industry in parallel positions, the petitioner has submitted several Internet job advertisements for marketing director positions. None of these job advertisements are for real estate management firms. It is not clear from the advertisements whether any companies are similar in size or business scope and activities to the petitioner. The job advertisement materials submitted on appeal while establishing that a bachelor's degree with experience is required for most marketing director positions, still does not establish that a bachelor's degree in a specific specialty was required throughout the industry. For example, these job advertisements mentioned requirements for degrees in multiple areas such as marketing, business, or communications. Without more compelling testimony, the petitioner did not establish the second criterion. As mentioned previously in this proceeding, the petitioner did not submit any additional information with regard to whether the petitioner had required previous directors of marketing to have a bachelor's degree or its equivalent for the position. Thus, the petitioner did not establish the third criterion of 8 C.F.R. 214.2(h)(4)(iii)(A).

With regard to the final criterion, namely that 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, counsel in her appeal points out the proffered position encompasses more than the duties of a marketing director. In reviewing the job description for the proffered position, counsel's assertion is well taken. The proffered position appears to combine marketing and management duties, some economic and sales analysis, along with duties in relation to serving the Latino community in the apartment complex with regard to services and opportunities. Nevertheless, the petitioner has not provided compelling testimony as to the specialized and complex nature of these numerous duties that would

necessitate the attainment of a baccalaureate or higher degree in a specific specialty. Without more compelling testimony, to date, the petitioner has not established the specialized and complex nature of the duties to be performed by the beneficiary.

Counsel further refers to an unpublished AAO decision that determined an individual working as the President and Director of Marketing was found to be a member of the professions by his education and experience. Counsel has furnished no evidence to establish that the facts of the instant petition are in any way analogous to those in the unpublished AAO decision. For example, the record is devoid of any reference to the beneficiary's experience or prior positions in the field of marketing. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, while 8 C.F.R. 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.