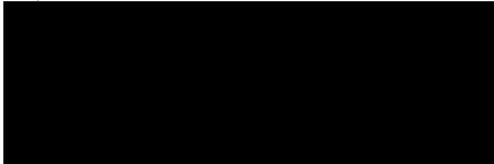


identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



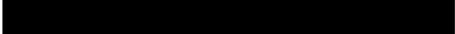
U.S. Citizenship
and Immigration
Services

PUBLIC COPY



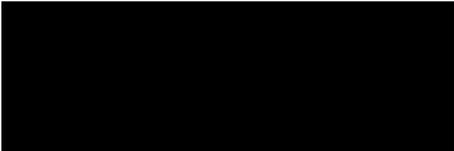
Bf

FILE: WAC 05 192 50550 Office: CALIFORNIA SERVICE CENTER Date: **MAY 01 2007**

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, 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 is a dental laboratory. The petitioner avers it employs two personnel and has a gross annual income of \$81,925. It seeks to employ the beneficiary as a marketing and promotions specialist. 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).

The record of proceeding before the AAO contains: (1) the June 28, 2005 Form I-129 and supporting documentation; (2) the director's August 22, 2005, request for evidence (RFE); (3) counsel's October 20, 2005, response to the director's RFE; (3) the director's January 13, 2006, denial letter; and (4) the Form I-290B and counsel's brief in support of the appeal. The AAO reviewed the record in its entirety before reaching its decision.

On January 13, 2006, the director denied the petition determining that the record did not establish that the proffered position is a specialty occupation. Thus, the issue is whether the petitioner has established 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) 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.

In a June 15, 2005 letter appended to the petition, the petitioner indicated:

As a Marketing and Promotions Specialist, [the beneficiary] shall be in charge of developing a marketing strategy for petitioner. He shall define and explore additional market[s] in order that new partners would be regularly brought in to [the petitioner's] Laboratory. He shall also conduct market research on positioning the products and services offered by petitioner. He shall market the products and services of petitioner through programs that drive demand for our services, customer acquisition, conversion, customer loyalty and retention. Additionally, [the beneficiary] shall identify and make recommendations regarding new products and dental services that may be offered by petitioner. He shall also ensure that an effective pricing strategy is effected by the petitioner such that its products and services are competitively priced and thus keep patients satisfied.

The Marketing and Promotions Specialist will develop promotional concepts and strategic tie-ins with petitioner's suppliers of dental equipment and materials. He will ensure that overall strategic concept of [the petitioner] is effectively communicated across online marketing, media planning and public relations. He shall also disseminate information about the products and services of petitioner through sales promotions and by generating email lists for promotions. [The beneficiary] shall create marketing and promotional collateral materials, as well [as] presentation of documents to promote petitioner's products and services to the target market. He shall obtain feedback and work closely with the target market to ensure that a successful campaign for the petitioner is delivered and that the promotional activities are executed successfully.

In response to the director's August 22, 2005 RFE, the petitioner provided a similar description by essentially repeating the first paragraph of its initial description of the position and adding: "[t]he Marketing and Promotions Specialist shall market our products and services through programs that maximize awareness, positively influence sales and educate dental partners," and indicating that the beneficiary would spend 40 percent of his time on these activities. The petitioner also repeated the second paragraph of its initial description of the position adding that the beneficiary would spend an additional 40 percent of his time on these activities. The petitioner then added a third paragraph to its initial description of the position as follows:

Finally, 20% of [the beneficiary's] time shall be spent to deal with the company's major customers on a personal basis and maintain regular contact with major accounts. He shall also promote positive relations with vendors and other suppliers of the company. He shall also update himself with developments and trends in the dental industry and monitor the company's competitive market position. He shall analyze our sales figures, review the market research information and collect feedback from partners and vendors to determine sales potential, inventory requirements and monitor the preferences of our dental partners. [The beneficiary] shall evaluate the effectiveness of current products, services, policies and procedures and oversee corrective action as needed. Furthermore, he may represent the company in meetings and conferences to further enhance our image and develop additional business.

The petitioner also submitted letters from five dental laboratories. The author of each letter indicated that it engaged the services of a consultant/marketing and promotions specialist or were actively recruiting a marketing consultant/marketing and promotions specialist with a bachelor's degree in business or marketing. The authors also generally referenced the importance of such a position to stay competitive with other dental laboratories.

The petitioner also provided copies of five job announcements for positions including: (1) a marketing specialist for Saint Louis University that listed the minimum qualification as education and experience equivalent to a bachelor's degree supplemented with two years of related experience; (2) a marketing specialist for a manufacturer of interactive computer systems that was expanding its marketing department and required a bachelor's degree in marketing; (3) a zoo marketing specialist that listed the minimum qualification as a bachelor's degree in marketing, advertising or a related field; (4) a sports marketing project specialist that listed a bachelor's degree in marketing, sports, management, journalism, communications or a business related field as required; and (5) an online marketing specialist for a leader in digital entertainment products for computer users that indicated the successful candidate will have at least 2-4 years experience in email marketing among other requirements, as well as a bachelor's degree in marketing, business, or an equivalent field.

On January 13, 2006, the director denied the petition determining that the proffered position incorporated many of the duties of a market research analyst as listed under market and survey researchers in the Department of Labor's *Occupational Outlook Handbook (Handbook)*. The director determined, however, that the petitioner did not need the services of a market research analyst as its business did not extend beyond the scope of the local community and that the petitioner did not have the organizational complexity to validate a position for an international marketing research analyst. The director further determined that as the petitioner had not established that it had a sales department, advertising, marketing or sales staff, all of the duties of those occupations would be performed by the beneficiary, and that sales representatives, marketing, advertising or promotions specialists and/or managers are not normally considered specialty occupations. The director also found that the industries that employ market research analysts are generally large firms or corporations and the evidence in this matter failed to establish that the petitioner engages in the type of business for which a market research analyst would typically be required on a regular full or part-time basis for any significant length of time.

The director also observed that the *Handbook* noted that the educational requirements for marketing managers encompassed a wide range of educational backgrounds and that many such positions are filled by promoting experienced staff, thus the occupation of marketing manager did not require a bachelor's degree as a minimum for entry into the position. The director also found that: the record failed to establish "that a degree in a specific field of study is common to the dental laboratory operation industry in parallel positions among similar organizations;" the description of the duties of the proffered position was generic and did not provide detail as to the specialized or complex nature of the position; the petitioner had not established that it normally required a degree or its equivalent for the position as it was offering the proffered position for the first time; the duties of the position did not establish that the proffered position is any more specialized or complex than any other marketing manager job.

On appeal, counsel asserts that the petitioner has demonstrated that the position of marketing and promotions specialist is a specialty occupation pursuant to the first, second and fourth criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Counsel notes the *Handbook's* section on the training and educational requirements for advertising, marketing, promotions, public relations and sales manager jobs. Counsel asserts that the nature of the petitioner's business, which requires dealing with professionals, like dentists, and the technical matters involved in promoting the petitioner's products and services, also requires a professional, or degree holder, who can communicate effectively with dentists, as well as promote dental products and services.

Counsel refers to the evidence submitted in response to the director's RFE regarding other dental laboratories and their requirements that their marketing and promotions specialists have bachelor's degrees and notes the director's failure to consider this evidence. Counsel also observes that the director failed to consider the job announcements submitted for marketing specialists in several different organizations. Counsel contends that the letters and advertisements presented by the petitioner show that the prevailing industry requirement for a position of marketing and promotions specialist is a bachelor's degree in business administration, marketing, or a related degree.

Counsel contends that the specific duties to be performed by the beneficiary are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree. Counsel restates the petitioner's description of the duties of the proffered position and concludes that it is evident from the description that the duties and responsibilities are complex and sophisticated and warrant the imposition of the requirement of a bachelor's degree in marketing, management, business administration, or a related degree. Counsel asserts that the proffered position requires an in-depth understanding of the general principles and procedures of marketing, management, and business, as well as an understanding of technical matters concerning cosmetic dental technologies.

Counsel notes that the proffered position is not that of an international market research analyst and the duties of the proffered position are distinct from that of a market research analyst. Counsel avers that the duties of the proffered position are nevertheless complex and sophisticated due to the nature of the petitioner's business as well as the products and services offered.

Preliminarily, the AAO finds that the director improperly characterized the petitioner's claim regarding the title of the position and incorrectly determined that the proffered position incorporated many of the duties of a market research analyst as listed under market and survey researchers in the Department of Labor's

Occupational Outlook Handbook (Handbook). The director's reference to the scope and organizational complexity of the petitioner's business as it related to an international market research analyst and the director's implicit assumption that only certain types of industries would require the services of market research analyst were also inappropriate. These references and assumptions are withdrawn. The AAO also observes that the director failed to consider all the evidence submitted in response to the director's RFE; thus the evidence will be considered for the first time on appeal.

Upon review of the totality of the evidence in the record, the AAO does not find counsel's assertion that the proffered position is a specialty occupation persuasive. The AAO turns first to an analysis of the duties of the proffered position and the occupation that includes the described duties. 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 occupation described in this matter most closely aligns with that of a marketing manager and of an advertising representative. As discussed within the occupation of advertising, marketing, promotions, public relations and sales managers of the *Handbook*:

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.

* * *

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

Advertising managers oversee advertising and promotion staffs, which are usually small except in the largest firms. . . . The *account executive* manages the account services department, assesses the need for advertising, and, in advertising agencies, maintains the accounts of clients. The *creative director* oversees the copy chief, art director, and associated

staff. The media director oversees planning groups that select the communication media - for example, radio, television, newspapers, magazines, the Internet, or outdoor signs - to disseminate advertising.

In this matter, the petitioner's job description includes duties such as defining and exploring additional markets, marketing the petitioner's products and services, as well as ensuring the petitioner's products and services are competitively priced. These are the duties of a marketing manager as generally described in the *Handbook*. In addition, developing promotional concepts, disseminating information about the products and services, identifying and recommending new products, and generally developing and managing a marketing strategy are duties associated with the marketing and promotion of the petitioner's products, duties performed by a marketing manager. The petitioner's addition of duties relating to personal contact with major customers, promoting positive relations with vendors and representing the company in meetings and conferences are duties generally associated with personnel in an advertising department.

The petitioner in this matter provides only broad generalities to describe the duties of the position. For example, the petitioner indicates the beneficiary will analyze sales figures, review market research, and collect feedback from partners and vendors to determine sales potential, inventory requirements and monitor partners' preferences as well as conduct market research on positioning the petitioner's products and services. However, these descriptions are general and do not describe or explain in detail how the beneficiary will carry out these tasks. A petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in relation to its particular business interests in order to establish that the duties are duties of a specialty occupation. In the instant matter, the general reference to duties that are similar in effect to portions of the *Handbook's* recitation of duties of a marketing manager or even more vaguely to that of a market research analyst do not identify the beneficiary's daily duties and moreover do not reveal how the duties incorporate the theoretical and practical application of a body of highly specialized knowledge. A generalized description outlining a range of duties that may be performed within an occupation cannot be relied upon to demonstrate the duties attached to specific employment. Making general conclusory statements regarding a position, rather than defining the activities associated with the position is insufficient. The petitioner must describe and provide evidence of the duties of the position rather than providing an overview of a particular occupation. 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 AAO determines that the petitioner has provided an overview of the duties of a marketing manager and an advertising representative. The *Handbook* discusses the educational requirements imposed on individuals who seek employment as marketing managers and advertising representatives as follows:

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. Courses in business law, economics, accounting, finance, mathematics, and statistics are advantageous

* * *

For advertising management positions, some employers prefer a bachelor's degree in advertising or journalism. A course of study should include marketing, consumer behavior, market research, sales, communication methods, and technology, and visual arts - for example, art history and photography.

* * *

Most advertising, marketing, promotions, public relations, and sales management positions are filled by promoting experienced staff or related professional personnel. For example, many managers are former sales representatives, purchasing agents, buyers, or product, advertising, promotions, or public relations specialists

As the *Handbook* indicates no specific degree requirement for employment as a marketing manager or an advertising representative, the AAO concludes that the performance of the proffered position's duties does not require the beneficiary to hold a baccalaureate or higher degree in a specific discipline. When an individual with a degree of generalized title can perform the duties of a position or when the position solicits individuals with a range of degrees, the position does not qualify as a specialty occupation. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). The AAO finds that the petitioner has not established the proffered position as a specialty occupation under the requirements of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

To establish its proffered position as a specialty occupation under the second criterion, a petitioner must prove that a specific degree requirement is common to the industry in parallel positions among similar organizations, or that the proffered position is so complex or unique that only an individual with a degree in the specific specialty can perform the duties of the position. In reaching its decision, the AAO has reviewed the five letters submitted by other dental laboratories submitted to establish a degree requirement as an industry standard and the five job announcements submitted to establish that a specific degree requirement is common to the industry.

The AAO observes that only one author of the five letters submitted indicates that his organization actually employed a consultant/marketing and promotions specialist. The record however, does not contain any information regarding the claimed employee, including the period of employment, verification of the individual's degree, or that the duties of the position are the duties of a specialty occupation. The remaining letters do not identify the duties expected of the consultant/marketing and promotions specialist nor does the record contain evidence substantiating that the organizations are attempting to hire consultant/marketing and promotions specialists with copies of their advertisements. The letters submitted are insufficient to establish a degree requirement as an industry standard for a position that is parallel to the proffered 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 has also considered the five job announcements submitted and notes that the advertisers do not appear to be similar to the petitioner in size, number of employees, or type of business. The advertisers range

from a university, a manufacturer of computer systems, a zoo, and a sports organization to a digital entertainment firm. There is nothing in the advertisements that suggest these organizations are similar to the petitioner's two person dental laboratory. The record in this matter is insufficient to establish that a degree requirement is an industry standard or is otherwise common to the petitioner's dental laboratory business. The petitioner has not established the first prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Counsel for the petitioner suggests that it is the nature of the petitioner's business that requires dealing with professionals and understanding the technical aspects of dental products which makes the proffered position unique and complex so that such a position would require a degreed marketing and promotions specialist. However, neither counsel nor the petitioner describe or explain how a four-year university education in a marketing discipline assists in dealing with dentists and the technical terms and products that dentists use. The AAO finds that the record does not describe nor has counsel provided evidence that the proposed duties exceed the scope of a typical marketing manager. The AAO is not persuaded that the nature of the specific duties of the proposed position is more unique and complex than that of a typical marketing manager, a position that does not normally require a bachelor's or higher degree in a specific discipline. The record does not establish the second prong of the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO notes that counsel does not contend that the petitioner has satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which allows for consideration of the petitioner's normal hiring practices for a particular position. The record offers no evidence of the petitioner's past hiring practices for the proffered position as the position is newly established; thus the petitioner cannot establish that it normally requires a degree or its equivalent for the proffered position. The petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its position's 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 AAO again acknowledges counsel's claim that the duties of the proffered position involve dealing with professionals and understanding the technical aspects of dental products. However, many non-degree requiring positions involve dealing with professionals and using technical terms unrelated to the verbiage of everyday speech. Using and understanding terms associated with a particular business do not elevate a position to a specialty occupation; rather, experience in a particular industry seemingly would be the ultimate and necessary criteria to gain familiarity with the common terms of the field, not the attainment of a bachelor's degree in an unrelated field.

Upon review of the duties of the proffered position, the AAO finds that the position is closely aligned to that of a marketing manager. It does not find these duties, as described by the petitioner, to reflect a higher degree of knowledge and skill than would normally be required of non-degreed marketing managers whose business responsibilities require them to market and promote their industries' products. That the beneficiary may be required to also perform some advertising or sales tasks as well as marketing the petitioner's products does not elevate the position to a specialty occupation. The job duties of the position do not reflect the specialization or complexity that require the individual performing the tasks to have attained a bachelor's degree or its equivalent in a specific field. The AAO, therefore, finds that the petitioner has not established that the proffered position is a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Upon review of the totality of the evidence submitted in support of the petition, the petitioner has failed to establish that the proffered position requires a bachelor's degree, or its equivalent, in a specific discipline. Accordingly, the petitioner has not demonstrated that the proffered 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.

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