

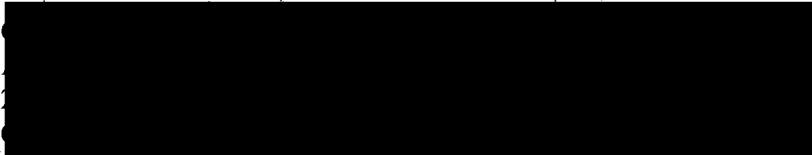
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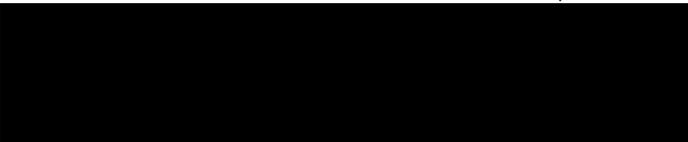


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FILE: WAC 03 015 50386 Office: CALIFORNIA SERVICE CENTER Date: **MAY 03 2007**

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 denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) remanded a subsequent appeal to the director for entry of a new decision. The director has denied the petition and certified his decision to the AAO for review. The director's decision will be affirmed. The petition will be denied.

Preliminarily, the AAO notes that new counsel for the beneficiary entered an appearance as attorney of record. As the beneficiary is not a recognized party to these proceedings, new counsel will not be substituted for the petitioner's counsel. All representations of the beneficiary's counsel will be considered; however, he will not receive notice of the decision.

The petitioner is a photography studio that seeks to employ the beneficiary as an operations and market analyst. The petitioner, therefore, seeks 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 Form I-129 and supporting documentation; (2) the director's May 5, 2003 request for additional evidence; (3) counsel's June 10, 2003 response to the director's request; (4) the director's June 30, 2003 denial letter; (5) the Form I-290B and supporting documentation, dated July 22, 2003; (6) the AAO's July 26, 2004 remand of the petition to the director; (7) the director's May 11, 2006 request for additional evidence; (8) counsel's July 28, 2006 response to the director's request; (9) the director's November 3, 2006 notice of certification; and (10) the beneficiary's counsel's November 28, 2006 response to the director's notice of certification. The AAO reviewed the record in its entirety before issuing its decision.

In its July 26, 2004 decision, the AAO determined that, although the petitioner had established that the beneficiary qualifies to perform the duties of a specialty occupation, the petitioner had not established that the proposed position qualifies for classification as a specialty occupation. In its decision, the AAO determined that the duties of the proposed position as set forth in the petition were similar to those of marketing managers, as such positions are discussed in the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*), a resource upon which the AAO routinely relies for its information about the duties and educational requirements of particular occupations.

In his July 28, 2006 response to the director's request for additional evidence, counsel repeated his assertion that the duties of the proposed position are similar to those of market research analysts, and submitted an excerpt of the *Handbook's* entry for that profession. However, as noted previously, the AAO in its decision determined that the duties of the position are not similar to those of a market research analyst, and counsel did not address this explicit finding by the AAO.

In his November 28, 2006 response to the director's notice of certification, the beneficiary's counsel contends that the proposed position qualifies for classification as a specialty occupation.

Section 214(i)(1) of the Immigration and Nationality Act (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:

[A]n 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 criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proposed position.

In his October 11, 2002 letter of support and June 10, 2003 response to the director's request for additional evidence, counsel stated that the duties of the proposed position would include solving organizational, operational, and distribution problems of the company through the usage of his knowledge of business administration; planning, forecasting, researching, scheduling, and the design production of facilities that best meet the petitioner's company goals; evaluating the pricing and distribution of products; analyzing management procedures; designing a control reporting system for effective methods of improvement, presenting analysis in oral and written research reports; demonstrating continuous efforts to improve operations; researching market conditions in the local and regional area so as to determine the potential for sales of the petitioner's products; researching methods of gathering data on competitors, pricing, and prevailing conditions; making recommendations and proposing alternative solutions to management.

In his July 28, 2006 response to the director's second request for additional evidence, counsel emphasized the marketing-related portions of the proposed position in his attempt to classify the proposed position as a market research analyst. In summation, the beneficiary would spend fifteen percent of his time conducting survey researches, developing marketing strategies, and providing studies and analysis; fifteen percent of his time generating, refining, and evaluating marketing actions, and monitoring the marketing performance of the company's products and services; fifteen percent of his time collecting and analyzing data on customer demographics, preferences, needs, and buying habits so as to identify potential markets and factors affecting

product and service demand; fifteen percent of his time gathering information or data on competitors, and devising and evaluating methods and procedures for collecting such data; fifteen percent of his time organizing and interpreting the information gained, and forecasting and tracking marketing and sales trends; fifteen percent of his time providing reports and summary conclusions, and making recommendations, to management, as well as proposing alternate courses of actions; and ten percent of his time measuring and assessing customer and employee satisfaction, measuring the effectiveness of the petitioner's marketing, and monitoring industry statistics and trends.

In his November 28, 2006 response to the director's notice of certification, the beneficiary's counsel emphasizes the advisory role that the beneficiary would play in the petitioner's company. Specifically, he states that the beneficiary would spend fifty percent of his time on analysis and decision-making; twenty percent of his time providing advice and consultation regarding the petitioner's company expansion; fifteen percent of his time on organizational development (conducting studies and evaluating the company's current organizational system, for example); and fifteen percent of his time communicating and reporting to management.

The AAO finds that, rather than clarifying the duties as they were previously described, the beneficiary's counsel's description of the duties of the proposed position constitute a material alteration of the proposed position. For example, counsel's July 28, 2006 description of the position has the beneficiary spending approximately eighty-five percent of his time on marketing-related activities. In contrast, the beneficiary's counsel states that the beneficiary would spend fifty percent of his time on such activities as analyzing, developing, and implementing solutions for process improvements, trouble-shooting, production support, new product development, analyzing business and operating procedures, and conferring with personnel to ensure the smooth functioning of newly-implemented systems or procedures. While the petitioner's initial job description did include such tasks as solving organizational, operational, and distribution problems of the company, the July 28, 2006 job description did not indicate that such tasks were to consume such a large percentage of the beneficiary's time. The fifteen percent of the beneficiary's time that was to be spent on "organizational development," according to the November 28, 2006 description did not appear in the July 28, 2006 job description. The AAO also notes that, according to the beneficiary's counsel, the beneficiary was to spend fifteen percent of his time updating top management on the overall operations of the petitioner's company performance. Again, such responsibilities were not reflected in the July 28, 2006 job description, which was largely limited to marketing-related activities.

In sum, the July 28, 2006 description appeared to have the beneficiary doing more of the actual marketing work, while the November 28, 2006 iteration of the job has the beneficiary managing more of the actual work done in the petitioner's operation.<sup>1</sup> Moreover, the AAO notes that the percentages of time to be spent performing each duty varies sharply from the July 28, 2006 description to the one provided on November 28, 2006. As the beneficiary's counsel was not authorized by the petitioner to make changes in the job description, the changes offered by the beneficiary's counsel will not be considered. A

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<sup>1</sup> For example the beneficiary's counsel has added the following to the list of the beneficiary's responsibilities:

The [beneficiary] is assigned a huge task of not only of [sic] ensuring that technical legal information [is] well disseminated but also all legal information presented [is] well understood by our clients from all over the world.

Again, this is a sharp departure from counsel's July 28, 2006 description of the duties of the proposed position, which focused almost exclusively on the marketing-related duties of the position.

petitioner cannot offer a new position to the beneficiary on appeal, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description. Therefore, the AAO's analysis will be based on the earlier job description.

The AAO affirms its previous finding that the duties of the proposed position are similar to those of marketing managers as such positions are described in the *Handbook*. In reaching its conclusions, the AAO has reviewed the discussion of market or marketing research analysts at pages 173-174 of the 2006-2007 edition of the *Handbook*. It has taken particular note of the following section of that discussion:

[M]arket research analysts devise methods and procedures for obtaining the data they need. They often design telephone, mail, or Internet surveys to assess consumer preferences. Some surveys are conducted as personal interviews by going door-to-door, leading focus group discussions, or setting up booths in public places such as shopping malls. Trained interviewers, under the market research analyst's direction, usually conduct the surveys.

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

The AAO finds that it is market research analysts' work in the design and analysis of original market research that sets this occupation apart from what might otherwise be characterized as marketing or sales manager positions, employment that also requires the incumbents to perform marketing research as they seek to identify and expand business opportunities for their employers. Such duties are not reflected in the various job descriptions that are now part of the record of proceeding. As the petitioner does not indicate that the proposed position would require the beneficiary to design and conduct the market research, the position does not reflect the work of a market research analyst.

Instead, as noted previously, the AAO finds the market research duties associated with the proposed position to be more closely related to the work of marketing managers, who also use marketing research and financial analysis to develop business strategies. The *Handbook's* discussion of the duties of advertising, marketing, promotions, public relations, and sales managers states the following:

*Marketing managers* develop the firm's 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 public. 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.

The *Handbook* states the following with regard to the educational qualifications required for marketing managers:

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. A bachelor's degree in sociology, psychology, literature, journalism, or philosophy, among other subjects, is acceptable. However, requirements vary, depending upon the particular job.

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. . . .

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. In small firms, where the number of positions is limited, advancement to a management position usually comes slowly. In large firms, promotion may occur more quickly.

Thus, the proposed position does not qualify for classification as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires a showing that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the type of position being proffered. The *Handbook* indicates that most marketing manager positions are filled on the basis of experience (most positions "are filled by promoting experienced staff or related professional personnel"). Moreover, the fact that some employers "prefer" a degree or that individuals possessing degrees "should have the best job opportunities" does not rise to this criterion's standard of employers normally requiring at least a bachelor's degree or its equivalent in a specific specialty. As such, marketing managers do not qualify as specialty occupations under the first criterion.

The AAO does not find convincing the beneficiary's counsel's assertion that the proposed position qualifies as a specialty occupation under the first criterion because of information contained in the *Dictionary of Occupational Titles (DOT)* or the *O\*Net*. The *DOT* is not a persuasive source of information regarding whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation. The SVP rating is meant to indicate only

the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience, and it does not specify the particular type of degree, if any, that a position would require. In a similar vein, the *O\*Net's* "Job Zone" rating does not indicate whether a degree in a specific specialty is required. As such, the AAO accords no significant weight to this information.

The AAO now turns to a consideration of whether the petitioner, unable to establish its proposed position as a specialty occupation under the first criterion set forth at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under one of the three remaining criteria: a degree requirement as 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; the petitioner normally requires a degree or its equivalent for the position; or the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree.

The proposed position does not qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations. The AAO has reviewed the job postings submitted by the petitioner's and beneficiary's counsel in response to the director's request for additional evidence and on appeal. Both counsels, however, have failed to consider the specific requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) for establishing a baccalaureate or higher degree as an industry norm. To meet the burden of proof imposed by the regulatory language, a petitioner must establish that its degree requirement exists in parallel positions among similar organizations.

The record fails to establish that any of these job postings come from companies that are "similar" to the petitioner, a photography studio with 32 employees. Sony Pictures Entertainment is a creator and distributor of entertainment products, services, and technology and, according to its posting, has operations in over 67 countries. Saatchi & Saatchi LA appears to be a marketing firm. ADVVO is a direct mail marketing company. Nova Marketing & Promotions is a marketing firm. ██████████ is an investment firm. MODIS engages in information technology consulting and services. Canac is a division of Kohler Co., and specializes in kitchen and bath cabinetry. UnitedHealthGroup is a medical services provider. H & R Block and Great-West Life & Annuity are financial services firms. The unnamed company advertising its vacancy through Spherion is a public consumer products company. ██████████ p. is an industrial and hazardous waste management company. ██████████ is an educational services provider. No information was provided regarding the business activities of ██████████ USA, the unnamed "contractor" in Richmond, Virginia, or the unnamed company in North Wales, Pennsylvania.

There is insufficient evidence to establish that the advertisers are similar to the petitioner in size, scope, and scale of operations, business efforts, and expenditures. Simply 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)).

Moreover, even if the AAO were to find that these companies were similar to the petitioner, the job postings are too few to establish an industry-wide standard.

Finally, the information regarding the duties and responsibilities of the advertised positions is general and does not support a meaningful comparison of their actual performance and specialty knowledge

requirements to those of the proposed position. Thus, while relevant to this proceeding, the job postings submitted by counsel are insufficient to establish the petitioner's degree requirement as an industry norm in parallel positions among similar organizations. The petitioner has not satisfied the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) requires the petitioner to prove that the duties of the proposed position are so complex or unique that only an individual with a degree can perform them. For reasons already set forth in this decision, the nature of the duties of the proposed position as set forth in this petition does not support such a finding. Neither counsel nor the petitioner has provided information that distinguishes the proposed position from similar marketing manager positions not requiring a four-year degree in a specific field or its equivalent, based upon its unique nature or complexity. The petitioner has therefore failed to establish the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Therefore, the petitioner has not established that the proposed position qualifies for classification as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a showing that the petitioner normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet this criterion, 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.

The beneficiary's counsel states, on certification, that the petitioner requires a bachelor's degree for the position. However, no evidence has been submitted to establish the petitioner's history of hiring only individuals who have a bachelor's degree in a specific field for this position in the past. The AAO notes that the beneficiary's counsel is not authorized to make representations on behalf of the petitioner. 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)). Accordingly, the proposed position does not qualify for classification as a specialty occupation under the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The AAO next turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires a demonstration 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. To the extent that they are depicted in the record, the duties of the proposed position do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. There is no information in the record to support a finding that the proposed position is more specialized and complex than the general range of marketing manager positions for which the *Handbook* indicates no requirement for the highly specialized knowledge associated with at least a bachelor's degree in a specific specialty. Therefore, the evidence does not establish that the proposed position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Accordingly, the proposed position does not qualify for classification as a specialty occupation, and the petition was properly denied.

Finally, the AAO turns to counsel's assertion that similar positions have "always been determined in the past by the Service as a specialty occupation." However, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory

eligibility, CIS is limited to the information contained in the record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the cases referenced by previous counsel were similar to the proposed position or were approved in error, no such determination may be made without review of the original records in their entirety. However, if the prior petitions were approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, the approval of those petitions would have been erroneous. CIS is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g., *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The petitioner has failed to establish that its proposed position qualifies for classification as a specialty occupation under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4). Therefore, the director's decision will be affirmed.

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 director's November 3, 2006 decision is affirmed. The petition is denied.