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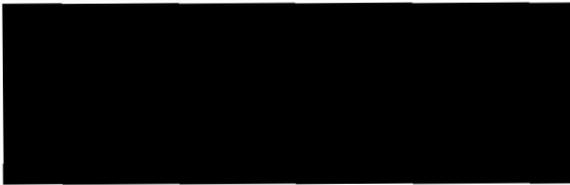
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U.S. Citizenship  
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Services

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FILE: LIN 05 251 53183 Office: NEBRASKA SERVICE CENTER

Date: JUL 28 2008

IN RE: Petitioner:  
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, Nebraska Service Center, denied the instant petition on September 21, 2005. The petitioner submitted a motion to reopen/reconsider on October 21, 2005, which the director dismissed on November 15, 2005. In his decision, the director stated that the petitioner had not submitted any new evidence or provided any precedent decisions to reconsider the original denial of the instant petition. The petitioner then filed an appeal of the instant petition to the Nebraska Service Center on December 14, 2005.<sup>1</sup> The director rejected the appeal as untimely filed but examined the matter as a motion to reopen. The director then reaffirmed the initial denial on January 10, 2006. The petitioner asked that the matter be forwarded to the AAO as an appeal since the regulations allow a motion that is denied to be appealed to the AAO if the original decision is appealable to the AAO. *See* 8 C.F.R. § 103.5(a)(6). The matter is now before the Administrative Appeals Office (AAO) pursuant to that request. As the December 15, 2005 filing was timely, we withdraw the director's January 10, 2006 decision and will consider the matter as before us on appeal. The appeal will be dismissed.

The petitioner is a marketing and advertising agency. It seeks to employ the beneficiary permanently in the United States as a Media Director. As required by statute, the petition is accompanied by a Form ETA 9089, Application for Permanent Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position because the petitioner had not established the beneficiary had the required baccalaureate degree in marketing as stipulated by the Form ETA 9089. The director denied the petition accordingly.

The record shows that the appeal is properly filed and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's September 21, 2005 denial, the single issue in the current petition is whether the beneficiary is qualified to perform the duties of the proffered position.

Section 203(b)(3)(A)(i) of the Act provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. While no degree is required for this classification, the regulation at 8 C.F.R. § 204.5(l)(3)(B) provides that a petition for an alien in this classification must be accompanied by evidence that the beneficiary "meets the education, training or experience, *and any other requirements of the individual labor certification.*" (Emphasis added.)

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

In addition, 8 C.F.R. §204.5(l)(3)(ii)(C) states:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official

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<sup>1</sup> The AAO notes that counsel submitted the December 15, 2005 filing on Form EOIR-27, Notice of Appeal to the Board of Immigration Appeals from a Decision of an INS Officer, rather than Citizenship and Immigration Services (CIS) Form I-290B, Notice of Appeal to the Administrative Appeals Office (AAO).

college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 9089 Application for Permanent Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on June 17, 2005.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>2</sup> On appeal, counsel submits a brief. The record also contains the following evidence submitted throughout the proceeding:

A copy of the beneficiary's diploma from the University of Liverpool dated July 25, 1996, that states the beneficiary was admitted to the degree of Bachelor of Arts with Honours (School of Politics and Communication Studies, Faculty of Social and Environmental Studies; A letter dated November 4, 1999, written by [REDACTED] of Division, Student and Examinations Division, The University of Liverpool. In his letter, [REDACTED] identified the beneficiary's twenty courses taken during his three-year program at the University of Liverpool in the school of politics and communication studies. The beneficiary's coursework includes communications, political marketing, media and politics, politics of media, and aspects of media power, among other classes;

A copy of the initial educational evaluation report written by [REDACTED] Evaluator, Foundation for International Services, Inc. (FIS), Bothell, Washington. The document, dated December 10, 1999, states that the beneficiary's diploma is the equivalent of a bachelor's degree *in political science and communications* from an accredited college or university in the United States;

A second educational evaluation report written by [REDACTED] FIS, Lynnwood, Washington dated October 11, 2005. In her evaluation, [REDACTED] stated that the beneficiary's diploma "is the equivalent of a bachelor's degree *in political science and communications* from a regionally accredited college or university in the United States." (Emphasis added.) [REDACTED] then concluded that the beneficiary has, as a result of his educational background and employment experiences (3 years of experience = 1 year of university-level credit), an educational background the equivalent of an individual with a

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<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

bachelor's degree in marketing from a regionally accredited college or university in the United States;

A copy of a document entitled "Labor Work-Up for [REDACTED] signed by the petitioner's president and approved by the beneficiary. This document notes the SVP level is eight for the proffered position, and that the required educational and experience for the position is a bachelor's degree in marketing and four years of experience;

A copy of an excerpt from the Department of Labor's (DOL) *O'Net Online* website, including a summary report for occupation classification 11-2011.00-Advertising and Promotions Managers;

A copy of an excerpt from the DOL Online Wages Library that identifies the prevailing wage for advertising and promotions managers; and

A copy of the DOL's *Occupational Outlook Handbook*, 2004-05 Edition (*Handbook*) description of the position of for Advertising, Marketing, Promotions, Public Relations, and Sales Managers.

The record does not contain any other evidence relevant to the beneficiary's qualifications for the proffered position.

On motion,<sup>3</sup> counsel notes that the director in his decision stated that the position of media director is not included in the list of professions listed in section 101(A)(32) of the Act, and that the evidence in the record must establish that a baccalaureate degree or its foreign equivalent is required for entry into the occupation.

Counsel further states that the proffered position of media director, certified by the DOL, is a professional position and requires a baccalaureate degree. Counsel notes that the beneficiary has already been approved by Citizenship and Immigration Services (CIS) for a similar professional position of media director and that the beneficiary currently has valid H-1B status, the minimum educational requirement for which is a bachelor's degree or the equivalent. Counsel further notes that the *O'Net* online summary report for the position of advertising and promotion manager indicates a Job Zone of four for the positions under this occupational category and that the summary states: "considerable preparation is needed for the position with most positions having the educational requirement of a four-year bachelor's degree."

Counsel also references the excerpt from the DOL Foreign labor Certification Online Wage Library submitted to the record and indicates that the position of advertising and promotion manager indicates an education and training code of four, which means "work experience, plus a Bachelor's degree or higher degree. Most occupations in his category are managerial occupations that require experience in a related non-managerial position." Counsel also references the *Handbook* excerpt for the occupations of advertising, marketing, promotions, public relations and sales managers, citing as follows:

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<sup>3</sup> The director dismissed the petitioner's motion after determining that the filing did not constitute a proper motion to reopen or reconsider. As stated above, the petitioner appealed that decision, which is the decision that we now consider before us. As the petitioner's motion was supported by new evidence, however, it did qualify as a motion to reopen pursuant to 8 C.F.R. § 103.5(a)(2). Thus, we will review the matter on its merits and consider the petitioner's assertions and new evidence submitted on motion.

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.

Counsel then notes that although the director stated the position of media director is not included in the list of professions listed at section 1001(A)(32) of the Act, the statute specifically states that the term "profession" shall include but not be limited to the professions listed in the statute.

Counsel then refers to the director's comments in his decision that the beneficiary did not have the required bachelor's degree in the requisite field as specified on the certified ETA Form 9089. Counsel states that the petitioner acknowledges its error in submitting initially an incorrect educational evaluation for which CIS denied the petition. Counsel states that a correct proper credential evaluation that confirms the beneficiary does have the equivalent of a bachelor's degree in marketing from a regionally accredited U.S. college or university has been submitted to the record.<sup>4</sup>

Upon review of the record, the AAO notes that the director's reference to section 101(a)(32) of the Act is not dispositive in this matter, but rather illustrative. Counsel is correct in his assertion that the list of occupations to be considered professional is more extensive than those listed at section 101(a)(32) of the Act. In fact the director's decision does not assert that the beneficiary does not possess a baccalaureate degree, but rather that he does not possess a baccalaureate degree *in marketing*. The AAO notes the director put the word "marketing" in his decision in bold print for added emphasis. Nothing that counsel has asserted to date addresses this part of the director's decision, namely whether the beneficiary's degree in political sciences and communications from the University of Liverpool is a foreign equivalent degree to a U.S. baccalaureate degree in marketing. The AAO will address this issue and another related issue in these proceedings.

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The ETA Form 9089, Part H set forth the minimum requirements for the position of media director. The proffered position requires a bachelor's degree in "marketing" and 48 months (4 years) of experience in the job offered. In Item 7, the petitioner indicated that no "alternative field of study" was acceptable. In Item 8, the petitioner indicated that it would not accept an alternate combination of education and experience. The petitioner could have indicated in Items 8-A through 8-C that an alternate combination of a baccalaureate in a different field in combination with experience in marketing was acceptable, but did not. In Item 9, the petitioner indicated a foreign educational equivalent was acceptable. Item 14 of Part H reflects no other specific skills or other requirements.

In Part J of the ETA Form 9089, the beneficiary indicated that the highest level of education he had achieved relevant to the requested occupation is a bachelor's degree in marketing with four years of relevant education

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<sup>4</sup> Counsel refers to the FIS evaluation report prepared by [REDACTED] dated October 11, 2005.

completed at the University of Liverpool, United Kingdom. In corroboration of the ETA Form 9089, the petitioner provided the beneficiary's Bachelor of Arts degree and description of coursework from the University of Liverpool. This document lists three years of university studies and the diploma from the University of Liverpool's School of Politics and Communication Studies.

In the instant case, the record contains a discrepancy with regard to the length of studies undertaken by the beneficiary at the University of Liverpool that is not addressed either by the director or the petitioner. The Form ETA 9089, signed by the beneficiary on July 22, 2005 under penalty of perjury, clearly states, on line J-14, that the beneficiary attended the University of Liverpool for four years. The beneficiary's course of studies document, however, clearly establishes a three-year plan of studies. Neither counsel, the petitioner nor the director address this discrepancy in their comments. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

Evaluating the actual credentials held by the beneficiary is provided through credential evaluations submitted into the record of proceeding for this case. It is noted that *Matter of Sea Inc.*, 19 I&N 817 (Comm. 1988), provides: "[CIS] uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight."

The first evaluation report written by [REDACTED] concludes that the beneficiary possesses a baccalaureate degree in political science and communications that is the equivalent of a baccalaureate degree in political science and communications in the United States. The first evaluator does not make any statement with regard to the equivalency of the beneficiary's degree in political science and communications being comparable to a U.S. baccalaureate degree in marketing.

The second FIS evaluation written by [REDACTED] submitted to the record on motion and presently on appeal, also concluded that the beneficiary's education is equivalent to a U.S. baccalaureate in political science and communications and then used the three years of experience for one year of education rule with regard to the beneficiary's work experience in marketing to find that the beneficiary's academic degree plus his years of work experience was equivalent to a four year baccalaureate degree in marketing. This evaluation is given only limited weight in these proceedings, as the evaluator uses the three for one rule to equate three years of experience for one year of education, but that equivalence applies to non-immigrant H1B petitions and not to immigrant petitions. *See* 8 CFR § 214.2(h)(4)(iii)(D)(5).

The petitioner clearly established that it was filing the instant petition under the employment-based professional classification. The record also clearly establishes that the beneficiary has a three-year baccalaureate degree in politics and communications. The record does not establish whether the coursework for a baccalaureate degree in marketing is similar enough to the coursework undertaken for the beneficiary's degree in politics and communications, that the two degrees are interchangeable. The AAO notes that the beneficiary's course of studies does contain courses in marketing, media or other courses related to the field of marketing and the petitioner provides no comprehensive or authoritative analysis to the record to actually establish any equivalency to a U.S. baccalaureate in marketing without considering experience.

Based on the beneficiary's educational documentation, namely, his diploma from the University of Liverpool, he may possess a foreign equivalent degree to a four-year bachelor's degree;<sup>5</sup> however, to date, the petitioner has not established that this baccalaureate degree is the equivalent of a U.S. baccalaureate degree *in marketing*. As stated above, the petitioner indicated on line H-8 that it would not accept an alternate combination of education and experience, which is the only manner by which the beneficiary's credentials have been evaluated as equivalent to a U.S. baccalaureate in marketing. Thus, the petitioner has not met its burden. The appeal is dismissed.

Beyond the decision of the director, the AAO also finds discrepancies between the beneficiary's own description of his job duties with various companies in the field of marketing contained in his resume, and the letters of work experience provided to the record. The letter provided by Initiative Media London Limited documenting the beneficiary's work from January 1997 to October 1998; the letter from PHD Media, London, England, written to confirm the beneficiary's work from October 1998 to October 1999 as a senior media planner/buyer; the letter from Epidemic.com, confirming the beneficiary's employment from October 1999 to April 2000, and the letter from Spire Media, Denver, Colorado that purports to document the beneficiary's work experience as an Account Services Manager, from May 2002 to January 2004 all contain several paragraphs of identical rote language describing the same job duties for all four jobs. With regard to the beneficiary's resume, the beneficiary lists very specific job duties and distinct projects for all four jobs. The identical rote language in the letters of work experience diminish the weight to be given these documents and raise further questions with regard to the beneficiary's work experience prior to the 2005 priority date. *Matter of Ho*, 19 I&N Dec. at 591 states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition."

Therefore the petitioner has not provided a clear explanation of whether the beneficiary has the requisite four years of prior work experience as a media director. For this additional reason, the petition shall be denied.

The evidence submitted does not establish that the beneficiary possesses the correct baccalaureate degree stipulated by the Form 9089, or the requisite four years of work experience also stipulated by the Form 9089.

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 met that burden.

**ORDER:** The appeal is dismissed.

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<sup>5</sup> The record would be bolstered by inclusion of the beneficiary's transcript for his secondary education documenting the number of years of high school.